AVOSETTA STOCKLHOLM MEETING 2009 UNITED KINGDOM

UK Response to Questionnaire (Richard Macrory & Sharon Turner)

1. Outline of the most important tools for enforcing environmental law in the UK

- Criminal and administrative law (in the form of judicial review against public bodies) are by far the most important tools for enforcing environmental law in the UK. The criminal law has traditionally been the dominant tool for enforcing environmental law in the UK, with judicial review playing an important but lesser role. Most environmental and other regulatory criminal offences are drafted in such a way that they can be committed without proof of intention or recklessness, and companies whose employees commit an offence as well as individuals can be prosecuted. The level of intention or guilt involved affects the decision whether to prosecute in the first place and/or the level of sentence imposed by the courts rather than actual committal or non-committal of the offence. Private law is only used occasionally.
- Following major reviews of the process of regulation (carried out by Sir Philip Hampton) and more specifically regulatory sanctions (carried out by Prof Richard Macrory), Government in England and Wales introduced far-reaching legislation in 2008 which will rebalance the roles played by the criminal law and administrative law in the enforcement of environmental law. Criminal prosecution will now be reserved for the most dangerous, intentional or reckless breaches of environmental law. Under the Regulatory Enforcement and Sanctions Act 2008 a range of new administrative sanctions (known as 'Macrory penalties') have been created, including fixed and variable monetary penalties, stop notices, enforcement undertakings, compliance notices, restoration notices, regulatory cost recovery notices, non-compliance penalties and disclosure requirements. Appeals against these administrative sanctions will go to a new Regulatory Tribunal rather than the ordinary courts.

  However, only regulators that can demonstrate compliance with 'Hampton Principles' of better regulation (risk-based, transparent, accountable, proportionate and consistent regulation) will be empowered to use the new administrative sanctions. Compliance with the Hampton Principles is determined by the Department for Business Innovation and Skills and a Cabinet Committee and Parliament must approve any proposed plans to allow a regulator to use the new Macrory penalties. The Department of the Environment, Food and Rural Affairs (Defra) has recently proposed that environmental regulators in England and Wales (the Environment Agency, Natural England and the Countryside Council for Wales) should have access to powers to apply Macrory penalties. These proposals are currently out to public consultation. The Environment Agency already has powers to apply administrative sanctions for breaches of the EU carbon trading scheme and can issue fixed penalty notices for some waste offences.

However, access to Macrory penalties will extend the application of administrative sanctions across the entire field of environmental law and will significantly increase the range of civil sanctions available to environmental regulators. Richard will be providing the group with a more detailed presentation of the background and scope of this reform.

2(I) & (IV): Sanctions for breach and the potential liability of competent authorities:

(a) **When an EIA project is established without an EIA permit** – affected citizens/ENGO could take judicial review against the UK authority responsible for conducting the EIA process.

(b) **When conditions attached to an EIA decision granting development consent are disregarded –** If the breach was deemed simply to be a breach of UK planning law then the UK authorities would retain an enforcement discretion. Breach of planning conditions is not a criminal offence in itself but a planning authority is empowered to serve a notice requiring compliance within a specified time; failure to comply with a notice is a criminal offence. Although there has not been a failure to conduct an EIA, it is arguable that the breach of the consent condition constitutes a breach of the outcome of the EIA process and therefore a breach of the Directive. In this case, the ECJ's decision in Case 6/60 *Humblet and Case C-201/02 Wells* that Article 10EC requires MS to take all general or specific measures to nullify a breach of EU law would create a duty to take effective enforcement action to remedy the breach – potentially including an obligation (as in *Wells*) to revoke or suspend the development consent. It is also arguable that failure to take appropriate enforcement action could create a *Francovich* liability in the event that the breach of EU law caused a financial or other loss to other individuals.

(c) **When an IPPC facility is established without IPPC permit –** The Environment Agency which enforces the IPPC regime could prosecute the operator. They have a general discretion whether or not to prosecute but their current enforcement policy says they will normally prosecute where no licence has been obtained. Failure to ensure compliance with the IPPC Directive would expose the Environment Agency to judicial review but third parties including environmental groups.

(d) **When an IPPC facility is permitted without prior assessment in accordance with Art 6(3) of Habitats Directive –** No sanction for facility operator but EA's failure to conduct assessment could be judicially reviewed as a breach of EU law.

(e) **When an IPPC facility is operated in violation of conditions in IPPC permit –** this would attract enforcement action by Environment Agency starting with a letter of warning, then proceeding to an enforcement notice, a formal caution, and (as a last resort) criminal prosecution. Discretion to determine the approach to enforcement and pace of enforcement action would remain with the Agency. When the Agency gains powers to impose Macrory sanctions this

situation could also give rise to the imposition of one or more of the new administrative sanctions outlined above. If it could be established that an IPPC facility has been permitted to operate in violation of the IPPC Directive then failure to enforce EU law could be subject to judicial review.

(f) **When an IPPC facility releases greenhouse gases beyond what is provided for by allowances under the ET Directive –** Environment Agency would be required to impose an administrative sanction under the UK Greenhouse Gas Emissions Trading Scheme Regulations 2005 which implement the ET Directive. The 2007 case of *Alphasteel v Environment Agency* is the first UK case concerning the application of civil sanctions by the Agency for breach of the ET Directive. Although the decision in this case was given by the Welsh Environment Minister (as opposed to a court) following a formal hearing under an appointed inspector, the case tested fundamental aspects of the administrative sanction regime in this context. The case confirmed that (unlike the general discretion relating to criminal prosecutions) the implementing regulations and the Directive obliged the Agency to impose administrative financial sanctions and at an amount calculated according to the formula specified. In this case the company had no intention to avoid their obligations, and had been careless at the most in failing to appreciate the need to acquire allowances in time. But the amount of the penalty (running into millions) was sufficient to put the company into liquidation.

(g) **When an IPPC facility has negative impact on Natura 2000 sites beyond the threshold in Art6(2) of the Habitats Directive -** If the negative impact involved a breach of an IPPC permit then the Environment Agency would have powers (but no obligation) to take enforcement action leading in last resort to criminal prosecution. When the Agency gains powers to impose Macrory sanctions this situation could also give rise to the imposition of one or more of the new administrative sanctions outlined above. Failure by the UK authorities to comply with Article 6(2) obligation to avoid deterioration and/or disturbance would also expose them to the risk of judicial review proceedings.

(h) **When water plans adopted under WFD or existing water quality standards under old Directives are not complied with -** Failure by a public body to ensure compliance with the WFD or old water quality standards could lead to a judicial review for breach of EU law. Breach of a discharge consent or other licence designed to ensure compliance with EU water standards could lead to enforcement action and potentially criminal prosecution – and potentially the imposition of civil sanctions under the Macrory reforms.

(i) When air plans under the Air Framework Directive are not complied with – Following the ECJ decision in *Dieter Janecek v Friestaat Bayern* (C-237/07, 14 May 2007) individuals have a right to require UK government and local authorities to draw up action plans where EC air

quality standards are at risk of being breached. The case would be taken by means of judicial review.

2(II) & (III)

- UK environmental regulators retain a considerable degree of discretion in deciding whether to take enforcement action. If it is taken, enforcement action will normally begin with a warning or caution, then proceed to the issuing of an enforcement notice and will only lead to criminal prosecution as a last resort. Advice and guidance is the primary approach to ensuring compliance in the UK. Courts in the UK have traditionally been reluctant to interfere with enforcement discretion of prosecuting authorities. In theory a third party could challenge by way of judicial review a decision by, say, the Environment Agency not to prosecute in a particular case but in the absence of clear evidence of legally irrelevant factors (such as bribery) a court would accept these bodies have a large degree of discretion as to how to respond to breaches. In recent years, however, many UK regulatory agencies have published enforcement policies indicating in general terms how they are likely to respond to different types of incident. To give one example, the Agency categorizes water pollution incidents into four types based on actual or potential environmental damage (Cat 1 being the most serious). A discharge without a licence into waters is a criminal offence whether intentional or not and the current policy states that where the Environment Agency consider the discharge unintentional its normal response will be where "*there is a potential for a Category 1 incident: prosecution; there is a potential for a Category 2 incident: formal caution/prosecution; there is a potential for a Category 3 or 4 incident: warning".*
  Published enforcement policies are increasingly becoming standard practice, and following the Macrory Review will be a statutory requirement for regulators who wish access to Macrory powers. . Although these policies are normally drafted in very broad terms thereby conferring considerable discretion on the regulator in terms of whether and what type of enforcement action will be taken, it is possible that a court would intervene if a regulator acted completely contrary to its stated enforcement policy.

- Where a judge finds that a breach of environmental law (EU or national) has occurred, UK courts retain a discretion concerning the type of judicial review remedy to be provided – this can include injunctive relief, a declaration confirming the fact of the breach, an mandatory order requiring action to be taken, or a quashing order quashing the decision of a public authority. However, UK courts have also signalled their commitment to ensuring proper compliance with EU environmental law – House of Lords decision (Hoffman LJ) in *Berkley v Secretary of State for the Environment* emphasises the obligation imposed on UK courts to ensure compliance with EU law and to ensure the provision of appropriate remedies for non-

compliance. The decision also emphasises the strict limits on judicial discretion to overlook instances of non-compliance.

- The Environmental Damage (Prevention and Remediation) Regulations 2009 introduced in England and Wales to implement the Environmental Liability Directive enable NGOs and interested parties to request that regulatory action is taken in cases of imminent threat of environmental damage. While the Directive does not impose an obligation to take enforcement action, the UK Regulations arguably fail to implement the Directive correctly in that they do not impose an obligation to give reasons for the regulatory decision taken.

- Where there is the possibility of criminal prosecution there is a general presumption in UK law that private prosecution can be taken by citizens/Environmental NGOs directly against polluters unless it is prohibited by legislation. Simply the threat of a private prosecution to embarrass a reluctant cautious prosecuting body may be sufficient to stir into action. One of the most celebrated instances of the effect of the potential for private prosecution arose in the *Environment Agency v Milford Haven Port Authority ('Sea Empress')* [1999] 1 Lloyds Reports 673 whereby the Environment Agency had come under intense pressure from the then Department of Trade and Industry not to prosecute a port harbour authority for breach of environmental law. Friends of the Earth threatened to take a private prosecution which ultimately forced the Environment Agency to exercise its discretion to prosecute. This prosecution led to the largest ever fine imposed by a UK court (£4million and £800k contribution to EA costs). It is also worth noting that if a Macrory administrative penalty is issued by the Environment Agency then no private prosecution can be taken to prevent double jeopardy.

- However, the EU limitation on horizontal direct effect means that while private parties can enforce EU environmental law against the state and its emanations this is impossible against private polluters. In England and Wales, the water industry was privatized in 1989 but because they perform public functions and have special statutory powers, the water companies are considered emanations of the state, and therefore directly bound by EU law. In contrast, most of the waste disposal industry is in the private sector and not directly bounds.

- **3 & 4:** The availability of judicial review is cited by the UK Government as the means of ensuring compliance with the requirements of Article 9(3) Aarhus Convention in so far that it fulfils the obligation to provide members of the public with access to a judicial procedure to challenge acts and omissions by public authorities which contravene national and EU environmental law. Although UK rules on standing for judicial review are regarded as sufficiently flexible to ensure the fair and equitable access to justice required by Article 9(4) of the Convention, the current arrangement concerning the costs of taking judicial review

proceedings have long been regarded as prohibitively expensive and therefore a breach of the Convention. In the UK, courts have a discretion as to how to award costs in JR proceedings and generally they follow the 'costs follow the cause' principle – meaning the losing party must pay the winning party's costs. For example, in the recent case of *Morgan and Baker v Hinton Organics* [2009] EWCA 107 costs for injunctive relief were set at £25,000. Like Ireland, the UK has argued that the reference to costs in Art 9(4) only includes the costs of lodging cases before the courts (which is very small) rather than the total legal costs and exposure to costs if a case is lost. Although UK courts have developed principles designed to limit costs at the outset of proceedings by means of a Protective Costs Order in significant public interest cases, they remain within the courts' discretion and are not informed by Aarhus principles.

In 2008 an unofficial working body of leading NGOs, academics (including Richard) and practitioners chaired by Sir Jeremy Sullivan (a High Court judge) published the *Sullivan Report* which concluded that unless action was taken to address the prohibitive expense of JR – then the UK risked breaching the Aarhus Convention. More recently the decision of the Court of Appeal in *Morgan* increased pressure on the UK to bring the arrangements for costs into compliance with Article 9(4). Lord Justice Carnworth provided a detailed review of the requirements of the Convention and the Sullivan critique concerning compliance with Article 9(4) and in doing so sent a powerful signal as to its view that the current position on costs is inconsistent with the requirements of the Convention. Although the CA was invited to give a definitive ruling as to the application of Aarhus to costs, it declined to do so on the grounds that a fundamental review of civil litigation costs was being carried out by Lord Justice Jackson, which is due to report at the end of 2009. The EU Commission has taken infraction proceedings against the UK due to its position on costs for judicial review – although this case only applies to the more limited EU approach to implementation of the Aarhus access to justice provisions. In addition a coalition of NGOs and other interested parties have made a formal complaint to the Aarhus compliance committee in this regard. The Committee has made formal contact with Defra in this regard. Lastly, given the ECJ's recent ruling in Case C-427/07 *Commission v Ireland* (16 July 2009) it is highly likely that the ECJ will also find the UK's rule on costs to be a breach of the Convention. In Case C-427/07 the Court specifically addressed the compatibility of the identical Irish position on judicial review costs and ruled that the requirements in Article 9(4) applied to 'costs arising from participation' in court proceedings. The ECJ deemed the Irish cost arrangements to be inconsistent with the Convention. The UK faces mounting legal pressure to come into compliance not only with the Convention in so far as EU provisions on the implementation of Aarhus requirements are concerned – but more generally. It remains to be seen if the EU Commission will await the outcome of the Jackson review before progressing the UK infraction to reasoned opinion stage. The interim findings of

the Jackson review highlights the challenges of compliance with the UK's obligations under Aarhus and suggested possible approaches for reform.

5: NGOs and affected citizens have access to injunctive relief and interim remedies in judicial review actions however, they are currently required to give cross undertakings in damages to provide security to third parties. The consequences of this rule on costs is graphically illustrated by the outcome in *R v Secretary of State (ex parte RSPB)* where a major ENGO could not afford to provide security costs and therefore was denied an interim injunction. Although the RSPB won its challenge to the UK's approach to the designation of SPAs under the Wild Birds Directive and the ECJ ruling established key principles concerning the scope of the designation obligation, in reality it was a pyrrhic victory. Without the injunction the harbour authority went ahead with the development of the habitat causing significant damage by the time the ECJ and national decisions were finally delivered. The *Sullivan Report* (above) recommended that where the Aarhus Convention applies that interim injunctions should be given without the requirement for security costs. But there should be a corresponding duty on courts to hear the case quickly to avoid undue disadvantage to third party.

6: Not to our knowledge

7: No