FROM: **THE CENTRE FOR CORPORATE ACCOUNTABILITY**
TO: **Health and Safety Executive, Policy Division**
DATE: **12 March 2001**

INTRODUCTION

1.1 This note discusses whether the differences that exist between the legal regimes enforced by the Environment Agency on the one hand and the Health and Safety Executive[1] on the other should impact upon the nature of the respective Enforcement Policy Statements of these two agencies.

1.2 The Centre has set out detailed proposals why the HSC should incorporate key aspects of the Environment Agencies Enforcement Policy Statement[2]. This would, crucially, mean that that HSC Enforcement Statement should:

- establish that the powers provided to the HSC be separated into those that that have a primarily *preventative* purpose from those that are primarily concerned with *responding to a criminal offence* and
- make clear that inspectors should, in relation to any inspection or investigation
  - consider whether it is appropriate to use one of its preventative powers to ensure that any unsafe practice does not continue or recur, *and*
  - consider, if a criminal offence has also been committed, whether there should be a criminal justice response and if so whether it is appropriate to issue a written warning, issue a formal caution or lay criminal charges.[3]

It is our view that establishing these principles in HSC's Enforcement Policy Statement would bring great clarity to an otherwise very confused enforcement situation, and ensure more consistency.

1.3 However, it has been suggested that it might not be appropriate to incorporate the EA Statement principles into the HSC document, because of significant differences that are said to exist between environmental law on the one hand and health and safety law, on the other.

1.4 It is argued that HSC's powers to enforce notices and prosecute offences are not concerned with the enforcement of a "licensing" or "authorisation" regime (as they are with the Environment Agency) but with the enforcement of a wider set of health and safety duties. This difference is considered to be significant because unlike general duties, a "license" or "authorisation" is individually tailored for each company and sets specific conditions to which the company must adhere. As a result, any enforcement action taken will concern breaches of a much narrower set of circumstances, with which the company has specifically agreed. In such a scenario, it is argued, it is more appropriate for the Environment Agency to (a)

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[1] And Local Authorities

[2] See CCA response to HSC Revised Enforcement Policy Statement and letter to Terry Gates of 18 December 2000

[3] There are other aspects of the EA Enforcement Policy Statement that the Centre proposes the HSC incorporate.

separate the powers into two categories, and (b) to establish parallel responses to legal breaches.[4]

1.5 This argument implies:

(a) the Environment Agency's Enforcement Policy Statement is appropriate to the Environment Agency because of the particular legal regime it enforces, and

(b) that the HSE would enforce the law in a similar way to the Environment Agency if it had a regime, similar to that of the EA, to enforce.[5]

1.6 This note argues that although there are indeed some differences between the two legal regimes:

- there are a number of parts of the legal regime which the HSE enforces – known as "permissioning" regimes" - which are very similar to the regimes enforced by the EA. If the proposition set out in paragraph 1.4 was correct, one would imagine that the HSE would enforce this regime in a "stricter" manner – with legal breaches resulting in both preventative and criminal justice responses. However, in fact HSE inspectors *enforce this regime in exactly the same way – and perhaps even less strict – than the rest of health and safety law*.

- the differences that do exist between a permissioning/ authorisation regime (whether as part of health and safety or environmental law) and the rest of health and safety law are not ones which justify a different enforcement approach.

- in any case, whatever differences in the legal regimes, there are two far more important differences between environmental and health and safety law, and between the two enforcing agencies which point to the need for health and safety law to be enforced at least as strictly as environmental law, if not more so. These are:

  - nature of the harm that is intended to be prevented by environmental law on the one hand and health and safety law on the other;

  - respective ability of the two agencies to detect offences;

  These differences far outweigh any significance that could ever be given to the differences between the two regimes set out in paragraph 1.4 above

NATURE OF THE HARM

2.1 The duties that the Health and Safety Executive are attempting to enforce are concerned with trying to ensure that corporate activities etc *do not cause death, injury and disease to people*. It is not simply that there is a *risk* that these

[4] This summary of the objection combines comments made by Terry Gates of HSE's Policy Division in a Telephone Conversation on Monday 5 March and an e-mail of 6 March

[5] Terry Gates of the HSE's Policy Division has for example, told that the Centre, that in those regimes enforced by the HSE that are similar to the Environment Agency, the HSE does prosecute when an offence has been committed. As is shown in paragraphs 4.5 to 4.12, this is not the case

activities might cause this sort of harm; it is clear from the annual statistics that these activities *do* cause death, injury and disease.

2.2 This should be contrasted with the harm that environmental law is trying to prevent – which is to water, air or land; indirectly of course, the prevention of harm to these environmental media may well prevent harm to people. But the evidence of a link between human diseases and environmental toxic exposures is far less concrete, than the day to day injuries/death actually caused at the workplace.

2.3 Clarifying this difference is not meant to downgrade the importance of environmental law. It is only to suggest that **if** there is going to be any difference in the way in which the health and safety law on the one hand and environmental law on the other are to be enforced, reason would suggest that the law attempting to prevent foreseeable injuries and deaths - health and safety laws - should be more "strictly" enforced than laws that are simply trying to reduce the risks of possible effects of environmental chemical exposures where the harm is less foreseeable and less evident.

2.4 However, at the moment, EA's enforcement Policy is more "strict" than the policy of the HSE! The Centre is not proposing that EA's policy should be any less strict than it is now; only that if there is to be a difference, it would be more logical and rational that HSE's statement should be more strict.

2.5 The point about the significance of the different harms can be illustrated by the Piper Alpha disaster. This was both an 'environmental' and 'occupational' tragedy. There was no doubt a great deal of environmental harm that resulted from the disaster. However clearly the most significant aspect of the disaster is that over 100 men were killed – something that health and safety law, not environmental law, is trying to protect against.

CAPACITY TO ENFORCE

3.1 One of the important purposes of both environmental and health and safety law is to *deter* companies placing peoples safety at risk on the one hand, and the pollution of the environment at risk on the other. There are a number of factors that will determine whether or not, the law will deter companies. Two of the most important ones are (a) the company's perception of the likelihood that their breaches will be "detected"; and (b) the company's perception of the potential implications of any detection.

3.2 There is a relationship between these two factors. If the levels of detection are low, there may still be deterrence if there is a perception that any detection will have serious implications. If the implications of detection are not great, it is important that the level of detection is high.

3.3 In relation to health and safety breaches, the level of detection is low. This is not a point that can be disputed. The HSE is an agency with limited funds; it can only afford to employ a limited number of inspectors. For example, in relation to the over 500,000 construction sites, the HSE can only allocate a maximum of 128 inspectors. These inspectors are responsible for both the "preventative inspection" of companies as well as the investigation of deaths and injuries. It is clear that

these inspectors are only able to inspect a small number of sites and investigate a small number of reported major injuries (13%). The position with construction inspectors is reflected in other industries.

3.4 The Environment Agency however has a higher detection rate than the HSE because it employs far more inspectors. It is able, for example, to investigate 100% of major pollution incidents.

3.5 In a situation where detection of offences is low, detection should normally lead to some sort of criminal justice response with implications for the company. If one compared HSE's and EA's detection rates one would imagine that the HSE would have a "stricter" enforcement policy, with clearer set of "criminal justice" implications if a breach was detected. But this is not the case.

3.6 To ensure deterrence, the HSE must balance its low detection rate with a "stricter" enforcement policy. It really is absurd that the EA, which has a higher detection rate should also have a stricter enforcement policy than that of the HSE - particularly when one is considering the sort of harm against which the respective laws are protecting.

COMPARING THE TWO LEGAL REGIMES

4.1 The section above, should have made it clear why, **whatever** the differences there may be between safety and environmental law, there is no justification for the HSC to have an enforcement policy statement that is less strict – if one can use that word – than the statement of the EA.

4.2 This section, however, deals with why the proposition set out in paragraph 1.4 in any case has no validity; that is to say why the differences between the two legal regimes are in fact far smaller than they may initially appear to be, and that any differences are simply not significant in the context of deciding whether or not the HSE should follow the EA Enforcement Statement model.

4.3 The HSE has specifically referred the Centre to the EPA's integrated pollution control's legal regime to illustrate the differences between Environmental and Health and Safety Law.[6] This note will therefore primarily focus on this regime. It should of course be noted that this part of the EPA will soon be overtaken by the new IPPC regulations that came into force at the end of last year and shall replace this part of the EPA by 2007.

4.4 The EPA requires that companies undertaking a particular set of prescribed processes to gain an "authorisation" from the EA. The company has to show the EA how it has the "*best available techniques not entailing excessive cost*" in place to prevent the release of toxic substances into water, land or air, or if this is not possible reducing their release to a minimum. The documents that form the basis upon which the EA gives it authorisation may well be a product of dialogue between the company and the Agency about what measures the company should take in order to ensure that emissions can be stopped or reduced. Another way of looking at the authorisation scheme is that the law imposes a duty upon operators to use best available techniques not entailing excessive cost and the Agency

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6 E-mail from Terry Gates, 7 March 2000

approves a scheme, which the company produces, which will ensure that the company will be able to comply with the duty.

ENFORCEMENT BY THE HSE OF ITS "PERMISSIONING" REGIMES

4.5 It is interesting to compare the EPA Authorisation Scheme with a number of legal regimes, enforced by the HSE, concerning the safety of the nuclear industry, onshore sites involving major chemical hazards, the railways and offshore operations. All these regimes – as is clear from the HSE document "*Regulating Higher Hazards: Exploring the Issues*"[7] - have many commonalties with the EPA regime.

4.6 Perhaps the regime most similar to the EPA's IPC Authorisation regime is established by the Offshore Installations (Safety Case) Regulations 1992. These regulations require offshore companies to provide detailed information to the HSE explaining the management regime that they will put in place to ensure that the operator will comply with the law.

4.7 It works in the following way. The owner or operator of every offshore installation must prepare a 'safety case' and submit it to the HSE for formal acceptance. The safety case must demonstrate that an effective management system is in place to control risks to workers and, in particular, to reduce to a minimum the risks from a major accident. The safety case must show that:

- the management system adequately covers all statutory requirements
- there are proper arrangements for independent audit of the system;
- the risks of major accidents have been identified and assessed:
- measures to reduce risks to people to the lowest level reasonably practicable have been taken; and proper systems for emergency arrangements on evacuation, escape and rescue are in place.

4.8 This off-shore safety case regime is similar to the authorisation regime enforced by the EA in all the ways which are considered significant in the proposition set out in paragraph 1.4. In both:

- the company prepares a document detailing how it intends to comply with the law;
- the documents are constructed around the particular operations of the company
- the adequacy is considered by the regulator who may require various changes to it;
- the regulator then authorises or accepts the written document in question;

4.9 It is important to identify this similarity since it shows that the HSE *currently* enforces a regime very similar (and other regimes, reasonably similar) to those of the Environment Agency. It provides an opportunity to test the proposition that there is something in these kind of regimes which require a separate policy of monitoring and enforcement, or whether in fact the identification of proposed difference in the environmental and health and safety regimes, is simply being used as an excuse to retain the status quo.

4.10 If the proposition was correct, one might expect that the HSE would deal with breaches of these legal regimes in a manner similar to that of the Environment Agency – where criminal offences will result in both a preventive and a criminal

[7] This is an HSE Discussion Document produced by the Safety Policy Directorate,in Sept. 2000

justice response – or at least in a response differently from the way it deals with most safety breaches.

4.11 However HSE inspectors do not deal with breaches in any different way from inspectors enforcing the law in other sectors. As Para 39 of "Regulating Higher Hazards: Exploring the Issues" states:

> "As elsewhere, HSE aims to secure compliance through advice, inspection and formal enforcement where necessary … The standard level of prosecution, Improvement and Prohibition Notices all remain available. Overuse of such legal powers can result in adversarial relationships to the detriment of health and safety. However, they are powerful levels for improvement and their use provides reassurance that enforcement action can be taken to limit or control the activities, if the duty holder's approach falls short of what is required."

4.12 Indeed this paragraph actually suggests, rather ironically in the circumstances, that the HSE uses an even lighter hand than it usually does in dealing with legal breaches elsewhere. Indeed paragraph 41 of the same document implies that such "permissioning" regimes, because of the particular relationship that can be built up between regulator and company within such a regime, can intrinsically result in a "softer' touch being used than usual, and that this possibility must be guarded against.

> "By their nature, "permissioning" regimes result in continuing relationship between the safety regulator and individual duty holders. This increases the possibility that inspector might begin to consider issues through the eyes of duty holders, compromising their independence. This has become known as "regulatory capture". Even unfounded perception of capture can be damaging, reducing confidence in the regulatory body as a whole."

4.13 The identical nature by which HSE inspectors off-shore and HSE inspectors on-shore deal with legal breaches has been confirmed to us in conversation with a senior OSD inspector[8]. The Centre was told that off-shore inspectors would deal with legal breaches in "exactly the same" way, in an "exactly identical" way to an inspector enforcing the law on a construction site. The Centre was told that off shore inspectors "use exactly the same set of rules" as other inspectors – that is to say they follow the same HSC Enforcement Policy statement. We were also told that OSD inspectors had no separate guidelines about when to enforce an improvement notice or prosecute a company. Finally the Centre was told that the Enforcement Management Model that is being piloted by the HSE. does not have within it any mention that safety case regimes should be dealt with differently from non-safety case regimes. The Enforcement Management Model is uniform throughout the HSE.

4.14 In summary, the HSE do not think it necessary to treat the off shore industry with a mode of enforcement that is any different from its normal style even though it is a very similar regime to that enforced by the EA. ***The argument summarised in paragraph 1.4 and 1.5 above is therefore completely invalid.***

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[8] Conversation with Ian Hewell, Unit Manager, OSD1, on 9 March 2001

NARROWNESS OF IPC AUTHORISATIONS?

4.15 The proposition in paragraph 1.4 above suggests that Environmental Law authorisations are "narrow". This perception is exaggerated. Although IPC involves a relatively small number of companies (similar to HSE "permitted" regimes), they deal with all toxic or potentially toxic emissions into the environment from a large number of processes. Furthermore new 2000 IPPC regulations which deal with emissions in a similar sort of way, concern an even wider set of processes and have become far more comprehensive. This new regulation will not result in any change to the general principles of the EA's enforcement policy statement.

4.16 In any case, although HSE inspectors – when undertaking an inspection or investigation - may in theory be enforcing general health and safety duties, in many if not most instances they will be enforcing a particular set of detailed regulations, some of which are specific only to certain types of companies. So, for example, the HSE when it comes to a construction site, will, in relation to a particular company only consider whether the company has complied with the "Construction (Design and Management) Regulations 1994 or the Construction (Health, Safety and Welfare) Regulations 1996 rather than any general Health and Safety duties. It will be the breach of these regulations that might then allow the inspector to consider whether the company has beached a wider set of duties.

SIMILARITY OF NATURE/PURPOSE OF NOTICE AND OFFENCES

4.17 It is also important to note that the enforcement notices and the offences contained in the EPA 1990 and the HASAW Act 1974 respectively are very similar. It is therefore not possible to argue that a difference within the notices or offences of the respective statutes themselves justify a different enforcement approach

- **Enforcement Notices:** Section13 of the Environment Protection Act 1990 states that:

  (1) If the enforcing authority is of the opinion that the person carrying on a prescribed process under an authorisation is contravening any condition of the authorisation, or is likely to contravene any such condition, the authority may serve on him a notice ..

  (2) An enforcement notice shall –

  - state that the authority is of the said opinion;
  - specify the maters constituting the contravention or the matters making it likely that the contravention will arise, as the case may be;
  - specify the steps that must be taken to remedy the contravention or to remedy the matters making it likely that the contravention will arise as the case may be; and
  - specify the period within which those steps must be taken"

Section 21 of the Health and Safety at Work Act 1974, states that:

If an inspector is of the opinion that a person –

(i) is contravening one or more of the relevant statutory provision; or
has contravened one or more of those provisions in circumstances that make it likely that the contravention will continue or be repeated,

(ii) he may serve on him a notice (in this part referred to an "improvement notice") stating that he is of that opinion, specifying the provision or provisions as to which he is of the that opinion , giving particulars of the reasons why he is of that opinion , and requiring that person to remedy the contravention or, as the case may be, the matters occasioning it within such period … as may be specified in the notice."

Section 22 of the HASAW Act 1974 states that:

> (2) If as regards any activities to which this section applies an inspector is of the opinion that, as carried on or likely to be carried on by or under the control of the person in question, the activities involve or, as the case may be, will involve a risk of serious personal injury, the inspector may serve on that person a notice (in this part referred to as "a prohibition notice").
> (3) a prohibition notice shall
> (a) state that the inspector is of the said opinion;
> (b) specify the matters which in his opinion give, or as the case may be, will give rise to the said risk;
> (c) where in his opinion any of those matters involved or, as the case may be, will involve a contravention of any of the relevant statutory provision, state that he is of that opinion, specify the provision or provision as to which he is of that opinion, and give particulars of the reasons why he is of that opinion; and
> (d) direct that the `activities to which the notice relates shall not be carried on by or under the control of the person on whom the notice is served unless the matters specified in the notice in pursuance of paragraph (b) above and any associated contraventions of provisions so specified in pursuance of paragraph (c) above have been remedied

Section 14 of the EPA states that

> (1) "If the enforcing authority is of the opinion that the person carrying on of a prescribed process under an authorisation that the continuing to carry it on, or the continuing to carry it on in a particular manner, involves an imminent risk or serious pollution of the environment, the authority shall serve a notice (a prohibition notice) on the person carrying on the process
> (2) A prohibition notice may be served whether or not the manner of carrying on the process in question contravenes a condition of the authorisation and may relate to any aspects of the process whether regulated by the conditions of the authorisation or not.
> (3) An enforcement notice shall –
> (a) state that the authority's opinion;
> (b) specify the risk involved in the process;
> (c) specify the steps that must be taken to remove it and the period within which they must be ; and
> (d) direct that the authorisation shall, until the notice is withdrawn wholly or to the extent specified in the notice cease to have effect to authorise the carrying on of the process;
> and where the direction applies to part only of the process it may impose conditions to be observed in carrying on the part which is authorised to be carried on.

These notices serve the same purpose within each of their respective statutes. Both have very similar wording and have a very similar function – that is to say they are "preventative" , trying to stop harm continuing and ensure that there is immediate compliance with the law. The fact that the EA notice is used to ensure compliance within an "authorisation" regime and the HSE notice is used to obtain compliance with general duties does not change the similar purpose and function of these notices.

- **Offences**: The main offence relating to the IPC is contained in Section 6 of the EPA. This states that:

> "No person *shall carry on a prescribed process* after the date prescribed or determined for that description of process by or under regulations under section 2(1) above .. except under an authorisation

granted by the enforcing authority and *in accordance with the conditions* to which he is subject"

This offence is similar to one of the main offences under health and safety law – the contravention of "any health and safety regulations or any requirement or prohibition imposed under any such regulations". It is clear that both these offences serve the same basic function – criminal accountability and deterrence.

It should be noted of course that the HSE does not treat conduct that is a breach of a regulations any differently from conduct that is a breach of health and safety law.

It should also be noted in any case other Environmental offences are more similar to the health and safety offence concerning a breach of the general duties – where it is necessary to show that the company did not take all reasonable and practicable measures. Where a company has breached the conditions of a License concerning "controlled waste" it is effectively necessary to show that the company did not take "all reasonable precautions" and did not exercise "all due diligence to avoid the commission of the offence". This is not a dissimilar test to that of reasonable practicability.

CONCLUSION

5.1 So-called differences between the two legal regimes do not justify retention of the HSC Enforcement Policy Statement status quo and rejection, by the HSC, of incorporation of the key principles contained in the EA Enforcement Policy Statement. It is the Centre's view that the identification of these differences and the process of giving these differences "significance" is spurious and is simply being used as an excuse to retain the status quo

5.2 Furthermore, the real significant differences that do exist between the two legal regimes point strongly towards the HSC incorporating the EA principles to ensure that it has at least an equivalently strict and formalised enforcement policy.