SENTENCING ADVISORY PANEL

6 October 1999

Dear Colleague,

CONSULTATION ON ENVIRONMENTAL OFFENCES

The Home Secretary has directed the Sentencing Advisory Panel, under section 81(3) of the Crime and Disorder Act 1998, to propose to the Court of Appeal that it should frame a sentencing guideline on environmental offences. We understand that the Court of Appeal may have an opportunity to consider whether to issue a guideline early in the new year.

The attached consultation paper sets out the Panel's provisional views on the sentencing of these offences, and we invite comments from all interested parties, whether on the specific questions summarised in section 6 of the Consultation Paper, or on any other relevant matter which consultees think the Panel should take into account.

Please send your response to the Secretary to the Panel, Miss Brenda Griffith-Williams, either by post to *Room 469, 50 Queen Anne's Gate, London SW1H 9AT*, by fax to *0171 273 2969*, or by e-mail to *eva.rak@homeoffice.gsi.gov.uk*. Responses should be received by 17 November. I am sorry that this is shorter than the 8 week period which the Panel normally intends to allow for consultation, but it would be very difficult for us to extend the deadline in this case because opportunities for the Court of Appeal to review the sentencing of environmental offences are rare. Please let the Secretary know if this causes you difficulty. It would also be helpful for us to know if you do not intend to submit a response on this occasion.

Unless you specifically ask us to treat your response as confidential, we shall assume that you are content for it to be made available to others.

Additional copies of this paper may be obtained from Gareth Sweny at the above address. The paper is also available on the Panel's website: http://www.sentencing-advisory-panel.gov.uk/

Yours sincerely,

Professor Martin Wasik
Panel Chairman

ENVIRONMENTAL OFFENCES: A CONSULTATION PAPER

1. THE OFFENCES

The five offences on which the Panel has been directed to advise are as follows.

(1) Integrated pollution control and air pollution control - carrying on a prescribed process without, or in breach of, authorisation (Environmental Protection Act 1990, s.23) (hereafter EPA 1990, s.23)

Integrated pollution control covers the more complicated processes, which often have the greatest potential for pollution. They are generally, but not always, carried out in larger factories. These offences are prosecuted by the Environment Agency. Offences relating to air pollution control, which are prosecuted by local authorities, are concerned with significant local air polluting industrial processes, including processes with a potential for serious nuisance impacts (especially odour).

The maximum penalty for these offences is £20,000 and / or 3 months imprisonment on summary conviction, and an unlimited fine and / or 2 years imprisonment on indictment.

(2) Depositing, recovering or disposing of controlled waste without a site licence or in breach of its conditions (Environmental Protection Act 1990, s.33) (hereafter EPA 1990, s.33)

The deposit and recovery of waste must be carried out under a site licence and in accordance with its conditions. It must also be carried out in a manner not likely to cause pollution to the environment or harm to human health. Risks associated with waste which is not properly disposed of or recovered include ground and surface water pollution and soil contamination.

The maximum penalty is £20,000 and / or 6 months on summary conviction, and an unlimited fine and / or 2 years imprisonment on indictment. Where this offence is committed in relation to waste which is "special waste" (broadly, any controlled waste which is classified as toxic, very toxic, harmful, corrosive, irritant or carcinogenic) the maximum term on indictment rises to 5 years imprisonment.

It should be noted that so-called "fly tipping" is not a separate offence. It is charged under s.33.

(3) Polluting controlled waters (Water Resources Act 1991, s.85) (hereafter WRA 1991, s.85)

Controlled waters are coastal and territorial waters; and any streams or rivers, and lakes or ponds attached to them. Polluting controlled waters can have a devastating effect on flora and fauna, and on the quality of water abstracted for drinking and other purposes.

The maximum penalty is £20,000 and / or 3 months imprisonment on summary conviction and an unlimited fine and / or 2 years imprisonment on indictment.

(4) Abstracting water illegally (Water Resources Act 1991, s.24) (hereafter WRA 1991, s.24)

Water abstraction is governed by a licensing system which ensures that only sustainable amounts are used. Over-abstraction can seriously harm the environment, and the flora and fauna dependent on it. Those who take water beyond their licensed quantity may put the public drinking water supply and other lawful users at risk. A reduction in the flow of streams may lead to an unacceptable concentration of pollutants from legitimate discharges, such as sewage treatment works.

The maximum penalty is £5,000 on summary conviction and an unlimited fine on indictment. This offence is not imprisonable.

(5) Failing to meet packaging, recycling and recovery obligations, or to register or to provide information (Environment Act 1995, s.93 and Producer Responsibility Obligations (Packaging Waste) Regulations) 1997 (hereafter EA 1995, s.93).

This legislation requires businesses to achieve minimum levels of recycling and recovery of an equivalent amount of packaging waste in relation to the packaging or packed goods they sell. The environmental objective is to use waste more productively and reduce the use of landfill.

The maximum penalty is £5,000 on summary conviction and an unlimited fine on indictment. The offence is not imprisonable.

Maximum fines for the offences (1) to (3) when tried summarily were raised to the level of £20,000 by the Environmental Protection Act 1990 and the Water Resources Act 1991. Before those statutes came into effect the fine level was at the normal statutory maximum for summary trial (now £5,000). There is no limit on the level of the fine which may be imposed in the Crown Court. Power to impose a custodial sentence for the offence under s.23, of up to three months in the magistrates' courts, was introduced by the Environment Act 1995.

2. THE CONCERNS

2.1 Public awareness of environmental issues, and anxiety about the effects of criminal acts which damage the environment, have been increasing in recent years. These offences despoil the environment, may harm human health, flora and fauna, and they affect the general quality of life. Pollution and contamination of land or of watercourses has an immediate environmental impact. The effects of the pollutant may also be continuing, and may carry risks to human or animal health which materialise at some future date. Particular instances of pollution may be very expensive and time-consuming to clean up.

2.2 Some instances of environmental crime concern individual offenders or small-scale commercial operations. Others involve large organisations, or multinational companies with multi-million pound assets. Achieving consistency of sentencing across such a wide range of differently situated defendants is problematic. There is public concern about the form and scale of sentencing which is appropriate for wealthy corporate offenders.

2.3 The Government has recognised these concerns and has referred this area of sentencing to the Panel. The environmental offences with which we are concerned are mainly dealt with in magistrates' courts and only occasionally come before the Crown Court. Opportunities for the Court of Appeal to issue sentencing guidelines, therefore, arise infrequently.

3. THE SENTENCING PROFILE

3.1 Home Office Statistics for 1997 and 1998 show the sentencing profiles for the *first three* of the five offences listed above (EPA 1990, s.23 and s.33, and WRA 1991, s.85). It should be noted that the figures do not distinguish between cases of air pollution and other kinds of pollution under EPA 1990, s.23. The statistics also include sentencing figures for those dealt with for failure to comply with a Prohibition Notice under EPA 1990, s.23.

3.2 Taking 1997 and 1998 together, the magistrates' courts sentenced 189 persons and 72 companies for these offences, and the Crown Court sentenced 22 persons and 8 companies. The fourth and fifth offences listed above are not included in the statistics. Very few prosecutions are recorded for the offence under WRA 1991, s.24. Home Office and Environment Agency figures for the offence under EA 1995, s.93 indicate that there have been only a handful of prosecutions.

3.3 In summary, the sentencing figures indicate that, where persons (rather than companies) are being sentenced for these offences, 71% are fined, 23% are discharged, 2% receive a community sentence and 4% a custodial sentence. When companies are sentenced, 96% are fined and 4% are discharged. The predominant use of the fine in these cases is clear and unsurprising, but it may be less well known that nearly a quarter of persons sentenced are dealt with by way of a discharge. Community and custodial sentences are rare and, of course, these are unavailable where the defendant is a company.

3.4 The statistics contain separate entries for the offence under EPA 1990, s.33, when committed in relation to (i) "special waste" and (ii) other controlled waste which is not special waste. Where "special waste" is involved, the sentencing profile is different, at least in the Crown Court. In 1997 and 1998 the Crown Court passed immediate custodial sentences on four of the ten defendants convicted of that offence, although magistrates' courts imposed custodial sentences on just two of the 38 persons convicted.

3.5 These figures are drawn from Home Office records, and it is recognised that they may significantly under-report the sentencing outcomes of non-police prosecutions. There is, however, no reason to think that the *sentencing spread* in the official records is untypical. A comparison between Home Office figures and Environment Agency records of prosecutions for the offence under WRA 1991, s.85 reveals a very similar sentencing pattern.

3.6 All the above remarks relate to sentencing where the defendant is convicted of the relevant environmental offence as a *principal* offence (ie where the defendant is convicted of more than one offence, the offence which carries the highest maximum penalty). Home Office figures show that environmental offences come before the courts more frequently as a *non-principal* offence. For example, the Crown Court sentenced four times as many defendants under the EPA 1990, s.33, as a non-principal offence as they did when it was a principal offence. The sentences imposed are also more severe. Of persons sentenced on that basis, 61% were fined for the environmental offence, 18% were discharged, 3% received a community sentence, but 17% received a custodial sentence, a substantially higher rate for use of custody for the environmental offence than occurs when sentencing as a principal offence. For companies, the sentencing spread was very similar to the figures given above, with 91% of defendants being fined and 9% being discharged.

The Panel invites comments on the sentencing patterns revealed by these figures, and what the reasons may be (a) for the high proportion of discharges and (b) for the divergence in sentencing when the environmental offence is sentenced as a principal or as a non-principal offence.

4. THE PANEL'S PROPOSALS

4.1 The Panel believes that it is desirable for the Court of Appeal to issue sentencing guidelines which are applicable across the range of these environmental offences. It is helpful to consider separately the sentencing of persons and of companies, although it is recognised that the distinction between the two categories becomes blurred in the case of small family concerns or one-person companies.

The sentencing of persons for environmental offences

The fine

4.2 The Panel proposes that the starting point for the sentencing of *persons* in cases of environmental crime should be a fine. The fine is generally the appropriate sentence for these crimes because:

(a) the offences are non-violent and carry no immediate physical threat to the person, and

(b) the offences are generally committed in situations where the defendant has failed to devote proper resources to preventing a breach of the law.

4.3 The level of the fine should be fixed in accordance with the normal principles in the Criminal Justice Act 1991, s.18 and attendant case-law, taking account of the seriousness of the offence and the financial circumstances of the individual defendant.

4.4 As an illustration of the level of fines imposed by the courts for environmental offences, the following figures relate to defendants sentenced in 1998 for offences involving controlled waste (excluding special waste) under EPA 1990 s.33.

4.5 Fifty-eight *persons* were fined in the *magistrates' courts*, where the average fine was £739 and individual fines ranged from £20 to £7,500. Two *persons* were fined in the *Crown Court*; the amounts were £100 and £5,000, averaging £2,550. Nineteen *companies* were fined in the *magistrates' courts*, where the average fine was £2,951 and individual fines ranged from £100 to £11,000. In the *Crown* Court, no companies were sentenced under this provision in 1998. The comparable Crown Court figures for 1997 are: 6 companies fined, at an average of £7,583 ranging from £250 to £15,000.

4.6 Recently, the Court of Appeal has issued sentencing guidelines in the area of health and safety at work in *Howe and Sons (Engineers) [1999] 2 Cr App R (S) 37*. In its judgment the Court indicated that fines in that context had in the past been too low, pointing out that although the overall level of fines had risen following an increase in the statutory maximum, the average fine remained less than one third of the maximum of £20,000, while almost half of the fines imposed in magistrates' courts for these offences were below one quarter of the maximum. In the Crown Court, where the level of fine was unlimited, the average fine per offence was £17,768. (All these figures relate to 1997/98.)

The Panel would welcome views as to whether similar criticisms can be made of the overall level of fines imposed in environmental offences.

4.7 The Panel's view is that the level of the fine should reflect how far below the relevant statutory environmental standard the defendant's behaviour actually fell. The assessment of seriousness requires that the court should consider the *culpability of the defendant* in bringing about, or risking, the relevant environmental harm. This needs to be balanced against *the extent of the damage which has actually occurred or has been risked*. The level of the fine should be high where the defendant's culpability was high, even if a smaller amount of environmental damage has resulted from the defendant's actions than might reasonably have been expected. Such a case might arise where damage (or more extensive damage) has been avoided through prompt action by the authorities, or through some fortuitous element, such as helpful weather conditions. Conversely, in a case where much more damage has occurred than could reasonably have been expected the sentence, while giving weight to the environmental impact, should primarily reflect the culpability of the offender.

The Panel invites views as to whether the balance between culpability and harm in respect of individual defendants, suggested in paragraph 4.7 above, is appropriate.

4.8 The following factors may be taken to enhance the *culpability* of an individual defendant, and thereby to *aggravate the seriousness* of the offence:

(a) where the offence is shown to have been a deliberate breach of the law, rather than the result of carelessness;

(b) where the defendant has acted from a financial motive, whether of profit or of cost-saving, for example by neglecting to put in place the appropriate preventative measures or by avoiding payment for the relevant licence;

(c) where the breach was in the nature of a regular or continuing one, rather than an isolated lapse;

(d) where the defendant has failed to respond to advice / caution / warning from the relevant regulatory authority;

(e) where the defendant has ignored concerns voiced by employees or others; and

(f) where the defendant is shown to have had knowledge of the specific risks involved, such as where he has knowingly dumped "special" waste.

4.9 The following factors relate to the *extent of the damage*, and should also be taken to *aggravate the seriousness* of the offence:

(a) where the pollutant was noxious, widespread or pervasive;

(b) where human health, animal health, or flora were adversely affected;

(c) where expensive clean-up operations were required;

(d) where other lawful activities were prevented or significantly interfered with.

4.10 If the defendant has previous convictions for similar offences, or has failed to respond to previous sentences, this will naturally be treated as a factor that should *increase the sentence*, but not to an extent that would be inappropriate to the facts of the case.

4.11 Among the factors that should be taken to *reduce the seriousness* of the offence are:

(a) the fact that the defendant played a relatively minor role in the commission of the offence, or had relatively little personal responsibility for it;

(b) the fact that the defendant genuinely lacked awareness or understanding of the regulations specific to the activity in which he was engaged;

(c) the fact that the offence was an isolated lapse.

4.12 Before arriving at the sentence, courts will then take account of *personal mitigating factors*, including:

(a) the defendant's ready co-operation with the enforcement authorities;

(b) the defendant's good environmental record;

(c) the fact that the defendant took steps to remedy the problem as soon as possible; and

(d) a timely plea of guilty.

4.13 A guilty plea will normally attract some discount on sentence, but where the offence is one of strict liability the discount will be modest since the defendant will have had little option but to plead guilty. The guilty plea discount should not be forfeited where the defendant contests his culpability for a strict liability offence at the sentencing stage and the court accepts the defendant's version of the facts.

4.14 If the defendant's culpability was low, there was little or no actual environmental damage, or there is strong personal mitigation in the case, the appropriate sentence may be a discharge rather than a fine.

Custodial and community sentences

4.15 A minority of environmental crimes committed by individual defendants is so serious that only a custodial sentence can be justified. It is suggested that a *custodial sentence* will normally be justified only where:

(a) the pollutant was noxious, widespread or pervasive; *and*

(b) the offence is shown to have been a deliberate breach of the law, or the defendant has acted from a financial motive, whether of profit, or of cost-saving, for example by avoiding payment for the appropriate licence or neglecting to put in place the appropriate preventative measures.

4.16 In some cases which do not cross the custodial sentence threshold, but where the offence is serious enough for a *community sentence*, the Panel recognises that there may be merit in imposing a community sentence rather than a fine. Since it contains a requirement of reparation to the community, a community service order may be the most appropriate community sentence.

The Panel would welcome views on the circumstances in which a community or custodial sentence is appropriate.

The sentencing of companies for environmental offences

4.17 The appropriate sentence for an environmental offence where the defendant is a *company* will almost always be a fine. As in the case of an individual defendant, the sentence should reflect how far below the appropriate standard the company has fallen. The level of the fine should reflect the company's *culpability*, which may be manifested in one or more of the following factors:

(a) the breach of the law was a deliberate company policy to gain commercial advantage;

(b) although the breach of the law was not deliberate, it was known to be a likely consequence of company policy;

(c) the breach occurred as a result of mismanagement of the company;

(d) management ignored concerns voiced by employees;

(e) the actions and attitude of management displayed a cavalier attitude to the environmental risks;

(f) the attitude of management towards the environment authorities was dismissive or obstructive; and

(g) the breach was part of a continuing pattern of offending rather than an isolated lapse.

4.18 The fine should also reflect the *extent of the damage* which has actually occurred or has been risked. The factors which should be taken to aggravate the seriousness of the offence are the same as those listed in paragraph 4.9 above in relation to individuals.

4.19 The fine which is imposed should reflect the means of the company concerned. In the case of a large company the fine should be substantial enough to have a real economic impact which, together with the attendant bad publicity resulting from prosecution, will create sufficient pressure on management and shareholders to tighten regulatory compliance and change company policy. It should be recognised that where pollution on a substantial scale has been occasioned by a large company, it is only the company itself (rather than individual directors) which will have the financial means to meet a fine proportionate to the degree of damage which has occurred.

4.20 For smaller companies, however, the courts should bear in mind that a very large fine may have considerable adverse impact. A crippling fine may close down the company altogether, with employees being thrown out of work, and with repercussions on the local economy. Alternatively, a large fine may make it even more difficult for the

company to improve its procedures in order to comply with the law. In such cases the court may reduce the level of the fine and / or spread the payment of the fine over a longer period of time. In *Rollco Screw & Rivet Co Ltd (Court of Appeal, March 26, 1999)*, the Court of Appeal established that, in the case of a corporate defendant, fine instalments may be required to be paid over a substantially longer period of time than the 12 months which is generally appropriate for an individual defendant.

Determining the company's ability to pay

4.21 It was established by the Court of Appeal in *Howe and Sons (Engineers) [1999] 2 Cr App R (S) 37* that, if a company wishes to make any submission to the court about its ability to pay a fine, it should supply copies of its accounts and other financial information on which it intends to rely in good time before the hearing, both to the court and to the prosecution. Where accounts are deliberately not supplied the court is entitled to assume that a company has the means to pay any fine which the court is minded to impose. The decision in *Howe* related to offences committed against health and safety regulations, but the same principles appear to be applicable to environmental offences.

4.22 There is no settled formula for determining the level of fine which a corporation should pay. In *Howe* it was made clear that the company should supply full information to the court as to its turnover and its net profits, since the court will need to consider both when fixing the fine. The Panel is of the view that the establishing of a more settled formula for determining the level of fine in cases involving corporations would enhance consistency in sentencing. It is recognised, however, that there is great diversity in the scale and nature of companies and that a simple measure of fine which would be applicable across this range may be difficult to find. Any such measure might take account of a number of different factors, including:

(a) turnover (the sales revenue of the company over, say, the last three years);

(b) profitability (the scale of net profits before tax and dividends over the last three years) and

(c) liquidity (the value of current short-term assets set against short-term liabilities).

4.23 It might be possible to express the fine as a percentage of one or more of these measures.

The Panel would welcome views on whether such a formula could be devised. It would also welcome views on whether it would be beneficial to sentencers to provide them with expert accountancy advice to assist them in such cases and, if that would be beneficial, who should bear the cost of providing that advice.

5. COSTS AND ANCILLARY ORDERS

Costs

5.1 A court will usually make an order for costs in favour of the prosecuting agency. Such an order will reflect the costs of the investigation, together with file preparation and presentation costs, and should not exceed the sum which the prosecutor has actually and reasonably incurred. The relevant principles are set out by the Court of Appeal in *Associated Octel Ltd [1997] 1 Cr App R (S) 435*, and have been reviewed recently in *Northallerton Magistrates' Court, ex parte Dove [1999] Crim LR 760*. According to the latter case, the order for costs ordinarily should not be disproportionate to the level of the fine imposed. The court should fix the level of the fine first, and then determine the costs. If the total sum exceeds the defendant's means, the order for costs should be reduced rather than the fine.

Compensation

5.2 It appears from the available statistics that compensation orders are rarely used in this category of cases. In the Panel's view, where there is a specific victim (such as a landowner who has incurred expense in cleaning up their property, or in re-stocking a watercourse polluted by the defendant's actions) the court should always consider making a compensation order. It should give reasons if it decides not to do so. The court should fix the level of the fine first, and then consider the issue of compensation. If the total sum exceeds the defendant's means, section 35 of the Powers of Criminal Courts Act 1973 provides that the fine should be reduced, rather than the order for compensation. Although the maximum summary fine for three of the environmental offences being considered by the Panel is £20,000, the maximum level of compensation which may be ordered by a magistrates' court is £5,000.

The Panel would welcome views on whether the courts should give more consideration to making compensation orders in appropriate cases, and whether the summary compensation limit is adequate for these offences.

Disqualification

5.3 In an appropriate case the court may consider making an order disqualifying the defendant from acting as a company director for a specified period.

6. SUMMARY OF QUESTIONS

(a) What are the circumstances which contribute to the granting of a significant number of discharges by the courts, and to the divergence in sentencing when the environmental offence is sentenced as a principal or as a non-principal offence?

(b) Is the balance between culpability and harm in respect of individual defendants, sketched out in part 4 above, an appropriate one?

(c) In addition to those mentioned in part 4 above, are there other factors which significantly aggravate or mitigate the seriousness of these offences?

(d) The Court of Appeal has expressed the view that the level of fines imposed for health and safety offences has been too low. Do similar criticisms apply to the overall level of fines imposed in environmental offences, and what are the factors to be taken into account in assessing the appropriate level of fines in these cases?

(e) In what circumstances is it appropriate to impose a community or custodial sentence on an individual defendant?

(f) Is it feasible to devise a formula for the level of fines to be imposed on companies for these offences, perhaps based on a percentage of the company's turnover, profitability or liquidity?

(g) Would it be beneficial to sentencers to provide them with expert accountancy advice in such cases and, if so, who should bear the cost of providing that advice?

(h) Should the courts give more consideration to making compensation orders in appropriate cases, and is the summary compensation limit adequate for environmental offences?