

# CONSISTENCY AND EFFECTIVENESS

## Strengthening the New Environment Tribunal

Professor Richard Macrory , Hon. Q.C., CBE



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# SUMMARY

1. The report is concerned with regulatory appeals in England and Wales – the rights of individuals or business to challenge decisions made by government departments or regulatory agencies by means of an appeal to another body. This is distinct from Judicial Review in the courts which is concerned with the legality of decisions. Regulatory appeals allow someone to have their case reheard on the merits.
2. Regulatory appeals have long been a significant feature of our legal system. Decisions of government bodies and other regulatory agencies can affect the livelihood of individuals or businesses (e.g. by refusing a licence to do something) or impose significant direct financial costs (e.g. the service of a civil penalty or an enforcement notice requiring remedial action). It has been considered right and fair that in many cases the individual or company directly affected should be protected by having the right of appeal to another body who can decide the case afresh.
3. This report has examined the provision for environmental appeals which appear in over sixty pieces of current legislation relating to the environment, from water pollution to emissions trading. It has found that appeals go to a wide range of different bodies including the High Court, Magistrates Court, the Planning Inspectorate, and different government departments. The system lacks common procedure and intelligibility. There is little in the way of underlying principle in choice of the appeal body.
4. In 2010 a specialized tribunal dealing with appeals concerning new environmental sanctions was established as part of the new First-tier Tribunal. Judges and expert members have now been appointed to the new Environment Tribunal which has a great deal of flexibility in where it sits and how it conducts its procedures. More straightforward cases can be heard by a single member, while those raising complex legal and technical issues can be heard by a panel of three with a legal chair and two expert members. There is an emphasis on flexible and low-cost procedures where appropriate and the encouragement of alternative dispute resolution.
5. The existence of the Environment Tribunal now provides an opportunity for consolidating environmental appeals across a wide range of existing laws. This is entirely in line with the current regulatory reform agenda which promotes the simplification and modernization of regulatory structures. It will allow the development of expertise in both law and technical issues needed to handle many contemporary environmental appeals in an effective way. The Tribunal operates under a set of procedural rules which will be clear and common to all involved, and sits within a structure that can be expected to command confidence among the regulated community and the public. Unlike many forms of appeal body, it has the capacity to provide wider guidance in its decisions which can greatly assist both regulators and the regulated, and reduce the likelihood of future disputes and consequent costs involved.
6. The report does not advocate the transfer of all appeals under environmental legislation to the new Tribunal. Those with significant land-use connections remain best handled by the Planning Inspectorate. Statutory nuisance appeals should continue to be made to Magistrates Courts but those courts should have the power to refer particularly complex appeals to the Tribunal.
7. A set of priorities for transfer to the Tribunal is identified, starting with appeals against environmental civil sanctions imposed by regulators. These are important new powers which avoid the unnecessary use of the criminal courts, but an effective appeals process is vital to prevent abuse. Already, we are seeing different appeals bodies being developed under different laws in this area, and there is a real danger of losing the opportunity for a more coherent appeals process.
8. There also exist significant examples where the legislation provides no right of regulatory appeal, other than by Judicial Review. This is often the case where the primary decision-maker is a government department, but even here the picture is by no means consistent. Appeals or other forms of review are provided in some cases, but not others, and there is little in the way of coherence in the current system.

Evidence suggests that the absence of the right to a regulatory appeal leads to greater pressure on Judicial Reviews which are ill-suited for such cases and a potential wasteful use of judicial resources. The report recommends a systematic review of current provisions where no appeal is provided in order to identify whether there are good grounds for continuing the present situation.

9. For new environmental legislation, the report recommends that where such laws give powers

to a government body or agency to determine someone's rights or impose obligations, there should be a presumption that there is a right of regulatory appeal to the new Environment Tribunal.

10. Over the years we have developed a system of environmental appeals which is complex and confusing. There is now a unique opportunity to make the current structures more coherent, simple and effective.

# CONSISTENCY AND EFFECTIVENESS

## Strengthening the New Environment Tribunal

### Context

1. In October 2010, I was asked by Lord Justice Carnwath, Senior President of Tribunals, to examine the current system of administrative appeals under environmental laws in England and Wales, and whether there was a case for making greater use of the new First-tier Tribunal (Environment) in handling them. This is my report to him.
2. In 2003, I conducted a similar exercise for the Department of Environment, Food and Rural Affairs (DEFRA). This was at a time of considerable discussion about the need for a new environmental court or tribunal in this country, but with a range of different views as to its form and jurisdiction. These extended from a ‘one stop’ court handling criminal, civil, and regulatory issues arising from a single incident such as a major pollution spill, a new Division of the High Court, to a more modest extension of appeals powers of the Planning Inspectorate. My research at that time focussed on what could be broadly termed as regulatory appeals where legislation gives, say, an applicant for a licence or someone served with an enforcement notice the right to appeal the decision of the regulator to another body. Unlike Judicial Review, these appeals are normally unrestricted in that the appellant can have the merits of the decision re-examined afresh by the body determining the appeal. In the remainder of this report I will use the term ‘regulatory appeal’ to describe this type of appeal and to distinguish it from Judicial Review.
3. My report *Modernizing Environmental Justice*<sup>1</sup> examined over fifty pieces of environmental regulation, and found a complex array of appeal routes, including magistrates courts, county courts, the Planning Inspectorate (PINS), the Secretary of State and the High Court. In some cases, there was no right of appeal other than by way of Judicial Review. It was difficult to determine any coherent principles that determined the choice of appeal route.
4. *Modernizing Environmental Justice* recommended that a new environmental tribunal be established as a single body to handle regulatory appeals under most environmental legislation. It was hoped that this would lead to more consistent and effective decision-making, and be an appropriate body to deal with future developments in environmental regulation, both at national and European Union level.
5. Although generally well received, the recommendations in the Report were not implemented by Government. There were three particular challenges at the time. First, was it really the case that environmental law was so different from other areas of contemporary regulation such as health and safety that it warranted its own appeals body? The report argued that there were distinct characteristics of modern environmental law that marked it out for special treatment, but not everyone agreed with this.<sup>2</sup> Second, the report was arguing for a fairly modest though significant reform of just one aspect of the environmental regulatory system. It expressly rejected the idea of a new Division of the High Court or similar model on grounds of both principle and political pragmatism. But others in the environmental law world were not convinced

1. Macrory R with Woods M (2003) *Modernizing Environmental Justice – Regulation and the Role of an Environmental Tribunal* Centre for Law and the Environment, Faculty of Laws, University College, London

2. E.g Environment and Rural Affairs Department, Scottish Government (2006) *Strengthening And Streamlining: The Way Forward For The Enforcement Of Environmental Law In Scotland*. “We acknowledge the special characteristics listed by Macrory and Woods and accept that they are features of environmental law. However, we are not persuaded that these features, or indeed this combination of features is unique to environmental law and it could be argued that similar statements could be made equally about other areas of law such as health, health & safety and employment none of which have specialist courts/jurisdiction” (para 2.99)

that this proposal would deal with the costs and risks involved in environmental litigation generally (especially Judicial Review), and in another report commissioned by DEFRA at the same time, the proposal of an environmental appeals tribunal was rejected as insufficiently ambitious.<sup>3</sup> Finally, the report was advocating the setting up of a wholly new tribunal that was likely to involve considerable establishment costs, and raised questions as to whether there would be a sufficient number of environmental appeals to justify the costs and upheaval involved in creating a new institutional body.

## Changes since 2004

6. The most significant change since the publication of *Modernizing Environmental Justice* is that in 2010 a First-tier Tribunal (Environment) was established as part of the new Tribunal system. For the sake of succinctness, I will refer to this as the Environment Tribunal in the remainder of this report. It was set up because the Environment Agency and Natural England were the first regulators to acquire civil sanctioning powers under Part III of the Regulatory Enforcement and Sanctions Act 2008, which provides that appeals against the imposition of sanctions must in principle be made to the First-tier Tribunal. It means that two of the key arguments addressed in *Modernizing Environmental Justice* are no longer relevant. It is not necessary to continue to argue that environmental law requires special treatment in institutional terms since the Environmental

Tribunal now exists. Nor is it necessary to justify the costs of setting up a wholly new tribunal since this has already occurred.

7. One of the major reasons why some of the environmental groups rejected the proposal of an environmental appeals tribunal in 2004 was that the proposal failed to address explicitly concerns at the costs of litigation, especially in Judicial Review. A new environmental division of the High Court was considered by many to be a preferred solution to these problems. But since 2004 there has now been a great deal of movement on this issue with the publication of the Sullivan Report on Access to Environmental Justice,<sup>4</sup> the Jackson Review on Civil Litigation,<sup>5</sup> the Sullivan follow-up report,<sup>6</sup> enforcement action by the European Commission against the United Kingdom for excessive costs with a Reasoned Opinion issued in 2010,<sup>7</sup> condemnation of the existing British system by the Aarhus Compliance Committee,<sup>8</sup> and judicial intervention, including a revisit of the existing limitations on Protective Costs Orders,<sup>9</sup> and the more recent referral by the Supreme Court to the European Court of Justice on the meaning of the requirement that costs must not be ‘prohibitively expensive’ as it appears in EU environmental legislation and reflecting obligations under Aarhus.<sup>10</sup> Given all these developments, I do not think that strengthening and extending the regulatory appeals jurisdiction of the new Environment Tribunal will now be seen as a diversionary threat to the challenge of dealing with costs issues in environmental litigation generally.

3. Environmental Law Foundation, World Wildlife Fund, and Leigh Day and Co (2004) *Environmental Justice*, ‘We do not, however, believe that a tribunal of such limited scope as identified in the UCL Report is, in itself, sufficient to achieve access to environmental justice. Moreover, we are concerned that the establishment of a tribunal limited to regulatory appeals could fill the “window of opportunity” to improve access to environmental justice at a time when more fundamental reform is clearly necessary.’ (Executive Summary, para 12)
4. Report of the Working Group on Access to Environmental Justice (2008) *Ensuring Access to Environmental Justice in England and Wales* (the Sullivan Report)
5. *Review of Civil Litigation Costs : Final Report* (2009) (The Jackson Report)
6. *Ensuring Access to environmental justice in England and Wales : Update Report* (2010)
7. European Commission (2010) *Environment: Commission warns UK about unfair cost of challenging decisions* Press Release 18 March 2010
8. *Findings and Recommendations of the Aarhus Compliance Committee with regard to Communication ACCC/C/2008/33* 24 September 2010
9. *Garner v Elmbridge Borough Council* Court of Appeal (Civil Division) [2010] EWCA Civ 1006 29 July 2010
10. *R (on the application of Edwards and another) v Environment Agency and others* [2010] UKSC 57 15 Dec 2010



## Review of regulatory appeals provisions under environmental legislation

8. This review has re-examined and updated the provisions for appeals under the environmental legislation first considered in *Modernizing Environmental Justice*. It is never easy deciding a precise boundary between environmental and other related legislation but as with *Modernizing Environmental Justice*, town and country planning legislation including environmental assessment is excluded, as is food standards, health and safety, built heritage, and hedgerow protection. One example of the powers to impose orders relating to agricultural diseases is included as representative of many other regulations in this area.
9. Appendix I contains nearly 60 examples of regulatory appeals in the environmental field, together with over 20 examples of significant decision-making where no regulatory appeal is provided. Appendix 2 arranges the information by subject area. *Modernizing Environmental Justice* noted the complexity of the appeals provisions with a range of different bodies involved, including the Planning Inspectorate (PINS), Magistrates Courts, County Courts, and the High Court, and with little in the way of underlying principle guiding the choice. In some ways, as Appendix 1 shows, the picture has become more complex since 2004 because, in addition to DEFRA, two government departments, Department of Energy and Climate Change (DECC), and Business Innovation and Skills (BIS) now take a lead on significant areas of environmental regulation, such as greenhouse gas emissions trading and electrical waste. They have developed their own form of appeals arrangements. DECC, for example, has appointed a senior barrister as Emissions Trading Scheme Appeals Officer to hear appeals and make recommendations to the Secretary of State.<sup>11</sup> In 2009, two appeals under the Waste Electrical and Electronic Equipment

Regulations 2006 were conducted by a senior BIS lawyer who made his decision on behalf of the Secretary of State. In addition to those relating to civil sanction powers of the Environment Agency and Natural England, the Environment Tribunal is beginning to acquire appeal functions in other areas of environmental regulation such as plastic bags. Finally, as was the case in 2004, there continue to be instances where there is no right of appeal against a regulatory decision other than by way of Judicial Review. This is particularly the case where the initial decision-maker is the Secretary of State, though even here the position is not consistent, with some regulations allowing for an appeal to say, the High Court and others none at all. This issue is discussed further in para 19 below.

10. A good example of the complexity of appeal provisions that can exist even within a single set of regulations is contained in the recent REACH Enforcement Regulations 2008/2852. In less than two pages, Schedule 8 provides for four separate appeal routes – decisions on notices served by the Environment Agency being appealed to the Secretary of State, notices served by the Health and Safety Executive to an Employment Tribunal, notices served by local authorities to the Magistrates Court, and finally notices served by the Secretary of State to the High Court. The choice of appeals route is clearly being largely determined by the body making the initial decision rather than the underlying nature of the regulations themselves. This is understandable but sacrifices any consistency that might come from a single appeals body dealing with a common set of regulations, and providing a common approach towards their interpretation.

## The Environment Tribunal

11. The Environment Tribunal was established in 2010 and sits as part of the General Regulatory Chamber of the First-tier Tribunal.<sup>12</sup> At present there are six appointed judges, all with at least seven years

11. Three such appeals have been reported to date : [http://www.decc.gov.uk/en/content/cms/what\\_we\\_do/change\\_energy/tackling\\_clima/emissions/eu\\_ets/legislation/legislation.aspx](http://www.decc.gov.uk/en/content/cms/what_we_do/change_energy/tackling_clima/emissions/eu_ets/legislation/legislation.aspx)

12. See generally <http://www.tribunals.gov.uk/environment/>

professional experience, together with ten non-legal members with a wide range of expertise. Members sit part-time, and the tribunal has a great deal of flexibility in how it handles cases. A judge and two non-legal members can be appointed to handle more serious or complex cases, but it is perfectly possible for a case to be heard by a single judge or a single non-legal member. The Tribunal is not based in a single location but can sit wherever it is needed, taking advantage of the common approach to administrative support provided by the new tribunal system. Procedures are governed by the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended.<sup>13</sup> and there is a fast track procedure for handling appeals against Stop Notices.<sup>14</sup>

12. As is common practice in tribunal appeals, each party normally bears their own costs, although the 2009 Rules allows for a Tribunal, acting either on its own initiative or in response to an application, to make an Order for Costs where, for example, it considers a party has acted unreasonably in bringing, defending, or conducting proceedings. The Rules also require that, where appropriate, the Tribunal must bring to the attention of the parties any appropriate alternative dispute resolution procedure and facilitate this as the parties wish.
13. The jurisdiction of the Environment Tribunal was originally limited to hearing appeals against civil sanctions, imposed by environmental regulators, pursuant to regulations made under the Regulatory Enforcement and Sanctions Act 2008.<sup>15</sup> But other environmental appeals have now been added to this jurisdiction, notably appeals against decisions of the National Measurement Office concerning civil sanctions under eco-design regulations,<sup>16</sup> and appeals under the new Welsh plastic bag regulations.<sup>17</sup> The first appeals under these various regulations are likely to be heard sometime in 2011.

## Advantages of the Environmental Tribunal as an Appeals Body

14. There are a number of advantages in having appeals under a range of environmental laws being handled by a single appeals body. Such a body can develop an expert understanding of the complexities of contemporary environmental legislation and policy and can provide a consistency of interpretation across the board where appropriate. Challenging concepts such as the precautionary principle now permeate many areas of environmental law as do provisions of European Union and international environmental law, and it is not easy to develop expertise or familiarity where appeals are scattered across too many different fora. The Tribunal sits in public and has its own infrastructure where hearings are held, and can provide a single portal for the reporting of appeal decisions. There exists an Upper Tribunal, established as a court of record which provides for the hearing of appeals from the First-tier Tribunal. The Upper Tribunal provides a specialist legal expertise in tribunal appeals, and this will be a significant advantage compared to most of the existing regulatory appeals bodies where legal appeals will generally be to the High Court. Appeals from the Upper Tribunal are to the Court of Appeal.
15. The Environment Tribunal should provide a natural home for many of these appeals in that it is now functioning, has a wide range of legal and other expertise available to it, and operates under an established set of procedural rules. From discussion with its judicial members, it is clear to me that the Tribunal is fully aware that, in addition to dealing with the appeal before it, its decisions can play a valuable role in providing wider guidance to regulators and the regulated community, and can be couched accordingly. This is likely to be particularly important where one is dealing with a wholly new area of law and policy such as environmental civil

13. SI 1976 (L.20)

14. Practice Direction 9 April 2010

15. The Environmental Civil Sanctions (England) Regulations (2010), The Environmental Civil Sanctions (Miscellaneous Amendments) (England) Regulations 2010, The Environmental Civil Sanctions (Wales) Order 2010, The Environmental Civil Sanctions (Miscellaneous Amendments) (Wales) Order 2010

16. Eco-design for Energy Using Products (amendment) (Civil Sanctions) Regulations 2010

17. The Single Use Carrier Bags Charge (Wales) 2010 No. 2880 (W. 238)

sanctions, and where a substantial number of appeals can be expected in the early years of operation as the new system is tested. Consolidating a large number of existing diverse regulatory appeal routes within a single clear structure is entirely consistent with the Government's regulatory reform agenda designed to simplify and modernize regulatory structures.

## Comparative costs of appeals bodies

16. Especially in the current economic climate, the comparative running costs of different appeals bodies may strongly influence the choice of body made by Government. Under various internal financial arrangements, the costs of the body are generally charged to the department responsible for the policy area in question. I have little doubt that given the flexibilities and opportunities for common administrative support, the Tribunal should be as cost-effective a forum as any other. At the end of the day, it is for Government to decide the significance of these costs but I would make two general points. First, it is important that the figures to be relied upon are calculated on the same basis, and I am not convinced that this is always the case at present. Costs of accommodation and the meeting rooms should be taken on board, and it needs to be recognized that the Environment Tribunal may often sit with a single judge or expert member if this is appropriate for the appeal in question, significantly reducing daily costs. If a new appeals body or appeals officer are proposed, costs of advertising and interviewing candidates must be taken on board. Similarly, one must factor in the time spent by such a person in developing their own rules of procedure. Secondly, in the longer term, it may prove a false savings in costs if one automatically chooses the option with the cheapest daily costs. As I have indicated, the Tribunal can play an important role in providing wider legal and policy guidance in its decision-making in a way that is less easy for some of the other appeals bodies, and this can help decrease the subsequent number of appeals, leading to an overall reduction in costs and delays.

## Secretary of State appeals

17. The legislative structure underlying existing environmental appeals to the Secretary of State varies, and this will be an important factor in deciding how easy it is to transfer such appeals to the Environment Tribunal. In some cases, an appeals body such as PINS may be making recommendations to the Secretary of State who makes the final appeal decision. I do not believe it would be acceptable for the Tribunal to be making recommendations to the Secretary of State in this way. There are examples where the primary legislation identifies the Secretary of State as determining the appeal, and amendments to the legislation would be needed if the Tribunal were to assume this role. In other cases, the primary legislation leaves the position flexible, in which case the choice of appeals body can be defined in regulations.<sup>18</sup> Sometimes, the primary legislation may give the Secretary of State the formal power to delegate his appeals functions to another body under regulations,<sup>19</sup> or to refer the appeal to another body. If that is the case, then it seems acceptable for him to formally delegate powers or refer the appeal to the Environment Tribunal without the need for new primary legislation.
18. There may be a reluctance on the part of the Secretary of State to formally delegate individual regulatory appeals to an independent body over which he has no control. I can understand that in the case of, say, a major infrastructure decision concerning a new nuclear power station, it may be appropriate that the Secretary of State takes the decision. But for the types of environmental appeals considered here, I think it preferable that individual appeals decisions are handled by an independent body, operating against the background of a regulatory and policy framework determined by Government. If Government is uncomfortable with the policy implications of an individual appeal decision, then it has the option of changing the policy. If the appeal body interprets the relevant legislation in a way that is contrary to Government expectation, then equally it can change the legislation.

18. For example, in relation of trading schemes under Part 3 Climate Change Act 2008 Sched 2 para 31(3) of the Act provides that regulations must "specify the court, tribunal or person who is to hear and determine appeals in relation to a trading scheme"

19. See, for example Sched 6 Town and Country Planning Act 1990 and The Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations 1997

19. In some cases, notably where the Secretary of State is the primary decision-maker, there is no right of appeal other than by way of Judicial Review. There may be doubts as to whether the complete absence of an administrative appeal is consistent with the Art 6.1 of the European Convention on Human Rights,<sup>20</sup> but in any event I think that as a matter of principle and good practice a merits appeal to an independent tribunal should generally be made available. An absence of appeal is likely to increase pressure on Judicial Reviews to handle what are in effect merits appeals – see further on this point in para 26 below. Furthermore, the current position does not appear to be consistent with different mechanisms being employed. Some regulations (e.g. leaded petrol permits) formally allow for an “appeal” from the decision of the Secretary of State to be made also to the Secretary of State, and it is dubious whether this is truly an appeal right rather than a right of review. Others, especially those relating to offshore activities, allow for an appeal to the High Court with no restriction on the grounds that may be raised. The 2009 Environmental Damage Regulations provide that where the Secretary of State is the enforcing authority, any appeal to him against his enforcement action must be referred for decision to someone appointed by him. The 2005 Greenhouse Gas Emissions Trading regulations contain a rather odd reciprocal arrangement under which the Secretary of State is the appeal body against decisions of the Environment Agency, including the imposition of civil penalties, but where the Secretary of State is the primary enforcement body (in relation to offshore installations), the Environment Agency acts as the appeal body against the Secretary of State’s decisions. Frankly, I can find little in the way of an underlying rationale for the distinctions being made, both as to whether there should be some sort of regulatory appeal or, if so, what form it should take, other than historical accident or uncoordinated individual choices being made by departmental lawyers in drafting regulations.
20. The list in Appendix 1, where there are no regulatory appeals, indicates that this is not simply confined to cases where the primary decision-maker is the Secretary of State. As a matter of principle, I think there should generally be a right of appeal in such cases, and would recommend that the current list be reviewed and the absence of appeal justified if appropriate.

### Appeals held by PINS (Planning Inspectorate)

20. PINS already handles a very large of appeals under the Town and Country Planning legislation, and in many ways operates as a form of tribunal with the hallmarks of independence and expertise. In the longer term it might be sensible to formally incorporate PINS within the new Tribunal system, but that is beyond the scope of this report. PINS also handles a number of more specialized environmental appeals including water abstraction and discharge appeals, and Appendix 4 provides figures on the current numbers.
21. There is always going to be a fine judgment as to what sort of appeals are truly environmental or not. My view is that appeals with clear land-use implications such as hedgerow and listed buildings appeals should continue to be handled by PINS, while it would make far less sense for environmental appeals with little connection with land-use planning – such as electrical waste or emissions trading – to be assigned to PINS. Appeals under Environmental Permitting Regulations are somewhat of a borderline case, and I recognize that PINS has already developed considerable expertise in some of these areas which should not be jeopardized by any change. But my recommendation is that in future, appeals under Environmental Permitting Regulations should be handled by the Environment Tribunal. The issues involved often raise a combination of complex technical and legal issues (often involving underlying EU legislation) for which the Tribunal should be especially well placed. In the
20. “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. See further *R v Secretary of State for the Environment, Transport and Regions ex parte Holdings & Barnes plc* (Alconbury) [2001] UKHL 23, *Tower Hamlets LBC v Begum* [2003] UKHL 5; *Tsfayo v United Kingdom* [2007] European Court of Human Rights BLGR 1

case-law on Article 6 of the European Convention on Human Rights, the Courts have highlighted instances of the ‘classic exercise of administrative discretion’ (Begum 2003 cited in footnote 20) or ‘the exercise of administrative discretion pursuant to wider policy aims’ (Tsyfayo 2008 cited in footnote 20) to be distinguished from more technocratic and factually based decision-making. This distinction may be useful here in deciding where to draw the boundaries. Land-use planning decisions frequently involve an exercise of discretionary judgment against a policy background. Environmental Permitting decisions may also often involve professional judgment but of a more technical and scientific nature. Individual planning inspectors who have developed experience and expertise in environmental appeals should be considered for appointment as tribunal members.

22. I do not think this goes against the recommendations of the *Penfold Review*<sup>21</sup> and the Government’s response to the Review<sup>22</sup> and indeed in many ways the proposals here are consistent with the thrust of that Review. *Penfold* called for changes that would speed up processes, reduce duplication of non-planning consents, and improve the interaction of planning and non-planning consents. But it did not recommend any further unification of planning and other consent regimes as a viable option for the time being. As to appeals, the Review noted the benefits of greater standardization of appeals and inquiries, especially those handled by PINS, but again did not call for a single unified system. It also noted the benefits of “*attempting to resolve objections or disputes without the need for an inquiry, such as by written procedure; ensuring that inquiries are focused on the key elements in dispute as opposed to the scheme as a whole; and timetabling when key actions and decisions are taken.*”<sup>23</sup> The proposals here are clearly designed to seek far greater standardization and simplification in the environmental appeals structure and it is equally clear to me that the Environment Tribunal is fully alive to the benefits of

different ways of handling appeals (such as by written representation, alternative dispute resolution) in appropriate cases, and will do so in practice. There may be rare cases where it would be sensible to hear a planning appeal and an environmental regulatory appeal simultaneously, and, given the flexibilities in administrative arrangements now available to the Tribunal Service, I see no reason why it should not be possible to organize a joint appeal held by both PINS and the Environment Tribunal in such cases.

## Statutory Nuisances

23. Appeals concerning statutory nuisances are heard by the Magistrates Courts, and can vary enormously in scope and length, from a neighbourhood noise dispute to an appeal involving a business and highly complex legal and technical issues, with immense financial implications and sometimes lasting days. Appeals involving businesses often will involve examination of the difficult concept of ‘best practicable means.’ In practice, more complex technical appeals may well be transferred from lay magistrates to a District Judge, but the evidence of the United Kingdom Environmental Law Association, reproduced in Appendix 5, raises real concerns as to the suitability of Magistrates Courts for handling these sorts of complex statutory nuisance appeals.
24. There may be a case for transferring all statutory nuisance appeals to the Environment Tribunal which can sit locally, as and when needed, but it appears to be those appeals raising very complex technical issues that present the greater challenges at present. It is difficult to define in advance classes of statutory nuisance appeals that should be heard by the Magistrates Courts or Environment Tribunal. My recommendation therefore would be that statutory nuisance appeals continue to be heard by Magistrates Courts but that in any particular appeal the Magistrates Court (or District Judge) should have the power to transfer the appeal to the Environment Tribunal, either on application or on the Court’s own initiative.

21. *Penfold Review of Non-Planning Consents Final Report* July 2010 URN 10/1027 [www.bis.gov.uk/penfold](http://www.bis.gov.uk/penfold)

22. *Government Response to the Penfold Review of Non-Planning Consents* November 2010 Department for Business Innovation and Skills

23. *Penfold Review*, para 3.25

## Third Party Appeals

- 25 The traditional UK approach in the design of regulatory appeals has been to confine the right of appeal to the person or body being regulated. Third parties such as neighbours or non-governmental organizations have no right of regulatory appeal but must challenge decisions of the regulators by way of Judicial Review, and subject to standing issues. Third party rights of appeal exist in some jurisdictions such as New Zealand, and the Royal Commission on Environmental Pollution in its 23rd Report *Environmental Planning*<sup>24</sup> recommended that third party rights of appeal be introduced in a limited number of planning and environmental decisions.
26. This is an issue that should be kept under review. At first sight, extending rights of appeal to third parties might appear to impose unacceptable new costs and delays. But equally introducing such a right may reduce the pressures on Judicial Review. In *Modernizing Environmental Justice* some 55 Judicial Review files involving environmental legislation<sup>25</sup> and heard between 2000-2002 were examined. Only four cases were successful, and the files suggested that around two-thirds of the cases were essentially merits-driven, where the party in reality was seeking a substantial rehearing of the case, though the case had to be couched in Judicial Review terms. Over half the Judicial Reviews were brought by industry rather than individuals or non-governmental organizations, and in two-thirds of the cases there had been no previous administrative appeal either because the applicant was a third party or because there was no right of regulatory appeal in the legislation in question. The evidence suggested a pent-up need for a right of regulatory appeal which was currently being met by having to use the Judicial Review procedure.
27. Judicial Review is inevitably a costly process, and can lead to substantial delays. Current proposals to change costs rules associated with Judicial

Review could well lead to an increased number of applications. Introducing new rights of regulatory appeal that could reduce the pressure on Judicial Review could clearly bring benefits to all parties concerned, and I believe that the Environment Tribunal could develop efficient and fair procedures for handling such appeals, and involving the minimum of delays.

## Presumptions and Priorities

27. It is clear that the present system of administrative appeals under environmental legislation has developed in a haphazard fashion with little in the way of underlying principle. The establishment of an Environment Tribunal in 2010 now offers the opportunity of greater consolidation of existing appeals procedures and would lead to improved consistency and effectiveness. I do not recommend an immediate transfer of all existing environmental appeals identified in this report, and in some cases changes to primary legislation would be required. It seems preferable to adopt an incremental approach, and I would suggest the following as a basis for priorities.
28. **New legislation relating to the environment.** I recommend that anyone seeking a licence or similar right should normally have the right of an unrestricted appeal to the Environment Tribunal. There should be the same expectation for anyone served with a notice or similar order imposing an obligation on them. This principle would apply whether the decision-making body was a local authority, a national regulator such as the Environment Agency, or the Secretary of State, and any departure from this presumption should be explicitly justified. Expressed more formally: **There should be a presumption that, where under new legislation relating to the environment a government department or other public body has power to make a decision determining a person's rights or imposing an obligation on a person, that person should have an unrestricted right of appeal to the First-tier Tribunal.**

24. Royal Commission on Environmental Pollution 23rd Report *Environmental Planning* Cm 5459 March 2002 HMSO, London, paras 5.40-5.47

25. Town and country planning Judicial Reviews (including those involving environmental assessment) were excluded

**29. Existing environmental legislation.**

I appreciate that some transfers may be easier to achieve than others, and that in some cases a change to primary legislation would be required. These factors are likely to influence the choice of initial candidates, but all things being equal, I would recommend the following order of priorities for transfer to the Environment Tribunal:

- (a) Appeals against the imposition of civil financial penalties which do not currently go to the Environment Tribunal. (see Appendix 3 for details)
- (b) Appeals against the imposition of other administrative orders requiring action (e.g. clean up) or suspending or imposing restrictions on activity.

In both these cases, a regulatory body has been given the power to impose immediate sanctions on an individual or business, and it is appropriate that these powers are kept under review in the form of an appeals procedure to an independent tribunal. Civil financial sanctions, in particular, are increasingly being used in many areas of environmental regulation, and there are likely to be many common issues of principle emerging which would be better handled by a single Tribunal rather than scattered through different forms of appeal body.

- (c) In the case of statutory nuisance appeals, however, appeals should remain with the Magistrates Court, but a court should have the power to refer any appeal to the Environment Tribunal on grounds of technical/legal complexity, on application or on its own initiative.
- (d) Appeals against other administrative decisions (such as refusal of a licence) under legislation relating to the environment but with little or no land-use planning connection (e.g. packaging waste).
- (e) Where existing legislation contains no right of regulatory appeal, such a right should generally be created and appeals should go to the Environment Tribunal. The examples under existing environmental legislation (see Appendix 1) should be systematically reviewed, and a case for continuing to provide no regulatory appeal in any particular instance justified.

- (f) Appeals against administrative decisions in environmental legislation whether or not there are land-use connections where the legal and technical complexity involved in the field of law concerned would be appropriately handled by the Environment Tribunal.

Expertise already built up by individuals handling appeals in environmental legislation should not be jeopardized by any transfer to the Environment Tribunal, and their appointment as members of the Tribunal should be considered.

**Number of Appeals**

- 30. It will always be difficult to make a precise prediction of the number of regulatory appeals that are likely to be made under the environmental legislation identified in this report. Appendix 4 contains figures of the numbers of appeals handled by PINS under current environmental legislation - less than 50 a year. Three appeals have been reported to date under the Greenhouse Gas Emissions Trading Scheme Regulations 2005, and three appeals under the Waste Electrical and Electronic Equipment (WEEE) Regulations 2006. I have no doubt that we have identified appeals provisions in environmental legislation where in practice there has never been an actual appeal to date. Even if this is the case, it still remains sensible to make a jurisdictional transfer to the Tribunal in order to have a sound structure in place were an appeal to arise at any time in future.
- 31. *Modernizing Environmental Justice* was proposing a wholly new institution and it was therefore necessary to identify a minimum number of likely appeals to justify the establishment costs. Since the Environment Tribunal now exists this is no longer such a critical factor, and indeed I do not see that the transfer of extra jurisdiction in any case should now be dependent on a minimum numbers prediction. What the figures do indicate is that if there were the extension of regulatory appeals jurisdiction to the Tribunal as advocated in this Report the overall numbers are unlikely to swamp its existing resources.

# APPENDIX 1

## APPEALS BODY (ENGLAND ONLY)

### Information Rights Tribunal

The INSPIRE Regulations 2009/3157 and The Environmental Information Regulations 2004/339 (information and enforcement notices)

### NVZ Appeals Panel

The Nitrate Pollution Prevention Regulations 2008/2349 (England) (designation of zones)

### Secretary of State (Environment Food and Rural Affairs) <sup>26</sup>

Clean Air Act 1993 (smoke control areas etc.)

Environmental Protection Act 1990 Part IIA and the Contaminated Land (England) Regulations 2006/1380 (England) (remediation notice and exclusion of confidential information on registers)

The Environmental Protection Act 1990 Part IIA, the Radioactive Contaminated Land (Enabling Powers) (England) Regulations 2005/3467 and the Radioactive Contaminated Land (Modification of Enactments) Regulations 2006/1379 (England) (identification of land, remediation notice, and exclusion of confidential information)

Genetically Modified Organisms (Contained Use) Regulations 2000/2831 (authorizations and exemption certificates)

Wildlife and Countryside Act 1981 and Countryside Rights of Way Act 2000 (consents and management notices relating to SSSIs)

The Conservation of Habitats and Species Regulations 2010/490 (consents – referrals)

Control of Pollution (Amendment) Act 1989 (registration of carriers)

Environmental Protection Act 1990 (c. 43) Part II (authorizations, enforcement and prohibition notices)

Control of Major Accident Hazard Regulations 1999/743 (information to the public)

The Persistent Organic Pollutants Regulations 2007/3106 (derogations)

The REACH Enforcement Regulations 2008/2852 (enforcement notices etc by EA)

The Environmental Permitting (England and Wales) Regulations 2010/675 (recovered appeals)

Anti-Pollution Works Regulations 1999/1006 (service of notice by EA)

Control of Pollution (Oil Storage) (England) Regulations 2001/2954 (service of notice by EA)

The Water Resources (Control of Pollution) (Silage, Slurry and Agricultural Fuel Oil) (England) Regulations 2010/639 (service of notices etc by Environment Agency)

The Producer Responsibility Obligations (Packaging Waste) Regulations 2007/871 (registration/accreditation decisions by Environment Agency)

Planning (Hazardous Substances) Act 1990 and regs (consents by local authority – recovered appeals)

### Planning Inspectorate

The Environmental Damage (Prevention and Remediation) Regulations 2009/153 (liability to remediate and remediation notice)

The Environmental Permitting (England and Wales) Regulations 2010/675 (licences/consents – delegated appeals)

Planning (Hazardous Substances) Act 1990 and regs (consents by local authority – delegated appeals)

Marine and Coastal Access Act 2009 (marine licence – proposed)

### Secretary of State (Transport)

Motor Fuel (Composition and Content) Regulations 1999/3107 Leaded petrol permits (appeals against own decisions by Secretary of State)

### Secretary of State (Energy and Climate Change)

The Greenhouse Gas Emissions Trading Scheme Regulations 2005/925 (permits, notices, certifications, civil penalties)

The Greenhouse Gas Emissions Data and National Implementation Measures Regulations 2009/3130 (information and civil penalty notices)

The CRC Energy Efficiency Scheme Order 2010/768 (enforcement notices and civil penalties)

The Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010/1996 (benchmarking plan approval, information notices, civil penalties)

The Transfrontier Shipment of Radioactive Waste and Spent Fuel Regulations 2008/3087 (consents by Environment Agency)

### Secretary of State (Business Innovation and Skills)

The Export of Radioactive Sources (Control) Order 2006/1846 (appeals against own decisions by Secretary of State)

26. Legislation simply specifies the “Secretary of State”. The assignment of policy and decision-making responsibilities to specific Secretaries of State will change from time to time, though we believe the following is accurate at the time of writing.



The Waste Electrical and Electronic Equipment (WEEE) Regulations 2006/3289 (approval of compliance schemes etc by EA)

The Waste Batteries and Accumulators Regulations 2009/890 (decisions by EA on compliance schemes)

### High Court

Offshore Combustion Installations (Prevention and Control of Pollution) Regulations 2001/1091

The Renewable Transport Fuel Obligations Order 2007/3072 (civil penalties)

Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001/1754 (directions by Department of Energy and Climate Change to reduce or eliminate adverse effects)

The REACH Enforcement Regulations 2008/2852 (enforcement notices by Secretary of State)

Offshore Chemicals Regulations 2002/1355

### County Court

Environmental Protection Act 1990 Part IIA and the Contaminated Land (England) Regulations 2006/1380 (England) (charging notice)

The Environmental Protection Act 1990 Part IIA, the Radioactive Contaminated Land (Enabling Powers) (England) Regulations 2005/3467 and the Radioactive Contaminated Land (Modification of Enactments) Regulations 2006/1379 (charging notice)

### Magistrates Court

Clean Air Act 1993 (LAS requirements on fireplaces)

The Environmental Protection (Controls on Ozone-Depleting Substances) Regulations 2002/528 (enforcement/prohibition notices)

The Fluorinated Greenhouse Gases Regulations 2009/261 (enforcement/prohibition notices)

The Persistent Organic Pollutants Regulations 2007/3106 (enforcement notices)

The REACH Enforcement Regulations 2008/2852 (suspension notices by local authority)

Control of Pollution Act 1974 s 60/61 (construction site notices)

Environmental Protection Act 1990, Noise and Statutory Nuisance Act 1993 (statutory nuisance notices)

The Private Water Supplies Regulations 2009/3101 (England) (enforcement notice by local authority)

Environmental Protection Act 1990 Part IV (litter) (local authority litter notices and consent to distribute free material)

The Transfrontier Shipment of Waste Regulations 2007/1711 (service of enforcement notices by Environment Agency or Secretary of State)

### Person appointed by Secretary of State

Biocidal Products Regulations 2001/880 (product authorizations etc by Health and Safety Executive on behalf of Secretary of State)

### Person agreed by parties

The Ecodesign for Energy-Using Products Regulations 2010/2617 (non-conformity notice)

The Merchant Shipping (Prevention of Air Pollution from Ships) Regulations 2008/2924 (detention by Harbour Master)

The Merchant Shipping (Prevention of Pollution by Sewage and Garbage from Ships) Regulations 2008/3257 (ship detention notice)

### Director General of Water Services

Water Industry Act 1991 (undertaker consents for discharge of effluent into sewers)

### Environment Agency

The Greenhouse Gas Emissions Trading Scheme Regulations 2005/925 (permits, civil penalties for off-shore installations by Secretary of State primary decision-maker)

### Employment Tribunal

Control of Major Accident Hazard Regulations 1999/743 (enforcement and prohibition notices)

The REACH Enforcement Regulations 2008/2852 (enforcement notices etc by Health and Safety Executive)

### First-Level Tribunal (Environment)

Environmental Civil Sanctions (England) Order 2010, Environmental Sanctions (Misc. Amendments) (England) Regulations 2010, Environmental Civil Sanctions (Wales) Order 2010, Environmental Civil Sanctions (Miscellaneous Amendments) (Wales) Regulations 2010 (civil penalties for specific environmental offences)

The Ecodesign for Energy-Using Products Regulations 2010/2617 (civil penalties)

The Single Use Carrier Bags Charge (Wales) Regulations 2010/2880 (civil penalties)

Marine and Coastal Access Act 2009 (civil penalties when regulations made)

### No appeal

The Environmental Protection (Controls on Ozone-Depleting Substances) Regulations 2002/528 (decisions of Secretary of State and Port Health Authority)

Sustainable Energy Act 2003 (modifications of distribution licence by Secretary of State)

Energy Act 2004 (imposition of charges etc by Nuclear Decommission Authority, and numerous powers including nuclear transfer schemes, modification gas and electricity licences, construction of renewable energy installations in waters)

The Renewable Transport Fuel Obligations Order 2007/3072 (issue and revocation of RTF certificates by Renewable Fuels Agency – to be transferred to Department of Transport on abolition of RWA)

The Community Emissions Trading Scheme (Allocation of Allowances for Payment) Regulations 2008/1825 (but internal review by Treasury provided for)

The Renewable Obligation Order 2009/785 (issue and revocation of renewable obligations certificates by GEMA)

The Electricity and Gas (Community Energy Saving Programme) Order 2009/1905 (determination of reduction obligations etc by GEMA)

The Storage of Carbon Dioxide (Licensing etc.) Regulations 2010/2221 (grant, modification, revocation of storage permits, and approval of site-closure plans by Department of Energy and Climate Change)

Environmental Protection Act 1990 Part VI and Genetically Modified Organisms (Deliberate Release) Regulations 2002/2443 (issuing and revocation of release and marketing consents by Department of the Environment Food and Rural Affairs)

Wildlife and Countryside Act 1981 and Countryside Rights of Way Act 2000 (notification of Sites of Special Scientific Interest by Natural England but right of representation provided before Natural England)

The Conservation of Habitats and Species Regulations 2010/490 (making of Special Nature Conservation Order by Secretary of State but inquiry/hearing must be held if proposed order opposed)

Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001/1754 (consent for surveys by Department of Energy and Climate Change)

Control of Major Accident Hazard Regulations 1999/743 (approval of reports by Health and Safety Executive / Environment Agency)

The Large Combustion Plants (National Emission Reduction Plan) Regulations 2007/2325 (verification of annual emissions and determination of allowances on closure by Environment Agency)

The Merchant Shipping and Fishing Vessels (Port Waste Reception Facilities) Regulations 2003/1809 (direction to remedy waste facilities etc)

The Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007/1842 (designation of site and granting of consents)

Water Industry Act 1991 (review and issue of notice by EA concerning special effluent discharges into sewers)

Water Resources Act 1991 (making of drought order by S of S but inquiry must be held if objections)

The Private Water Supplies Regulations 2009/3101 (England) (refusal by local authority to authorize different standards)

The Water Supply (Water Quality) Regulations 2000/3184 (England) (refusal by Secretary of State to authorize temporary supply that is not wholesome)

The End-of-Life Vehicles (ELVs) (Producer Responsibility) Regulations 2005/263 (decisions by Secretary of State to ascribe responsibility, approve collection systems, and service of compliance notice)

The Batteries and Accumulators (Placing on the Market) Regulations 2008/2164 (service of compliance notice by BIS or NMO)

The Bluetongue Regulations 2008/962 (England) (designations, licences to move animals etc)

# APPENDIX 2

## REGULATORY APPEALS BY SUBJECT

INDEX	LEGISLATION	RELEVANT DECISION-MAKING	DECISION-MAKING BODY	APPEAL FORUM	GROUNDS OF APPEAL
<b>ACCESS TO ENVIRONMENTAL INFORMATION ACCESS TO ENVIRONMENTAL INFORMATION</b>					
1	<b>The INSPIRE Regulations 2009/3157</b> on public access to spatial information for the purposes of EU environmental policies (reg 11) and <b>The Environmental Information Regulations 2004/3391</b> (reg 18) on public access to environmental information held by public authorities, both applying provisions of the <b>Freedom of Information Act 2000</b>	Service of decision notices, information notices or enforcement notices	Information Commissioner, on a complaint from any person in respect of requests for information made to a public authority	Information Rights Tribunal	(1) Whether the notice is in accordance with the law (2) If the notice was an exercise of discretion by the Commissioner, whether he should have exercised his discretion differently
<b>AGRICULTURE</b>					
2	<b>The Bluetongue Regulations 2008/962</b> (England) and 2008/1090 (Wales)	Making authorisations or designations, service of notices and granting licences to move/vaccinate animals, for the control and eradication of bluetongue	Various: Chief Veterinary Officer, veterinary inspectors, inspectors and the SoS (DEFRA)/ Welsh Ministers	No appeal provided	
3	<b>The Nitrate Pollution Prevention Regulations 2008/2349</b> (England) and 2008/3143 (Wales) (both as amended), on the prevention of certain nitrogen contributions originating from agricultural and other sources and the environmental conditions of nitrate vulnerable zones	(1) Designation of nitrate vulnerable zone (regs 8 & 9)  (2) Refusal of derogation application (regs 13C to 13E)	(1) SoS (DEFRA)/Welsh Ministers  (2) SoS (DEFRA)/Welsh Ministers	(1) Independent panel appointed by SoS (DEFRA)/ person appointed by Welsh Ministers  (2) Independent panel appointed by SoS (DEFRA)/ person appointed by Welsh Ministers	(1) The holding does not drain into the polluted water or drains into water that the SoS (DEFRA) should not have identified as polluted  (2) Not specified
<b>AIR POLLUTION</b>					
4	<b>Clean Air Act 1993</b> giving power to local councils to control domestic/industrial smoke	(1) Approval of arrestment plant for new non-domestic furnaces and for burning solid fuel in other cases, chimney heights and chimneys of buildings (other than residences, shops or offices) outside Greater London  (2) Revocation and variation of Smoke Control Area orders (s 18)  (3) Local authority requirement to adapt fireplaces in private dwellings (s 24)  (4) Information notices regarding air pollution (s 36)  (5) Exemptions for investigations and research (s 45)	(1) LA  (2) LA  (3) LA  (4) LA  (5) LA	(1) SoS (DEFRA)  (2) SoS (DEFRA) delegated to PINS  (3) Presumed Magistrates Court (Part XII of the Public Health Act 1936)  (4) SoS (DEFRA)  (5) SoS (DEFRA)	(1) Not specified  (2) Not specified  (3) Not specified  (4) Information requested would prejudice a private interest, be contrary to the public interest or is not readily/ reasonably available  (5) Not specified
5	<b>Motor Fuel (Composition and Content) Regulations 1999/3107</b> covering leaded petrol permits generally	Applications for leaded petrol permits	SoS (DfT)	SoS (DfT)	Not specified

INDEX	LEGISLATION	RELEVANT DECISION-MAKING	DECISION-MAKING BODY	APPEAL FORUM	GROUND(S) OF APPEAL
<b>AIR POLLUTION (continued)</b>					
6	<b>Offshore Combustion Installations (Prevention and Control of Pollution) Regulations 2001/1091</b> covering permitting of combustion installations	Operating permits for combustion installations including their variation and the provision of information (reg 17)	SoS (DECC)	High Court	Not specified
7	<b>The Environmental Protection (Controls on Ozone-Depleting Substances) Regulations 2002/528</b> as amended by 2008/91 making provisions regarding substances that deplete the ozone layer. To be replaced by regulations implementing new EU Regulation 1005/2009	<p>(1) Requirement to dispose of controlled substance, new substance, product or equipment placed on the market in contravention of the regulations (regs 8-10)</p> <p>(2) Requirement to dispose of or render harmless a controlled substance, product or equipment that has been brought to a place of export (reg 11)</p> <p>(3) Authorisation (and the modification / revocation thereof) to fumigate for quarantine or preshipment (reg 12)</p> <p>(4) Service of an information notice (reg 14)</p> <p>(5) Service of an enforcement or prohibition notice (regs 15-6)</p>	<p>(1) SoS (DEFRA)</p> <p>(2) SoS (DEFRA)</p> <p>(3) LA or Port Health Authority</p> <p>(4) A person authorised by EA, Welsh Ministers, SoS (DEFRA), LA or Port Health Authority</p> <p>(5) A person authorised by EA, Welsh Ministers, SoS (DEFRA), LA or Port Health Authority</p>	<p>(1) No appeal provided</p> <p>(2) No appeal provided</p> <p>(3) No appeal provided</p> <p>(4) No appeal provided</p> <p>(5) Magistrates Court</p>	<p>(1) Extensive grounds are detailed in reg 7</p> <p>(2) Not specified</p> <p>(3) Not specified</p>
Note: the EA/SoS may also initiate civil proceedings					
<b>CONTAMINATED LAND AND ENVIRONMENTAL LIABILITY</b>					
<b>Contaminated Land</b>					
8	<b>Environmental Protection Act 1990</b> Part IIA (as amended) and the <b>Contaminated Land (England) Regulations 2006/1380</b> (England) and <b>2006/2989</b> (Wales) (as amended) on the remediation of contaminated land	<p>(1) Service of remediation notices (s 78L)</p> <p>(2) Service of charging notices (s 78P)</p> <p>(3) The inclusion of confidential information relating to the affairs of any individual or business on registers (s 78T)</p>	<p>(1) EA or LA</p> <p>(2) EA or LA</p> <p>(3) EA or LA</p>	<p>(1) SoS (DEFRA) / National Assembly for Wales</p> <p>(2) County Court</p> <p>(3) SoS (DEFRA) / National Assembly for Wales</p>	<p>(1) Extensive grounds are detailed in reg 7</p> <p>(2) Not specified</p> <p>(3) Not specified</p>

INDEX	LEGISLATION	RELEVANT DECISION-MAKING	DECISION-MAKING BODY	APPEAL FORUM	FOUNDATIONS OF APPEAL
<b>CONTAMINATED LAND AND ENVIRONMENTAL LIABILITY (continued)</b>					
<b>Radioactive Contaminated Land</b>					
9	The Environmental Protection Act 1990 Part IIA, the Radioactive Contaminated Land (Enabling Powers) (England) Regulations 2005/3467 and the Radioactive Contaminated Land (Modification of Enactments) Regulations 2006/1379 (England) and 2006/2988 (Wales), extending Part IIA EPA 1990 to 'radioactive' contaminated land	(1) Decision to: (i) identify contaminated land and designate special sites (s 78B); and (ii) determine land as a special site and service notice thereof (s 78D)  (2) Service of remediation notices (s 78L)  (3) Service of charging notices (s 78P)  (4) The inclusion of confidential information relating to the affairs of any individual or business on registers (s 78T)	(1) LA  (2) EA (if a special site) or LA (if contaminated land)  (3) EA (if a special site) or LA (if contaminated land)  (4) EA (if a special site) or LA (if contaminated land)	(1) SoS (DEFRA)  (2) SoS (DEFRA)/National Assembly for Wales  (3) County Court  (4) SoS (DEFRA)	(1) If the EA 'disagrees' with the decision  (2) Extensive grounds are detailed in reg 7 (of Regulations 2006/1380 and 2006/2989 (on contaminated land, applicable to radioactive contaminated land))  (3) Not specified  (4) Not specified
<b>Environmental Damage</b>					
10	The Environmental Damage (Prevention and Remediation) Regulations 2009/153 (England) and 2009/995 (Wales) (as amended) on the prevention and remediation of damage to protected species, natural habitats, sites of special scientific interests, water and land	(1) Liability to remediate  (2) Remediation notices	(1) Enforcing Authority dependent on area of damage (England: EA, Natural England, LA, SoS) (Wales: EA, Countryside Council for Wales, LA, Welsh Ministers)  (2) As above	(1) Where SoS is not the enforcing authority, to SoS who must refer appeal to a person appointed by SoS for decision or recommendation to SoS; where SoS is enforcing authority to person appointed by SoS for decision by that person (sch 5 parts 1 and 2)  (2) Written/formal hearing as directed by SoS/Welsh Ministers	(1) Detailed grounds of appeal set out in reg 19  (2) Contents unreasonable
<b>ENERGY AND CLIMATE CHANGE</b>					
11	Sustainable Energy Act 2003 and The Sustainable Energy (GHP Provisions) Order 2003/2987 modified by Climate Change and Sustainable Energy Act 2006 s. 5(2) and others providing for the development and promotion of a sustainable energy policy	Modification of the conditions of a distribution licence (reg 7 SI 2003/2987)	SoS (DECC)	No appeal provided	

INDEX	LEGISLATION	RELEVANT DECISION-MAKING	DECISION-MAKING BODY	APPEAL FORUM	FOUNDATIONS OF APPEAL
<b>ENERGY AND CLIMATE CHANGE (continued)</b>					
12	<b>Energy Act 2004</b> concerning, <i>inter alia</i> , the establishment of the Nuclear Decommissioning Authority (NDA) and the development, regulation and encouragement of renewable energy sources	<p>(1) Numerous powers, including the allocation of research grants and loans, the imposition of charges and declarations as to the management, operation or decommissioning of a nuclear site</p> <p>(2) Numerous powers, including grants to and borrowing by the NDA, making and consenting to nuclear transfer schemes, modification of gas and electricity licences and operation, construction and decommissioning of renewable energy installations in regulated waters</p>	<p>(1) NDA</p> <p>(2) SoS (with Treasury consent to agreements relating to nuclear transfer schemes)</p>	<p>No appeal provided</p> <p>No appeal provided</p>	
13	<b>The Greenhouse Gas Emissions Trading Scheme Regulations 2005/925</b> (as amended)	<p>(1) Refusal to grant a greenhouse gas emissions permit or vary such a permit and service of enforcement notices</p> <p>(2) Decisions, notices or certifications</p> <p>(3) Civil penalties for excess emissions (reg 39) and under reporting (reg 40)</p>	<p>(1) EA, or SoS for offshore installation</p> <p>(2) SoS (DECC) or National Assembly for Wales (as the appropriate authority)</p> <p>(3) EA, or SoS for offshore installation</p>	<p>(1) SoS, or EA offshore installation. Appeal body may appoint person to conduct appeal hearing and make report and recommendations (sch 2, para 4). Powers to delegate appeal functions to another body (reg 34)</p> <p>(2) SoS/National Assembly for Wales</p> <p>(3) SoS, or EA if offshore installation</p>	<p>(1) Not specified</p> <p>(2) Not specified</p>
14	<b>The Export of Radioactive Sources (Control) Order 2006/1846</b> (as amended) on licences for the export of controlled radioactive sources	<p>Decision not to grant, to suspend, revoke or amend a licence</p>	SoS (BIS)	SoS (BIS)	Not specified
15	<b>The Renewable Transport Fuel Obligations Order 2007/3072</b> imposing on transport fuel suppliers who supply relevant hydrocarbon oil in the UK an obligation to supply a certain amount of renewable transport fuel (and furnish a Renewables Transport Fuel (RTF) certificate)	<p>(1) Issue and revocation of RTF certificates</p> <p>(2) Imposition of civil penalties arising from a breach of the Order (art 23)</p>	<p>(1) Administrator (the Office of the Renewable Fuels Agency)</p> <p>(2) Administrator (the Office of the Renewable Fuels Agency)</p>	<p>(1) No appeal provided but Administrator must be prepared to 'reconsider' decision and revoke</p> <p>(2) High Court (s 131 Energy Act 2004)</p>	<p>(2) That he is not liable to pay the fine or that the amount of the penalty is too high</p>
16	<b>The Community Emissions Trading Scheme (Allocation of Allowances for Payment) Regulations 2008/1825</b> (as amended) on the conduct of allocations, the payment for and transfer of emissions allowances, consequences of late or non-payment etc	<p>Any decision of the Treasury or of a person conducting an auction or allocation for payment (otherwise than by auction) (reg 13)</p>	Treasury	<p>No appeal provided but 'review' by Treasury/independent appointee thereof (specifically not the individual responsible for the original decision)</p>	

INDEX	LEGISLATION	RELEVANT DECISION-MAKING	DECISION-MAKING BODY	APPEAL FORUM	FOUNDATIONS OF APPEAL
<b>ENERGY AND CLIMATE CHANGE (continued)</b>					
17	<b>Climate Change Act 2008</b> providing, <i>inter alia</i> , for a target for the reduction of targeted greenhouse gas emissions; to establish a Committee on Climate Change and to make other provisions concerning climate change	SoS (DECC) may make provision by regulations for a carbon unit scheme, including registration and maintenance of accounts and transfer of units. Such regulations should include appeal provisions relating to civil penalties (sch 3) rebates or payments under waste reduction schemes (sch 5) and fixed monetary penalties or discretionary requirements (sch 6)	Authority designated under regulations	Part 3 (emission trading schemes) sch 2 para 31(3) provides that regulations must 'specify the court, tribunal or person who is to hear and determine'	
18	<b>The Fluorinated Greenhouse Gases Regulations 2009/261</b> on the control of certain fluorinated greenhouse gases	Service of enforcement and prohibition notices for contravention of the regulations	A person authorised by: (i) EA, LA, Port Health Authority or SoS (DECC) in England; (ii) EA, the LA, the Port Health Authority or the Welsh Ministers in Wales; or (iii) SoS (DECC) for offshore installations	Magistrates Court	Not specified
19	<b>The Renewables Obligation Order 2009/785</b> requiring all licensed electricity suppliers in England and Wales to produce a certain number of renewables obligation certificates, administered and issued by GEMA	Issue and revocation of renewables obligation certificates	GEMA	No appeal provided	
20	<b>The Electricity and Gas (Community Energy Saving Programme) Order 2009/1905</b> placing an obligation on electricity and gas suppliers with more than 50,000 customers to achieve a carbon emissions reduction obligation	Determination of reduction obligations, approval of qualifying actions, transfers and trading	GEMA	No appeal provided	
21	<b>The Greenhouse Gas Emissions Data and National Implementation Measures Regulations 2009/3130</b> on the collection and production of emissions data	(1) Service of information notices (reg 7 and sch 1) (2) Service of civil penalty notices (reg 7 and sch 1)	(1) EA (2) EA	(1) SoS (DECC)/Welsh Ministers (2) SoS (DECC)/Welsh Ministers	(1) Not specified (2) Not specified
22	<b>The CRC Energy Efficiency Scheme Order 2010/768</b> establishing an emissions trading scheme in respect of greenhouse gases applying to direct and indirect emissions from supplies of electricity, gas and fuel by public bodies and undertakings	(1) Various determinations and service of enforcement notices for non-compliance	(1) EA	(1) SoS (DECC)/Welsh Ministers but independent person appointed by SoS/Welsh Ministers where appeal made by Government Department or Welsh Assembly Government (sch 10) (2) As above	(1) Not specified (2) Not specified
		(2) Civil penalties imposed pursuant to part 14	(2) EA		

INDEX	LEGISLATION	RELEVANT DECISION-MAKING	DECISION-MAKING BODY	APPEAL FORUM	FOUNDATIONS OF APPEAL
<b>ENERGY AND CLIMATE CHANGE (continued)</b>					
23	The Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010/1996	(1) Various administrative decisions including refusal of benchmarking plan and service of notice for information  (2) Imposition of civil penalties for non-compliance with obligations, including failure to surrender sufficient allowances and comply with an information notice	(1) EA  (2) EA	(1) SoS (DECC)/Welsh Ministers, who may delegate functions to appointed persons  (2) SoS (DECC)/Welsh Ministers, who may delegate functions to appointed persons	(1) Not specified  (2) Not specified
24	The Storage of Carbon Dioxide (Licensing etc.) Regulations 2010/2221 (and the Energy Act 2008) on the granting and contents of (offshore) CO <sub>2</sub> exploration and storage permits and site closure obligations	Grant, modification and revocation of storage permits and approval of site-closure plans	SoS (DECC)	No appeal provided	
25	The Ecodesign for Energy-Using Products Regulations 2010/2617	(1) The issue of a non-conformity notice given by a notified body (reg 11, sch 3)  (2) Issue of civil penalties in respect of non-compliance (sch 5)	(1) The body appointed by SoS (DEFRA) pursuant to reg 11  (2) NMO	(1) The person agreed between the parties or in the absence of agreement the person appointed by SoS (DEFRA)  (2) First-tier Tribunal (Environment)	(1) Not specified  (2) Wide grounds
<b>GMOS</b>					
26	Genetically Modified Organisms (Contained Use) Regulations 2000/2831 (as amended) protecting persons and the environment from risks arising from activities involving the contained use of genetically modified micro-organisms and genetically modified organisms	Certain requests or decisions, including refusals to authorise certain activities involving genetic modification and the grant or revocation of exemption certifications (reg 29)	Competent authority (HSE)	SoS (DEFRA)	Not specified
27	Environmental Protection Act 1990 Part VI and Genetically Modified Organisms (Deliberate Release) Regulations 2002/2443 covering the control of the deliberate release into the environment and the marketing of genetically modified organisms by means of the imposition of a requirement to obtain consent for those activities, prohibition notices and mandatory public consultation	Issuing and revocation of release and marketing consents	SoS (DEFRA)	No appeal provided	



INDEX	LEGISLATION	RELEVANT DECISION-MAKING	DECISION-MAKING BODY	APPEAL FORUM	FOUNDATIONS OF APPEAL
<b>HABITATS</b>					
28	Wildlife and Countryside Act 1981 as amended by the Countryside and Rights of Way Act 2000 on notification etc of SSSIs	(1) Notification of management schemes  (2) Refusal, conditions, modifications and withdrawal of consents concerning SSSIs  (3) Service of management notices (in relation to management schemes)	(1) Natural England  (2) Natural England  (3) Natural England	(1) No appeal provided, but right of representation before Natural England  (2) SoS (DEFRA)  (3) SoS (DEFRA)	(2) Not specified  (3) Including (but not limited to) that some other owner should take all/any of the specified measures
29	Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001/1754 (as amended) on the conservation of wild birds, relating to oil and gas activities carried out on the UK continental shelf	(1) Consent for geological surveys (reg 4)  (2) Directions imposed to reduce or eliminate adverse effects on relevant sites or deterioration or disturbance of certain natural habitats or species (regs 8 and 9)	(1) SoS (DECC)  (2) SoS (DECC)	(1) No appeal provided  (2) Review by the SoS (DECC) and then the High Court	(2) Not specified
30	The Conservation of Habitats and Species Regulations 2010/490 consolidating 1994/2716 and amendments	(1) Making a special nature conservation order for a European site and issuing stop notices relating to damaging operations  (2) Refusal of consent to carry out operations specified in a stop notice (reg 26)	(1) SoS/Welsh Ministers  (2) Natural England/Countryside Council for Wales	(1) No right of appeal but local inquiry or hearing must be held if special nature conservation order opposed  (2) No right of appeal as such but on request matter can be referred to SoS/Welsh Ministers who may direct decision-making body to give consent	(2) SoS/Welsh Ministers must be satisfied consent needed for imperative reasons of overriding public interest
<b>INDUSTRY REGULATION (SEE ALSO WASTE)</b>					
31	Control of Pollution (Amendment) Act 1989 covering the transport of controlled waste	Registration of carriers and related matters (s 4)	EA	SoS (DEFRA) (by appointee – delegated to PINS)	Not specified
32	Planning (Hazardous Substances) Act 1990 (as amended)	Consents	LA	SoS (DEFRA) (delegated to PINS)	Not specified
33	Control of Major Accident Hazard Regulations 1999/743, covering the control of major accident hazards involving dangerous substances	(1) The approval of operator safety reports (reg 7)  (2) The provision of information to the public by the authority (reg 21)  (3) Enforcement provisions including the service of prohibition notices	(1) The HSE and EA acting jointly  (2) The HSE and EA acting jointly  (3) The HSE and EA acting jointly	(1) No appeal provided  (2) SoS (sch 8)  (3) Employment Tribunal	(2) Not specified  (3) Not specified

INDEX	LEGISLATION	RELEVANT DECISION-MAKING	DECISION-MAKING BODY	APPEAL FORUM	FOUNDATIONS OF APPEAL
<b>INDUSTRY REGULATION (SEE ALSO WASTE) (continued)</b>					
34	<b>Biocidal Products Regulations 2001/880</b> (as amended) enabling applications to be made for agreement that an active substance can be used in a biocidal product	Renewal, revocation or conditions of product authorisations and registrations or exemption certificates	HSE on behalf of SoS	Person appointed by SoS	Not specified
35	<b>The Large Combustion Plants (National Emission Reduction Plan) Regulations 2007/2325</b> combustion plants and a national emissions reduction plan	Verification of annual emissions and determination of allowances on closure	EA	No appeal provided	
36	<b>The Persistent Organic Pollutants Regulations 2007/3106</b> (as amended) on the production, marketing, stockpiling and waste management of persistent organic pollutants	(1) Permits for the release of certain relevant materials, see Environmental Permitting Regulations 2010 (reg 4), below (2) The refusal to derogate from normal waste persistent organic pollutants management options (reg 8) (3) Service of notice for contravention of prohibitions concerning producing, marketing, stockpiling and waste management of persistent organic pollutants (reg 10)	(1) See Environmental Permitting, below (2) EA (3) EA	(1) See Environmental Permitting, below (2) SoS (DEFRA) but with right to make representations to person appointed by SoS (3) Magistrates Court	(1) See Environmental Permitting, below (2) Not specified (3) Not specified
37	<b>The REACH Enforcement Regulations 2008/2852</b> providing for the enforcement of Regulation EC No 1907/2006 concerning the registration, evaluation, authorisation and restriction of chemicals	(1) Service of information, enforcement and prohibition notices (2) Service of prohibition, enforcement or improvement notices (3) Service of suspension notices (4) Service of enforcement notices (part 4 sch 6)	(1) EA (2) HSE (3) LA (4) SoS (DEFRA)	(1) SoS (DEFRA)/Welsh ministers (2) Employment Tribunal (part 2, sch 8) (3) Magistrates Court (4) High Court	(1) Not specified (2) Not specified (3) Not specified (4) Not specified
38	<b>The Environmental Permitting (England and Wales) Regulations 2010/675</b> creating a common procedure for the permitting aspects of numerous EU Directives including, <i>inter alia</i> , IPPC and waste installations or operations, water discharge consents, groundwater permitting and radioactive substances	(1) Grant of a permit, condition, variation, revocations (2) Decision not to authorise the closure procedure relating to a permit (reg 3 1) (3) Confidentiality (reg 53)	(1) EA/LA (2) EA/LA (3) EA/LA	(1) SoS (DEFRA)/Welsh Ministers (2) SoS (DEFRA)/Welsh Ministers (3) SoS (DEFRA)/Welsh Ministers	(1) Not specified (2) Not specified (3) Not specified
39	<b>Environmental Civil Sanctions Order 2010/1157</b> (England) and 2010/1821 (Wales) and <b>Environmental Sanctions (Misc. Amendments) Regulations 2010/1159</b> (England) and 2010/1820 (Wales)	Imposition of civil sanctions for specified environmental offences	EA and Natural England	First-tier Tribunal (Environment)	Wide grounds

INDEX	LEGISLATION	RELEVANT DECISION-MAKING	DECISION-MAKING BODY	APPEAL FORUM	GROUNDINGS OF APPEAL
<b>MARINE</b>					
40	<b>Offshore Chemicals Regulations 2002/1355</b> providing a regime for the purpose of implementing OSPAR on a Harmonised Mandatory Control System for the Use and Reduction of the Discharge of Offshore Chemicals in relation to offshore activities	The granting, review and revocation of permits and related notices	SoS (DECC)	High Court	Not specified
41	<b>The Merchant Shipping and Fishing Vessels (Port Waste Reception Facilities) Regulations 2003/1809</b>	A direction to a harbour authority or terminal operator to remedy inadequate waste reception facilities (reg 5) or take necessary steps to implement a waste management plan (reg 10); and decisions to approve a waste management plan (reg 6) or exempt any harbour authority or terminal operator from the requirement to provide adequate waste reception facilities (reg 15)	SoS (DfT) (Maritime and Coastguard Agency)	No appeal provided	
42	<b>The Offshore Marine Conservation (Natural Habitats, &amp;c.) Regulations 2007/1842</b> making provisions for the conservation of wild birds and the conservation of natural habitats and of wild fauna and flora in relation to marine areas where the UK has jurisdiction beyond its territorial sea	(1) Inclusion of a site as a site of Community importance or the classification of special protection area sites in the offshore marine area  (2) The grant of project consents (reg 25) or the review thereof (reg 27) and licences permitting the otherwise prohibited use of wild birds or keeping of certain specimens (reg 49)	(1) SoS (DEFRA)  (2) SoS (DEFRA)/Welsh Ministers, amongst others	(1) No appeal provided but SoS (DEFRA) may give opportunity of appearing before an appointee prior to final designation  (2) No appeal provided	
43	<b>The Merchant Shipping (Prevention of Air Pollution from Ships) Regulations 2008/2924</b> (as amended) concerning the content of marine fuels	Power of detention for non-compliance	Harbour master	Arbitrator agreed by parties	Not specified
44	<b>Marine and Coastal Access Act 2009</b> making provisions, <i>inter alia</i> , in relation to marine functions and activities	(1) Decision to vary or revoke a marine licence under s 71  (2) Power to impose a fixed or variable monetary penalty (if granted by order) (s 93/95)  (3) Service of compliance/enforcement notice in respect of non-compliance (s 90/91) or stop and emergency safety notices (s 102/4)  (4) Imposition of a fixed monetary penalty (s 142) for an offence under s 139 (offence of contravening bylaws or orders)	(1) SoS/Welsh Ministers  (2) SoS as enforcement authority  (3) SoS/Welsh Ministers  (4) Enforcement authority as defined s 147	(1) Regulations must provide for right to make appeal (s 73) (Note: PINS proposed in DEFRA consultation document July 2010)  (2) If regulations made, appeal must be to the First-tier Tribunal or any other tribunal created under enactment (sch 7)  (3) Regulations must provide for right of appeal (s 108)  (4) If order made, appeal to the First-tier Tribunal or any other tribunal created under enactment	(2) Appeal provisions must include the following grounds of appeal: that the decision was based on error of fact, the decision was wrong in law and that the decision was unreasonable (s 94(7), s 96(7))

INDEX	LEGISLATION	RELEVANT DECISION-MAKING	DECISION-MAKING BODY	APPEAL FORUM	GROUNDS OF APPEAL
<b>STATUTORY NUISANCE</b>					
45	<b>Control of Pollution Act 1974</b> specifying acceptable methods for the construction of sites and the confirmation of noise abatement zones	(1) Service of notices specifying how work should be carried out (s 60) (2) Conditions imposed in a prior consent (s 61)	(1) LA  (2) LA	(1) Magistrates Court  (2) Magistrates Court	(1) Not specified  (2) That any condition is not justified or is unreasonable or that there has been some informality in connection with the consent
46	<b>Environmental Protection Act 1990</b> Part III, Noise and Statutory Nuisance Act 1993 and <b>Statutory Nuisance (Appeals) Regulations 1995/2644</b> relating to statutory nuisances	Service of abatement notices (ss 80 and 80A)	EA or LA	Magistrates Court	Not specified
<b>WATER</b>					
47	<b>Water Industry Act 1991</b> covering the regulation of undertakers, water supply and sewerage services (also amended by Water Act 2003)	(1) consent or variation of consent for the discharge of trade effluent or special category effluent  (2) Review by EA of consents/agreements relating to special category effluent and issue of notice following review	(1) Sewerage undertaker  (2) EA	(1) OFWAT  (2) No appeal provided but EA must give opportunity for representations before making decision (s 132)	(1) Not specified  (2) Not specified
48	<b>Water Resources Act 1991</b> regulating water abstraction, pollution and powers of EA. See now Environmental Permitting Regs 2010	(1) Licensing decisions for abstraction or impounding works and the service enforcement notices, applications for drought permits by water undertakers (s 79A and sch 8), consents required for Water Protection Zones and Nitrate Sensitive Areas (s 96), consents for discharges into waters and byelaws for regulating the use of inland waters (schs 25 and 26)  (2) The making of ordinary and emergency drought orders (ss 73 – 75 and sch 8)	(1) EA  (2) SoS (DEFRA) on application of the EA	(1) SoS (DEFRA) (by appointee – delegated to PINS)  (2) SoS (DEFRA) (by appointee delegated to PINS)	(1) Not specified  (2) Not specified
49	<b>Anti-Pollution Works Regulations 1999/1006</b> prescribing the contents of anti-pollution works notices served under s 161A of the <b>Water Resources Act 1991</b>	Service of anti-pollution works notices (reg 3)	EA	SoS (DEFRA)	Not specified
50	<b>The Water Supply (Water Quality) Regulations 2000/3184</b> (England) and <b>2010/991</b> (Wales)	Authorisation of temporary water supply that is not wholesome (reg 20)	SoS/Welsh Ministers	No appeal provided	

INDEX	LEGISLATION	RELEVANT DECISION-MAKING	DECISION-MAKING BODY	APPEAL FORUM	GROUNDS OF APPEAL
<b>WATER (continued)</b>					
51	<b>Control of Pollution (Oil Storage) (England) Regulations 2001/2954</b> requiring persons having custody or control of oil to carry out certain works to prevent pollution of any waters which are controlled waters for the purposes of part III of the Water Resources Act 1991	Service of notice to minimise pollution in transitional cases (reg 8)	EA	SoS (DEFRA)	Not specified
52	<b>The Private Water Supplies Regulations 2009/3101</b> (England) and 2010/66 (Wales) on the quality of private water supplies intended for human consumption	(1) Authorisation of different standards pursuant to reg 17 and the revocation or amendment thereof  (2) Duty to serve a notice if a private supply of water intended for human consumption constitutes a potential danger to human health (reg 18)	(1) LA  (2) LA	(1) No appeal provided  (2) Magistrates Court (reg 19)	(2) Not specified
53	<b>The Water Resources (Control of Pollution) (Sludge, Slurry and Agricultural Fuel Oil) (England) Regulations 2010/639</b> (England) and 2010/1493 (Wales) on storage and permitting of sludge, slurry, and agricultural fuel oils	Service of notice and related aspects (reg 8)	EA	SoS (DEFRA)/Welsh Ministers	Not specified
54	<b>Flood and Water Management Act 2010</b> making provisions concerning water including the management of risk in connection with flooding and coastal erosion including provisions on the structure between the EA, SoS and other agencies/local authorities	(1) Information request (and the service of enforcement notice and penalty for a failure to respond) in connection with a person's flood and coastal risk management functions  (2) The designation of a structure or feature of the environment (meaning that a person may not alter, remove or replace the designated structure of feature without the consent of the designating authority)  (3) Approval of a drainage system for construction work (sch 3, para 7)	(1) EA and/or the lead local flood authorities/Welsh Ministers  (2) EA, lead local flood authority, district council and/or internal drainage board (the Designating Authority)	(1) SoS/Welsh Ministers must by regulations provide a right of appeal against penalties  (2) SoS (DEFRA)/Welsh Ministers must by regulations provide a right of appeal concerning designations, consents, enforcement, notices to Ministers, Court or Tribunals (sch 1)  (3) SoS (DEFRA)/Welsh Ministers may by order provide a right of appeal (para 15, sch 1 and para 25, sch 3)	(1) Not specified  (2) Not specified

INDEX	LEGISLATION	RELEVANT DECISION-MAKING	DECISION-MAKING BODY	APPEAL FORUM	GROUNDINGS OF APPEAL
<b>WASTE</b>					
55	<b>Environmental Protection Act 1990</b> Part IV (as amended by the Clean Neighbourhoods and Environment Act 2005), on litter notices and the administration of consents concerning the distribution of free literature in designated restricted areas	(1) Service of litter abatement and litter clearance notice (s 92, s 92A) or street clearance notice (s 93)  (2) Consent to distribute free material in designated area (including conditions or limitations thereon)	(1) Principal litter authority (or authorised officer thereof)  (2) Principal litter authority (or authorised officer thereof)	(1) Magistrates Court  (2) Magistrates Court	(1) No grounds specified for abatement notices or street clearance notice but broad grounds for clearance notices  (2) Not specified
56	<b>The End-of-Life Vehicles (ELVs) (Producer Responsibility) Regulations 2005/263</b> on producer recycling and recovery obligations, including registration	(1) Registration of responsibility, decision to ascribe responsibility to producers and to approve ELV collection systems  (2) Service of compliance notice	(1) SoS (BIS)  (2) SoS (BIS)	(1) No appeal provided  (2) No appeal provided	
57	<b>The Waste Electrical and Electronic Equipment (WEEE) Regulations 2006/3289</b> (as amended) on producer responsibility for WEEE, the approval of compliance schemes and authorisation of treatment facilities	Various decisions under system including approval of compliance scheme	EA	SoS (BIS) but may appoint or refer appeal to any person	Not specified
58	<b>The Producer Responsibility Obligations (Packaging Waste) Regulations 2007/871</b> on measures relating to the prevention, reduction and elimination of pollution caused by the management of packaging and packaging waste	Refusal to grant an application for registration or cancellation of registration or accreditation	EA	SoS (DEFRA)/National Assembly for Wales	Not specified
59	<b>The Transfrontier Shipment of Waste Regulations 2007/1711</b> on requirements for transfrontier shipments of waste	Service of enforcement and prohibition notices (sch 5)	A person authorised by the EA (destination and dispatch) or SoS (transit)	Magistrates Court	Not specified
60	<b>The Batteries and Accumulators (Placing on the Market) Regulations 2008/2164</b> on batteries and accumulators and waste batteries and accumulators	Service of compliance and enforcement notices	SoS (BIS) and NMO	No appeal provided but suspends any proceedings for an offence	
61	<b>The Transfrontier Shipment of Radioactive Waste and Spent Fuel Regulations 2008/3087</b> on the transit of radioactive waste or spent fuel	Authorisation or consent for shipment of radioactive waste being refused or granted subject to conditions (reg 13)	EA	SoS (DECC)/Welsh Ministers	Not specified
62	<b>The Merchant Shipping (Prevention of Pollution by Sewage and Garbage from Ships) Regulations 2008/3257</b> on various prohibitions concerning sewage/garbage from ships, together with powers of ship detention	Service of ship detention notice	Inspector	Single qualified arbitrator appointed by agreement of parties	Whether the ship was or was not liable to be detained

INDEX	LEGISLATION	RELEVANT DECISION-MAKING	DECISION-MAKING BODY	APPEAL FORUM	GROUNDINGS OF APPEAL
<b>WASTE (continued)</b>					
63	<b>The Waste Batteries and Accumulators Regulations 2009/890</b> (as amended) on producer responsibility compliance schemes for waste batteries and accumulators	Decisions as to the approval of compliance schemes	EA	SoS (BIS)/Welsh Ministers (or an appointee)	Not specified
64	<b>Single Use Carrier Bags Charge (Wales) Regulations 2010/2880</b> imposing charges on plastic bags in order to encourage greater use of reusable bags	(1) Imposition of civil sanctions for breach or non-compliance (2) Service of publicity notice	(1) LA (2) LA	(1) First-tier Tribunal (Environment) (2) No appeal provided	(1) Wide grounds
BIS	Department for Business, Innovation and Skills				
DECC	Department of Energy and Climate Change				
DEFRA	Department for Environment, Food and Rural Affairs				
DfT	Department for Transport				
EA	Environment Agency				
GEMA	Gas and Electricity Markets Authority				
HSE	Health and Safety Executive				
IPPC	Integrated Pollution Prevention and Control				
LA	Local Authority				
MCZ	Marine Coastal Zone				
NMO	National Measurement Office				
PINS	The Planning Inspectorate				
RTF	Renewables Transport Fuel				
SoS	Secretary of State				
SSSI	Site of Specific Scientific Interest				

# APPENDIX 3

## APPEAL BODIES IN ENVIRONMENTAL CIVIL PENALTY SCHEMES

In Para 29 of the report, I recommend that a high priority should be to ensure that all appeals against civil penalties imposed under legislation related to the environment should be heard by the First-tier Tribunal (Environment). The following is the current position.

### First-tier Tribunal (Environment)

Environmental Civil Sanctions (England) Order 2010, Environmental Sanctions (Misc. Amendments) (England) Regulations 2010, Environmental Civil Sanctions (Wales) Order 2010, Environmental Civil Sanctions (Miscellaneous Amendments) (Wales) Regulations 2010 (civil penalties for specific environmental offences)

The Ecodesign for Energy-Using Products Regulations 2010/2617 (civil penalties)

The Single Use Carrier Bags Charge (Wales) Regulations 2010/2880 (civil penalties)

Marine and Coastal Access Act 2009 (civil penalties when regulations made)

### S of S (Energy and Climate Change)

The Greenhouse Gas Emissions Trading Scheme Regulations 2005/925

The Greenhouse Gas Emissions Data and National Implementation Measures Regulations 2009/3130

The CRC Energy Efficiency Scheme Order 2010/768 (enforcement notices and civil penalties)

The Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010/1996

### Environment Agency

The Greenhouse Gas Emissions Trading Scheme Regulations 2005/925 (civil penalties served by Secretary of State in respect of off-shore installations)

### High Court

The Renewable Transport Fuel Obligations Order 2007/3072



## APPENDIX 4

## PLANNING INSPECTORATE ENVIRONMENT APPEALS 2006–2010

	2006-7	2007-8	2008-9	2009-10
Water discharge consents (including enforcement)	69	21	39	21
PPC Regs	65	37	18	1
Landfill Regulations 2002	9	7	2	
EP Regs 2007	-	=	42	14
Waste	22	14	4	5
Anti-pollution works	1	1	0	0
Water abstraction	0	0	0	0
Hazardous Substances	3	1	0	0
IPC/Part I EPA	1	0	0	0
Total received	173	88	106	41
Total withdrawn	339	195	267	332
Decisions/reports	29	39	7	20

Figures supplied by PINS to Macrory 2010

## APPENDIX 5

### UKELA ENVIRONMENTAL LITIGATION WORKING PARTY RESPONSE TO: 'EXTENDING THE JURISDICTION OF THE NEW ENVIRONMENTAL TRIBUNAL'

#### Background

Professor Macrory has been asked by Sir Robert Carnwath, Senior President of Tribunals, to prepare a report for him looking at the possibility of extending the jurisdiction of the new First-tier Tribunal (Environment) to determine other forms of statutory appeals under various environmental laws. UKELA welcomes the opportunity to assist Professor Macrory with his research.

#### *Response to questions posed by Professor Macrory*

#### 1. Does the current range of appeals bodies make any rational sense?

The present range is only explicable by its history. However, its effect is to cause significant difficulty for parties and a sense or feeling that the law and its procedures are ill-considered and unfair. There are many examples. The unfairness (whether real or perceived) may arise from one party being able to choose the particular tribunal in which the procedural rules or costs consequences are advantageous to them. One example is the choice as between use of an administrative notice such as an enforcement notice and issuing a complaint in the Magistrates' Court. The costs position is favourable to the complainant in the Magistrates' Court, but generally neutral on appeal to the Secretary of State. That said, the use of the First-tier Tribunal would not entirely address this issue because criminal and civil proceedings remain options for litigants, whether regulators or individuals.

Environmental issues often call for a wide range of legal skills in any one case. However, each tribunal may not have the full skill-set required, as the mind-set of each tribunal is necessarily different: one might have a policy focus, another be expert in public law principles while another has primary expertise in determining guilt or innocence. Some environmental cases merit a tribunal of the experience and background of deputy high court judge. It is impossible to obtain such a tribunal in the civil jurisdiction of the Magistrates' Court. Resident judges are not, in our experience, receptive to the suggestion that a specialist be imported to hear such cases in the Crown Court civil jurisdiction.

The present position of PINS requires careful consideration. PINS has much expertise which crosses technical and regulatory boundaries (eg. environmental regulation, water industry issues, planning, rights of way). Any new role for the First-tier Tribunal ought to respect and preserve the expertise in PINS. No doubt, PINS has been consulted in any event.

#### 2. Do members have any views on whether procedures are currently satisfactory or not?

If this is the big question 'Should there be an environmental tribunal or court', then UKELA is very clearly of the view that the answer to that has been 'yes' for the last decade or so and for the reasons articulated in several well-researched reports on the topic. If 'procedures' means rules of evidence, then there is no overriding difficulty with any particular set of procedural rules used at present to determine environmental cases. However, when there is a range of procedural rules in respect of broadly similar issues, then costs necessarily increase for all parties. A unified system avoids procedural proliferation. Moreover, each tribunal lacks a full appreciation of the means by which the other operates. There is often (an understandable) lack of knowledge of the substantive law. Hence each tribunal has to be educated by the parties, at their cost. By this we mean each individual tribunal member. It is fantastically inefficient. We have considerable experience of conducting appeals against abatement notices in Magistrates Courts. These can often involve huge implications for the business if the abatement notice is upheld. Our experience has highlighted the following issues on procedures in the Magistrates Court:

- Individual Magistrates Courts often have no previous experience of the appropriate procedures for these cases (as they are in fact civil proceedings, often relying heavily on expert evidence).
- The lack of previous experience means that there is a considerable discrepancy in approach depending on which panel of Magistrates is dealing with the case in hand – in our experience, although some clerks are very good, others are not.

- If a District Judge is asked to hear the final trial because of the nature of the appeals there is often difficulty with this request because of budgetary constraints at the Courts. However, because of the importance of the issues to the Appellant and the (often) lack of experience in the panel, business disputes of this kind are more properly heard by an experienced, legally trained arbiter.

We would suggest that the issue of costs where one party withdraws before a hearing needs to be addressed.

Our members have been involved in appeals against Environment Agency enforcement notices where the notices have been withdrawn very late in the appeal process prior to a hearing. The Appellant is left with a large irrecoverable legal bill and no way of challenging the initial legitimacy of the notice that has to be complied with while an appeal proceeds. It may be the case that the solution to this unfairness lies in changes to the underlying legislation; for example, to remove the right to withdraw an enforcement notice after an appeal has been lodged unless agreed by the parties.

### **3. Are there advantages in consolidating more of these appeals with the new First-tier Tribunal (e.g. clearer procedural rules, legally argued decisions, etc)?**

There must be advantages in consolidating more of these appeals with the First-tier Tribunal. In the sphere of immigration, the First-tier Tribunal and its appellate tribunals presently accommodate issues of fact and policy with the scope to deal with issues of law at a level equivalent to the High Court. We would expect an First-tier Tribunal, appropriately constituted, to be capable of providing the correct skill set both as to fact-finding and issues of law that arise in environmental cases. This would be an improvement on the current situation, described above, of different tribunals each having different mind-sets, and generally being ill-equipped to deal with complex, specialist legal issues. It would hopefully result in better, legally argued decisions and costs savings due to familiarity with the issues. A genuinely specialist environmental tribunal would, it is hoped, also result in consistency of process and decision-making due to the expertise built up through hearing a significant volume of cases. One clear set of procedural rules would have an obvious advantage for all parties.

### **4. The Tribunal would make final decisions rather than recommendations to the Secretary of State as happens in some current appeals. Is there any advantage in the Secretary of State retaining jurisdiction?**

There must be an advantage in the Tribunal making final decisions. Indeed, that is the present trend in respect of planning appeals in which almost all appeals are now transferred for the Inspector's decision. In cases in which a minister receives a recommendation, the upshot is delay and a further stage at which legal error may arise.

### **5. What cost-savings if any would be likely from greater consolidation (a major factor in the current climate)?**

Greater consolidation is likely to result in a specialist Court building up a bank of expertise therefore having the ability to hear and dispense of cases much more quickly thereby resulting in cost savings. Costs savings for parties could also be achieved through consistent procedures to avoid lengthy hearings about procedure. One example is the use of s59 notices under the EPA 1990, to require waste to be removed or its effects remedied. They are appealable within 21 days to the Magistrates' Court on limited grounds. Given the complexities of waste regulation and its interaction with planning law, there are considerations which amount to an answer to a notice, but for which the Magistrates do not have jurisdiction. It is therefore necessary to apply for judicial review.

The availability of transfer to JR is an obvious attraction and would provide significant cost savings.

### **6. Any views on first candidates (e.g. sanctions such as emissions trading)?**

As stated above, appeals against abatement notices are a prime candidate – in our view, they are currently held in an entirely inappropriate venue. We think that UK EU ETS appeals are also a good option as a first candidate. We currently have a UK EU ETS appeal before the Planning Appeals Commission for Northern Ireland. This is the first such case that it has heard and whilst it undoubtedly has an expertise in planning matters, it has no experience of the EU ETS. It is not just our EU ETS

case which is experiencing these issues. In England, the Premier Foods case was heard in January and is still awaiting final determination by the Secretary of State some nine months later<sup>27</sup>. We do think there are other suitable candidates, such as appeals under the Environmental Liability Regulations and appeals against other types of civil sanction, eg appeals against works notices under section 161A of the Water Resources Act 1991. These appeals raise similar issues to appeals against RES Act civil sanctions, currently already within the Tribunal's jurisdiction. In the longer term, if the First-tier Tribunal is to take on appeals against notices

enforcing certain types of permit, it would seem logical and procedurally preferable for it also to deal with other appeals connected with the same type of permit (eg determinations of permit applications).

### **Overall Conclusion**

This is an exercise which is very worthwhile and potentially quite productive in UKELA's view. The main risks are to add a further jurisdiction without eliminating another and doing harm to the expertise which has been assimilated in PINS.

October 2010

## **ACKNOWLEDGMENTS**

I am very grateful for the discussions and advice I have received during the preparation of this report, and in particular Katrine Sporle, Chief Executive, Planning Inspectorate; David Hart QC, EU Emissions Trading Scheme Appeals Officer; Nicholas Warren, Tribunal Judge; Richard Kimblin, barrister and chair UKELA Environmental Litigation Working Party; Richard Burnett-Hall. Carrie Bradshaw, Denise Leung, and Anna Pope of the UCL Faculty of Law provided invaluable assistance in preparing the tables in the appendices, and Richard Foulsham of the Centre for Law and the Environment helped with the publication.

27. This decision is now reported on the DECC web-site (RM).









Centre for Law and the Environment  
University College London

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