Irresolute Clay

Shaping the Foundations of Modern Environmental Law

Richard Macrory

• HART •
OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING

Bloomsbury Publishing Plc

Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

1385 Broadway, New York, NY 10018, USA

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2020

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Macrory, Richard, author.

Title: Irresolute clay : shaping the foundations of modern environmental law / Richard Macrory.

Description: Oxford ; New York : Hart, 2020. | Includes bibliographical references and index.

Identifiers: LCCN 2019053728 (print) | LCCN 2019053729 (ebook) | ISBN 9781509928118 (hardcover) | ISBN 9781509928125 (Epub)

Subjects: LCSH: Environmental law—Great Britain—History. | Macrory, Richard. | Environmental lawyers—Great Britain—Biography.

Classification: LCC KD3372 .M23 2020 (print) | LCC KD3372 (ebook) | DDC 344.4104/6—dc23

LC record available at https://lccn.loc.gov/2019053728

LC ebook record available at https://lccn.loc.gov/2019053729

ISBN: HB: 978-1-50992-811-8
ePDF: 978-1-50992-813-2
ePub: 978-1-50992-812-5

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon CR0 4YY

7

A National Environmental Agency

The creation of the Environment Agency in 1995 as the core national environmental regulator in England and Wales owed its origins to water privatisation some 15 years earlier. In the Victorian era, local authorities had the main responsibility for ensuring water quality and effective sewerage treatment but, during the twentieth century, their powers were increasingly transferred to larger public bodies with more specialised functions. Rivers and water bodies areas do not respect local administrative boundaries and, over the next 40 years or so, there was a period of further consolidation to ensure that new authorities had increasing jurisdiction over a whole river system from source to estuary. By 1973, there were just ten water authorities in England and Wales based on the country's main water catchment areas which were responsible for the whole water cycle, including pollution control, water abstraction, flood management, fisheries and sewerage treatment.

As part of the Thatcher Government's policy on privatisation, the government published a White Paper in 1986 proposing to privatise these water authorities. It was reluctant to breach the integrated approach to water management that had been developed over so many years and therefore proposed transferring nearly all the functions of the river authorities[1] to the new privatised bodies. This included their powers to grant water discharge and abstraction licences and the bodies would also be responsible for the enforcement of the controls. These regulatory functions would now be set against a much tighter framework of legally binding environmental standards made by government. There was concern amongst many in industry and the environmental sector as to whether it was appropriate for a private body to regulate and enforce legal controls in this way, but the government argued that there were other areas, such as the financial sector or professional standards, where regulation was often in the hands of the private sector. With a much clearer legal framework of environmental standards, together with protective appeals mechanisms, there should be no concern. However, in a letter published in *The Times* on 13 May 1986, Nigel Haigh of the Institute for European Environmental Policy pointed out that many European directives in the field of water pollution required Member States to appoint 'competent authorities' to carry out certain functions including the issuing of consents to discharge pollutants into rivers or estuaries. The term 'competent authority' was not defined in the

[1] Flood control and land drainage were excluded.

EU legislation but he queried whether as a matter of EU law it could encompass a private body.

I was then Standing Counsel to the Council for the Protection of Rural England, an honorary position where I was asked from time to time to give legal advice to the organisation. Its director, Robin Grove-White, was an acute environmental tactician and was well aware that simply publishing a legal opinion from a senior QC could have considerable impact on government thinking. He decided to commission an opinion on the question of EU law that had been raised by Nigel Haigh. I did not think that my views on the legal issue would carry sufficient weight and, in any event, was not sufficiently familiar with wider aspects of EU public law that would inevitably be involved in any analysis. We therefore engaged one of the country's leading experts in EU law, Francis Jacobs QC.[2] There was no clear case law in the European Court on the issue. His opinion[3] considered that where EU legislation referred to operational matters such as monitoring or taking samples, these tasks could be carried out by a private body. But when it came to issues such as the issuing of licences or carrying out enforcement functions being carried out by a 'competent authority', he concluded that, were the issue to come before the European Court of Justice, it might well decide that these functions had to be carried out by a public body. It was, at the very least, a seriously arguable case. The Opinion was published and sent to government and the European Commission. The legal uncertainty that it raised, together with the prospect of potentially lengthy litigation before the European Court and the effect this might have on any flotation of shares, clearly unnerved government ministers.

Shortly before the 1987 General Election, the then Secretary of State for the Environment, Nicholas Ridley announced a major rethink. Ridley was known to be a strong believer in the free market but was also very much an independent thinker who was not afraid to grasp political realities. He decided that privatisation of the industry would still go ahead, but no longer based on the integrated water management model. Instead, a new non-departmental public body, the National Rivers Authority (NRA), would be established to carry out the regulatory and enforcement functions, with the new privatised water authorities responsible for the delivery of services, including water and sewerage operations. As he said in Parliament on 21 October 1987 about the regulatory functions: 'After further consideration and having listened carefully to the arguments, I came to the conclusion that these functions are essentially a public responsibility. I could not accept the principle that one private body should determine what another can take out of a river or put into it or how much it should be charged for so doing.' The NRA came into existence in 1989 under the strong chairmanship of Lord Crickhowell, a former Conservative MP. He rapidly helped to establish the new body as a truly independent environmental regulator in the water field.

[2] Later to become an Advocate General of the European Court of Justice.
[3] Written jointly with Murray Shanks of his chambers.

Meanwhile, changes were taking place within the Alkali Inspectorate, a small specialised agency of central government that had regulated emissions into the air from a range of designated industrial processes since the 1860s. In its 1976 study on air pollution, the Royal Commission on Environmental Pollution had praised the technical expertise of the inspectorate but felt that in a contemporary climate requiring greater openness and public engagement, it needed to conduct its business in a far more transparent manner than had hitherto been the case. The Royal Commission had also called for a change in the law to allow the inspectorate to regulate all emissions from the designated processes whether to air, water or onto land to allow a more integrated approach to pollution control. It recommended that the overall criterion for decision making should be the best practicable environmental option and that a new body to be called Her Majesty's Pollution Inspectorate be established to replace the old Alkali Inspectorate and reflect its wider remit. The government initially responded by simply calling for greater coordination between the different environmental regulators but, in 1987, the Alkali Inspectorate was renamed Her Majesty's Inspectorate of Pollution. The change anticipated a new system of integrated pollution control from designated processes which would cover all the emissions from a process whether to air, water or land.[4] I was told later that the change of name from that proposed by the Royal Commission was a last-minute decision by a civil servant who was clearly a stickler for precise grammar and who had felt that the title 'Her Majesty's Pollution Inspectorate' might suggest it was just dealing with pollution from royal palaces.

David Slater was appointed chief inspector of the new inspectorate on 1 May 1991. Coming from the environmental consultancy world, he brought a fresh openness to the position and was anxious to engage with the wider environmental community. We had met at a conference and he invited me to give a talk to his senior staff on the changing world of environmental law. I explained to them that there had recently been a rapid growth in specialist environmental lawyers, the substance of environmental law was becoming more complex and formalised and that EU environmental law was becoming much more significant in its legal impact on our national system. Environmental groups were becoming more active in bringing judicial reviews against government bodies and the inspectorate could expect such challenges in the future. At the time, the inspectorate numbered around 250, but there were no in-house lawyers. The lack of legal staff was understandable in that, in the past, highly technically qualified inspectors were largely dealing and negotiating with their counterparts in the industries that they regulated. One striking illustration of this non-legalistic approach concerned the core criterion in the legislation that had existed since 1874 until 1990 that industries must use the 'best practicable means to prevent and reduce pollution from air emissions'. The term was described by Alfred Fletcher, the Assistant Inspector, in 1876 as legally

[4] Integrated pollution control was introduced in the UK under Part I of the Environmental Protection Act 1990.

superior to fixed emission standards 'for it is an elastic band and may be kept tight as knowledge of the methods of suppressing the evil complained of increased'. But to a lawyer, the phrase was clearly full of ambiguities and was crying out for judicial interpretation. Does one take into account technologies developed in other countries to judge what is 'best' at any particular time? And when a Chief Alkali Inspector in the 1980s wrote in one of his reports that 'what would be uneconomic would not be practicable', did that mean uneconomic for the particular process operator, or for the whole sector? Yet, in over 100 years, there had never been litigation on these provisions, a fact that was completely incomprehensible to my US environmental lawyer colleagues.

This did not mean that the system was ineffective, but I argued at the meeting that, rightly or wrongly, we were now in a new era of environmental law where the old style of closed regulation would not survive. I urged David Slater to hire an in-house lawyer to work with the inspectors to address these new challenges. The inspectorate was then an agency within the Department of the Environment but housed in a separate building and David explained that he could always go the government lawyers for specialist legal advice. But while this might be valuable in some instances, I felt this was bound to be a rather detached and formal process and from my experience as the staff lawyer at Friends of the Earth working on a daily basis with campaigners, it made all the difference to have an in-house lawyer who could work closely and informally with individual inspectors. A few months later, I heard that my views had clearly resonated and that a lawyer in the Department of the Environment, Rik Navarro, had been transferred to the Inspectorate as their first staff lawyer.[5]

In 1991, the government finally accepted the need for a new national environment body with John Major, the Prime Minister, announcing on 8 July the intention to establish an Environment Agency. Although the principle of the new organisation was established, there followed considerable discussion as to the precise scope of its functions and in its consultation on the proposal, the government set out four possible options: (i) the Environment Agency to take over waste regulation from local authorities and the responsibilities of Her Majesty's Inspectorate of Pollution (HMIP) but with the National Rivers Authority (NRA) continuing in existence; (ii) the Agency to be an umbrella body coordinating the work of both the HMIP and NRA; (iii) the Agency to take over waste regulation, the water pollution functions of the NRA and HMIP; and (iv) the Agency to take over waste regulation and incorporate both the NRA and HMIP. The House of Commons Select Committee on the Environment established an inquiry into the proposed options in 1992 and I was appointed a specialist adviser to the committee. On hearing the evidence, I advised the committee that it would be preferable that the new Agency focus on regulatory aspects of the environment, leaving the NRA to handle flood defence and other operational aspects of water management. Otherwise, there was a danger

[5] Rik Navarro later became the first head of legal services at the Environment Agency.

that the new Agency's work would become overly dominated by its water management responsibilities, both in terms of staff numbers and finance. The committee agreed and advised accordingly, but the chairman of the NRA, Lord Crickhowell, vigorously resisted the idea, arguing that this model would be the final break-up of the integrated approach to water and river catchment management planning. His views prevailed.

The Environment Agency (The Agency) was established under the Environment Act 1995 and took over the responsibilities of the NRA, HMIP and the waste regulation authorities in local government. It was not an easy marriage in the first few years, with staff coming from three very different types of organisation and with three separate trade unions representing their interests which added enormous complications for pay structures. The Agency is what is termed a non-departmental body. As such, it is independent in law from central government and its staff officers are not civil servants but employees of the Agency. Independence, though, is a relative concept. Board members and the chief executive are appointed by government and a large proportion of its finances are derived directly from government. Section 4 of the Environment Act 1995 gave power to ministers to give guidance to the Agency with respect to the objectives to pursue and, under section 40, a minister could give the Agency legally binding directions of both a general or specific character in relation to any of its functions. During my time, very few such directions were, in practice, issued and those were of a non-controversial nature, mainly relating to EU environmental legislation. In theory, government could use these powers to, say, require the Agency to refuse a particular licence application or to block a controversial prosecution. But the political protection against such a degree of control is the legal requirement that directions must be published. It would be a brave government minister who would abuse their power to interfere with such specific Agency decisions.

The Environment Agency had been in existence for four years when in 1999 I applied to be a board member. It was a competitive process and, during the interview, I explained that despite my environmental law expertise, I did not want to be seen in any way as a rival or threat to the in-house legal team; rather I would try and bring a strategic dimension to the legal side of its work. I was duly appointed and one of the most striking aspects I found in the discussions and paperwork for board meetings was the amount of time given to income streams and funding. My academic lectures on environmental law focused on the legal powers of the Agency but paid very little attention to how it derived its income. But my experience on the board brought home just how critical finances are to organisations of this size. They were complex and came from a variety of sources. When I joined the board, just over a quarter of the Agency's income came from direct grant from government known as 'grant-in-aid'. The grant was not in a single block, but ring fenced into various categories such as environmental protection, water resources and navigation and fisheries, and money could not be transferred from one to another. Income for flood defences, coming from various precepts and levies and capital grants from government, was a higher proportion. The remaining

income came from industry and other non-government sources through charging schemes such as those for environmental permitting, navigation fees and fishing licences. These external sources of income gave the Agency a greater degree of resilience from government, especially when it began to put a squeeze on resources and contrasted greatly with the position of the other key national environmental regulator, English Nature (later to become Natural England) which was almost wholly dependent on government funding. It was striking how much flood defences and water dominated the Agency's activities; in my early days on the board, over 45 per cent of the Agency's money was spent on flood defence, some 20 per cent on water resources and just about 30 per cent on other areas of environmental protection. Sitting on the board, I still had concerns whether it would have been preferable, as the House of Commons select committee had originally recommended, to have constructed the Agency to be focused almost exclusively on environmental protection, but was constantly assured that, in practice, the large engagement on water operational issues brought wider environmental benefits.

For my first few years on the board, meetings were held in private. There was no statutory requirement to hold the meetings in public, nor were board papers published. In May 1997, the board discussed the issue of openness and confirmed the current arrangements, which were consistent with the relevant government code of practice at the time. But the board agreed that a summary of its deliberations and decisions should now be posted on the Agency's website after board meetings. Nevertheless, pressures were building for more transparency. Later that year, Michael Meacher, a Minister at the Department of the Environment, met the board and while he accepted that it had taken some steps to make its decisions more transparent, he urged that its meetings should be more open and that the public should have full access to board papers. In 1998, the Labour government had published a White Paper[6] proposing that the boards of all public bodies should, as a minimum, hold annual meetings to improve public understanding of their work. Meanwhile, the Environment Agency's counterpart in Scotland, the Scottish Environment Protection Agency, had moved to holding its board meetings in public, putting pressure on the Agency to follow suit. Marek Mayer, the editor of the influential environmental journal, *ENDS Report*, had regularly requested access to board papers and had equally regularly been refused. He now began a sustained campaign of criticism of the board's lack of openness, making his feelings public at the Agency's Annual General Meeting in September 1998.

The debate continued within the board on the issue. Some members argued strongly that if meetings were held in public, Agency officers would no longer be as candid with us about problems and challenges. My own view was that the time was right to move to a more transparent system. There would still be opportunities for informal discussions outside the board meetings and, in any event, we would

[6] *Quangos: Opening the Doors* Cabinet Office (London, Office of Public Service, July 1998).

not always be told the full story by officers, whether operating meetings in private or public. In 1999, we eventually agreed, in principle, that board meetings should be conducted in public and held a dummy run of a public board meeting, watched by a number of assessors, including an official from the Scottish Environment Protection Agency, a trade union representative and the Agency's Head of Public Affairs. One of the main comments of the assessors was that if the meetings were to be held in public, we should no longer have board members and officers sitting together as had been the previous practice. The public needed to see that that the officers were reporting to the board and the two groups needed to be physically separated from each other. We were also advised that board members should be wary of making witticisms as that could be seen by the public that we were not taking issues seriously. I was probably as guilty as any as I do, sometimes, employ a flippant sense of humour as a means of tackling a difficult issue, but I had to learn to restrain myself.

Although there were some areas such as personnel issues or ongoing legal disputes that were reserved for a closed session, we decided that most of the board's business should be conducted in public. Local authorities often agree positions beforehand in advance of conducting business in public, but we never had a pre-discussion on the items in the open agenda and the board meetings involved a genuine and unrehearsed exchange of views. The first open board meetings were well attended by the press and members of the public and it was, initially, an unsettling experience to know that whatever one said was being listened to by a silent but attentive audience. But gradually the meetings became more natural and less inhibited and, at the end of the day, I felt it was a healthy experience. The press and the public had in front of them copies of all the board papers that we were looking at and I could honestly tell them afterwards they were seeing the decisions being made as they happened and there were no secret agendas in play.

Normally, the chair and chief executive would take questions from the public after the formal meeting was completed and there were two particular occasions where proceedings became especially uncomfortable. After the board meeting held in Swansea, we met members of the local community who were extremely concerned about a waste incinerator planned to be built very close to where they lived. Suspiciously, it was just within the boundaries of a neighbouring local authority, which had already granted planning permission for the project. The Environment Agency now had to consider an application for a waste operating licence. After the fairly prosaic discussions of finance and pensions at the board meeting the experience of meeting the local residents brought home to me the very real world in which the Agency operated and the pressures that its individual officers often had to face in dealing with an antagonistic and suspicious public. At a crowded public meeting held a few weeks before, the leader of the local authority had opened by saying that the officer from the Environment Agency would now explain how many people would die if the licence was granted. This was not a middle-class community of professionals and the internet had now given them access to the latest scientific papers on the effects of dioxins and other emissions

from incinerators, including those published in other countries. They expected the board members and the Agency officers to be fully up-to-date with the literature.

But the toughest public board meeting I experienced was near Doncaster where a local action group had been agitating about a nearby landfill site for waste. There was an exceptionally high public turnout and we suspected there would be trouble. Sir John Harman, the chair of the Agency, opened proceedings, carefully explaining that this was not a public meeting of the Agency board, but a meeting of the board in public. He was immediately interrupted by the leader of the action group who demanded that we discuss there and then their concerns about the waste disposal site. Sir John explained this was not an item on the agenda but, when the meeting was over, he and the chief executive would take questions and could discuss the issue with them. The leader of the action group refused to back down, saying they were not prepared to wait for three hours while all the ordinary business of the board was discussed. There was a stand-off and Sir John finally called us to leave the hall. I was spat upon as we left to a jeering crowd and the board retired to a small back room. Rik Navarro, the head of legal services and I suggested that perhaps we should go and meet the group to discuss their concerns but Barbara Young, the chief executive, argued this would simply be caving into mob rule. The agenda had been made public beforehand, clearly stating there would be a question and answer session for the public after the close of the board meeting and we must stick to this. We therefore carried on with our business, against a background of jeers from the crowd as they occupied the main hall. The police had been sent for and arrived in the form of a one young policeman who was horrified to see we were still conducting our board meeting, but now in private. The crowd had assumed they had forced us to abandon our meeting. If they realised this was not the case, there would be even more trouble. Nevertheless, unbeknownst to them, we carried on for several hours and, by the time we had finished, most of the objectors had left out of boredom. In retrospect, Barbara Young was correct not to change the planned agenda, but the experience was a vivid reminder of the very real passions and concerns the public can feel on environmental issues. The practice of open board meetings being held in various locations around the country continued for a number of years, but, apart from occasional exceptions such as the Doncaster meeting, the public attendance was small and it was an expensive exercise, especially in times of increasing financial constraints. In June 2016, the board decided that the practice was no longer justifiable and board meetings are now held in closed sessions in London. Minutes of the meetings and board papers, though, continue to be available on the Agency's website and the board holds more informal public events to discuss particular areas of public interest. I have some regrets, though, that the practice has discontinued, especially as the Scottish Environment Protection Agency continues to have open board meetings. But perhaps, like the major public inquiries of the 1970s and 1980s, it was a brave exercise in open democracy that, in times of austerity, was now past its sell-by date.

The experience of open board meetings also raised questions as to the precise role of board members. Chief executives and senior officers often seemed to

treat the board as a sort of non-executive advisory group, but, according to the Environment Act 1995, the chairman and the board members 'were' the Agency: 'The Agency shall consist of not less than eight members nor more than fifteen members.'[7] But what did this really mean in law and who were we representing when we were in the public arena? Initial job descriptions were fairly ambiguous on the point. One board member during my time clearly felt he was there to represent the public, with his main role to hold the Agency and its officers to account. During site visits he would readily tell members of the public about internal weaknesses of the Agency and, in the board meetings, would take some delight in humiliating or catching out Agency senior officers with surprise questions. This did not seem the correct approach to me. In public I felt it my role to defend the Agency as far as I could and, while at the board meetings I would question officers on papers, I generally give them advance notice of my concerns as I did not feel that springing surprises was the most productive method of teasing out information on complex issues. But it was not always an easy balance to maintain.

Another piece of the legislation concerning the board was frustrating and was typical of legal provisions being drafted with the best of intentions but having perverse effects. There had been concern in the 1980s that some hospital trusts had awarded contracts to firms in which trustees had undisclosed interests or relatives who ran the businesses concerned. As a result, statutory provisions for declarations of interests in non-departmental public bodies had been tightened up. In the case of the Environment Agency, Schedule 1 of the Environmental Act 1995 stated a board member who 'is any way directly or indirectly interested in any matter that is brought up for consideration' must declare that interest. I had no problem with this, nor that the board member was disbarred for voting on the matter in question. But the provision then went on to say that once the interest was declared, the member must not take part in any deliberation or decision of the Agency relating to that matter. This seemed perverse. The board, for example, might have been discussing the regulation of chemicals and a member, who had a relative working in the chemical industry, might have some pertinent observations on the subject. Once the interest was declared, others could judge whether the contribution was of value or biased because of the connection. Similar interest provisions existed in local authorities and Sir John Harman, who had been leader of Kirkless City Council, told me he was disbarred from taking part in any discussions on education because his daughter was a teacher. Worse still, because of the draconian consequences of declaring an interest, the Agency legal advice was to interpret what was meant by 'an interest' extremely narrowly. It seemed to me it would be far preferable to have as generous approach as possible to declaring interests and then permit involvement (but not voting) by the member concerned who might have something useful to contribute because of their interest in the matter.

[7] Environment Act 1995, s 1(2).

These provisions about declarations of interest remain in force and I still consider them unhelpful.

Board members, of course, did not confine their contribution to just the monthly board meetings. There were various sub-committees in which we were expected to participate and a good deal of informal interaction with officers on particular issues. I was asked to be the 'Legal Champion'. Lawyers in organisations such as the Agency are often perceived as having a negative influence, frequently having to explain to the chief executive and other officers why a particular course of action was legally impossible. I felt at times it was not always appreciated by the board quite what an impressive team of environmental lawyers has been developed within the Agency. In 2003, the legal publishers Butterworths published a textbook on new pollution legislation that had written by three Agency lawyers – Julia Farthing, Bridget Marshall (who later became the head lawyer for the Scottish Environment Protection Agency) and Peter Kellett (currently head of legal services at the Agency). At just under 500 pages, it was impressive legal work providing a detailed commentary on the background and the provisions of the legislation and the authors did not hold back from their own criticisms where they felt the law or policy was misguided. It was a book that any academic or practitioner would have been proud to have written and I brought it to the attention of the board as an important endorsement of the Agency's legal expertise.

As the only lawyer on the board at the time, I had a particular interest in how the Agency went about the enforcement of environmental law. This was ten years before civil sanctions became available to the Agency[8] and, when it came to dealing with breaches of environmental law, the Agency at the time had a number of possible responses. The most serious was a criminal prosecution and, unlike its counterpart in Scotland, the Agency had the power to initiate its own prosecutions without going through the Crown Prosecution Service. Instead of a prosecution before the courts, it could issue a formal caution, which required an admission of guilt and, though carrying no sanction, would go on the company's record. In some areas of environmental law it could serve a notice requiring compliance within a specified time or it could simply issue an informal warning or advice. Although, technically, nearly all breaches of environmental law were strict liability offences, meaning that the mere act of the breach was an offence without the need to prove intention or recklessness, it was clear that not all breaches were prosecuted. The Agency had to exercise a professional discretion as to how to respond. Re-reading one of my early board papers, we were told that, in 2001, there were just under 45,000 reported incidents of potential breaches. Technically, these were all criminal offences, but many were extremely minor and needed no formal response – in that year there were 717 prosecutions, 360 cautions and 371 notices, with prosecutions focused on what were considered to be the most serious incidents. In the early 1970s Keith Hawkins of Oxford University had carried out

[8] On civil sanctions see further ch 11.

some pioneering socio-legal research on how the then regional water authorities exercised their discretion to initiate a prosecution and found that choices were often made by individual officers, applying their own perceptions of what seemed fair and just in the circumstances. In deciding whether to prosecute, the Environment Agency itself had to follow the Code of Crown Prosecutors[9] and still does. This contains a two-stage test: first, it had to be satisfied that the evidence for a prosecution was reliable and credible and that there was a realistic prospect of conviction; second, that the prosecution had to be in the public interest. These are pretty broad criteria and, in 1998, the Agency decided to publish a detailed Environment and Prosecution Policy which contained the principles on which the Agency made its enforcement decisions and it has continued to do so to this day. A published enforcement policy is valuable in that it can help ensure consistency in approach within a large organisation and sends important signals to industry and the general public. For example, the policy can indicate that voluntarily owning up to the offence and taking immediate remediation steps can significantly affect the Agency's likely response. The Agency was somewhat of a pioneer in making public its enforcement policy. When I later conducted the Sanctions Review for the Cabinet Office in 2006, I found that out of 53 national regulators within the scope of the review, only 17 had a published enforcement policy.[10]

The board received regular reports on the number of prosecutions made and initially officers made much of their 100 per cent success rate. I pointed out that this was not necessarily a good benchmark, since it implied that the Agency might not take a case to test a point of difficult law where the result might be uncertain, or where the evidence was not absolutely clear cut but the case still worth pursuing. A 90 per cent success rate might be a better goal, provided one knew the reasons for the failures and that they were not down to poor case management. My advice was accepted and I was pleased to hear from the head of legal services some years later that he had recently congratulated the legal staff on a prosecution they had just lost on an interpretation of the law. He had reassured them that the Agency's actions had been entirely justifiable and it was not a black mark to have been on the losing side. Nevertheless, during my period on the board, it was clear that when criminal cases came before the courts, the fines imposed were extremely small – in 2000/2001, the average prosecution fine was just £3,758. For some companies, the damage to its public reputation from a conviction, however small the fine, might be a sufficient deterrent, but for the less scrupulous, the profit being made for breaking the law often outweighed any fine imposed. I even heard rumours that within the newly privatised water authorities, calculated comparisons between the costs to the company of compliance, the likelihood of detection and levels of fine were sometimes being made. The reasons for the general level of low fines were varied. Magistrates' courts were often unfamiliar with environmental

[9] The Code of Crown Prosecutors was introduced under the Prosecution of Offences Act 1985, s 10.
[10] See ch 11.

prosecutions and had to take account of the financial means of the offender, many of whom, especially in the field of illegal waste disposal, were small businesses or even single operators. It was not until 1999 that the Court of Appeal[11] provided general guidance on the level of fines to be imposed in health and safety prosecutions, with the court noting that, 'A fine needs to be large enough to bring that message home where the defendant is a company not only to those who manage it but also to its shareholders'. Many of these principles could be read across to environmental law, but it was only in 2014 that the Sentencing Council issued detailed guidelines for sentencing in environmental offences. This has since had a dramatic effect on increasing the overall level of fines.[12]

Back in the 1990s, the level of fines being imposed by the courts was immensely frustrating for the Agency. In 1999, it decided on a new approach to bring home the importance of compliance – the publication of annual league tables which would 'name and shame' companies guilty of the most serious pollution offences. At board level, we had an intensive discussion as to how best to rate the gravity of the offences, but eventually decided that rather than impose the Agency's own judgement, we would simply list them by the level of fine imposed by the courts. We recognised that the quirkiness of sentencing practice by individual judges and magistrates meant that these tables did not necessarily reflect the comparative reality of the seriousness of the breaches, but at least no-one could question the figures. The 'Hall of Shame', as it was dubbed by the press, captured the attention of the national media and was a lead item on both the BBC and ITV news. *The Guardian*'s report was headed 'Worst polluters named in official list of shame', *The Times*' headline was 'ICI heads list of worst polluters' and local radio and newspapers focused on polluting companies in their own regions. It was a bold move and many of the companies listed resented the publicity, though some responded by saying how much they had invested in environmental protection. ICI had come out top of the list with three fines at different plants totalling £382,500. In public it claimed that this was unfair and, in any event, old news. But I was later told that ICI's Chief Executive had privately met with senior staff at the Agency to discuss the steps they should take to avoid appearing so high on the list in the future. The report became an annual fixture, but the next year the Agency decided that, rather than totally focus on the negative, they would also include lists of companies which had gone beyond that statutory minimum in terms of environmental protection and renamed the report 'Spotlight on Business Environmental Performance'. Interestingly, some companies appeared in both lists.

Securing sufficient resources from government for effective environmental enforcement was a continuing battle and the Agency made several responses.

[11] *R v Howe & Son (Engineers) Ltd* [1999] 2 All ER 249.

[12] Courts are obliged to follow the guidelines unless satisfied it would be contrary to the interest of justice to do so (Coroners and Justice Act 2009, s 125). In the review I conducted in 2006 for the Cabinet Office on regulatory sanctions, I had recommended that the Sentencing Council publish sentencing guidelines for regulatory offences: see further ch 11.

In 2000, Barbara Young, then the Chief Executive, put up a paper to the board suggesting that the Agency approach the Treasury to request that the income from fines imposed by the courts and which went to them (then around £2.8 million) be returned to the Agency and ear-marked for enforcement activities. I was somewhat surprised to find that I was the only board member to have real doubts about the wisdom of such a move. The Agency had always exercised discretion in how it responded to breaches of the law and its judgements and its reputation could be easily undermined if either industry or the public felt that a decision to prosecute rather than take another course of action was being influenced by the prospect of extra income coming to the Agency. I argued my case strongly but found no support from the rest of the board. The proposal went up to the Treasury which resoundingly rejected the idea – not on any high-sounding principles about enforcement discretion, but because they wanted the income. They replied that if the Agency received income from fines, the sum would simply be deducted from any government grant-in-aid to the Agency, resulting in no net benefits. The idea was revisited in 2003 in the light of that recent legislation[13] which permitted the Lord Chancellor, with the consent of the Treasury, to make regulations allowing fines imposed by magistrates to be paid to another body rather than central government. There was already a precedent in relation to fines for road traffic offences which could now go directly to local authorities, provided the income was directed towards road safety matters. The Agency's case for change confirmed that prosecutions would still only be undertaken in accordance with its enforcement policies and the Code of Crown Prosecutors and that the fine income would be directed towards enforcement activity including giving greater advice to business, especially small and medium-sized enterprises. But the proposal was never followed through. The whole issue of whether regulators should receive any direct financial benefit from sanctions imposed became particularly acute when I was considering the possibility of introducing civil sanctions (allowing a regulator to impose a financial sanction without going to court) during the Review of Regulatory Sanctions I conducted for the Cabinet Office in 2006. I favoured the use of civil sanctions as a sensible response to some types of breaches of law but continued to feel it unwise that the regulator imposing the sanction received any of the income. My recommendation was written into the legislation that followed the Review, which provides that all income from civil penalties goes to the Treasury.[14]

Another potential source of income was charges. From its inception, the Environment Agency had the power to impose charges in respect of licences and consents and over the years an increasing proportion of its income concerned with environmental protection has come from charges as government grant-in-aid was being reduced. The extent to which these charges could reflect not just the costs of granting the licence and monitoring the regulated process in question but also the

[13] Justice of the Peace Act 1967, s 60A inserted by the Access to Justice Act 1999.
[14] Regulatory Enforcement and Sanctions Act 2008, s 69. See ch 11.

wider financial burden on the Agency for carrying out enforcement activity against illegal operators raised both legal and political issues. From the legal perspective, charges were made in accordance with a charging scheme approved by the Secretary of State. According to the current government guidance on Environment Agency fees and charges: 'You may have to pay an Environment Agency charge to cover the costs of regulating your activity. The amount you pay depends on the activity you carry out and the regulations that apply to you.' This suggests that charges cannot reflect the costs on wider enforcement carried out by the Agency. Yet, in relation to sewerage charges imposed by privatised sewerage undertakers on industry, the Court of Appeal in 2006[15] held that charges did not have to relate only to the actual cost of regulating the discharge in question but could also reflect the wider costs on the undertaker in providing an effective sewerage system in its area. The charges in that case were made under different legislation, but the statutory provisions relating to the Environment Agency charges appear even more flexible. Yet, whatever the legal position, there is clearly a political dimension. I have long felt that it should be in the economic interests of law-abiding industries to see effective enforcement action taken against illegal operators in the same sector and that they should be prepared to contribute to the costs of so doing. Equally, they could argue that that enforcement activity is a matter of public interest and should be paid for by the taxpayer. In practice, it is not easy to judge the extent to which charges schemes do, in fact, include an element of cross-subsidy for enforcement. With government grant-in-aid to the Agency for environmental protection ever decreasing – it reduced by nearly 60 per cent between 2005 and 2017 – the pressure to make up the shortfalls by increasing charges will be all the stronger. However, there will come a point where the legality of doing so may well be tested in court.

A more promising and, in the end, more profound approach towards dealing with financial constraints was the development by the Agency in 2001 of what is termed 'risk-based regulation'. In essence, it implied concentrating the Agency's enforcement activity on those sites and processes considered to pose the greatest environmental risk. A traditional inspection regime for landfill sites, for example, would require all sites to be regularly visited at the same intervals. In contrast, risk-based regulation meant evaluating sites in advance and focusing inspection on those posing greater risks, while well-run sites operated by law-abiding operators would require only the occasional inspection and could even largely rely on self-reporting. It was not a term I had come across before and, when the proposals were first presented at a board meeting, I queried, rather cynically, whether 'risk-based regulation' was really a euphemism for cut-price regulation. The director of operations replied that in a time of financial pressures it certainly would help to use limited resources more efficiently, but that even if he had unlimited finance

[15] *Thames Water Utilities v Ministry of Defence* [2006] EWCA Civ 1620.

it was a still direction that was sensible to take. Initially I remained sceptical, but I was comforted by the fact that as the programme was being rolled out, the number of serious incidents at regulated sites was declining. Correlation never necessarily implies causation, but if there had been an increase in environmental incidents I would have had serious concerns. As part of the approach, the Agency developed a fairly sophisticated methodology for evaluating risks, known as Operational Risk Appraisal (OPRA), based in part of the environmental and physical sensitives of a site, the complexity of the process and the operator's track history of performance and compliance. Sites were then banded as a result of the evaluation.

I became convinced that risk-based regulation was indeed the right way to develop and, in many ways, the Environment Agency was ahead of the game compared with most regulators at the time. When the Hampton Review on regulation was carried out by the Treasury in 2005, the Agency's approach was commended and the review[16] advocated that risk-based regulation should be adopted by all regulators. Financial incentives were introduced to encourage industries to obtain higher OPRA scores by varying the charges imposed – those on the lowest band being charged three times the standard charge and those on the highest receiving a modest reduction. Though I endorsed the concept, at the time I had – and still have – two main concerns about the system. First, the decision on banding is essentially an administrative decision made by the Agency, but one with significant consequences for the industry concerned, both in terms of reputation and financial costs. But there is no formal appeal mechanism if an industry queries the decision, other than raising the issue with the Agency or possibly complaining to the local ombudsman. Second, I suspect that very few members of the general public fully understand the implications of risk-based regulation nor are they formally engaged in the decision-making on banding. Almost by its very nature, risk-based assessment will sometimes fail and a serious incident could occur at a site previously judged by the Agency to be low risk. Local residents are unlikely to be impressed to learn that that there have been very few Agency inspections and a great deal of self-reporting because the site had been given a high OPRA score. Engagement with the public at the earliest stages to understand the rationale for the approach, as well as its potential pitfalls, is important if wider confidence in the system is to be sustained.

The concept of a national governmental body which is part of the state yet, at the same time legally and operationally independent from government, was developed in Britain in the nineteenth century and I often found it one that was difficult to explain to my environmental law colleagues in other European countries. In 2004, I was commissioned by a coalition of Northern Irish environmental groups to study the arrangements for environmental governance in the region. At the time – and it remains the case – the equivalent to the Environment Agency,

[16] *Reducing Administrative Burdens – Effective Inspection and Enforcement* (London, HM Treasury, March 2005). See ch 11.

the Environment and Heritage Service,[17] was an executive agency of the Northern Irish government and, unlike arrangements in other parts of the United Kingdom, had no independent legal status. I was asked to look at the position of equivalent environment agencies in other parts of Europe with the presumption that the Northern Irish position was wholly out of step with arrangements elsewhere. In fact, rather to my surprise, the research proved the opposite. With the exception of Sweden where the Environment Protection Agency was legally independent from government, in nearly every other country national environmental agencies were essentially part of the relevant government ministries.

For the Environment Agency, determining the balance between its functions of implementing government policy and acting independently was not always easy. Soon after I joined the board, we received a briefing from the Permanent Secretary of the Department of the Environment, Food and Rural Affairs[18] on how he viewed our role. He was very clear that we could be as critical of government policy as we wished and publicly so, provided there were no surprises. Government expected to have advance warning of what was to be published by the Agency but would not interfere in any way. In strict legal terms, the government had the powers to direct the Agency on any matter, including how it went about enforcing environmental controls, but it wisely refrained from doing so. As a board member, the closest I saw to government pressure on a specific prosecution concerned the Sea Empress disaster. On 15 February 1996, a loaded oil tanker, the Sea Empress, was sailing towards an oil refinery near Pembroke when she became grounded, causing a major oil spill, the third largest to date in the United Kingdom. At the time, the ship was under the guidance of a pilot employed by Milford Haven port authority and there was evidence that he had been negligent. The Agency considered prosecuting the port authority for causing the pollution, but government began to pressurise the Agency to desist, because any fine would simply come out of the public purse. At the same time, Friends of the Earth was mounting a high-profile campaign on the issue and threatened that if the Agency did not prosecute, they would mount their own private prosecution against the port authority, shaming the Agency by so doing. Despite considersble pressure from government, the Agency decided to prosecute and the board supported the chief executive's decision. In January 1999, the port authority pleaded guilty at Cardiff Crown Court and the judge imposed what was then a record fine of £4 million with an award of £825,000 costs to the Agency.[19] The decision to prosecute was, I am sure, correct, though it did not necessarily mean that the Agency got the public credit for doing so.

[17] In 2008, it was renamed the Northern Ireland Environment Agency.

[18] DEFRA had been formed in 2001 when the Ministry of Agriculture Fisheries and Food was merged with the Department of the Environment, Transport and Regions (DETR) In its turn, DETR had been created in 1997 subsuming the former Department of the Environment and Department of Transport. The frequent change in departmental structures since the 1970s has not helped to secure a more integrated approach to environmental policy.

[19] The fine was later reduced to £750,000 on appeal.

One of the board members was sitting in a Welsh pub when the report of the judge's sentence came up on the television news. He heard a group of students praising Friends of the Earth for bringing the prosecution, but one of them said he thought it was actually some organisation called the Environment Agency. The majority, though, had never heard of the Agency and they all agreed that it must be Friends of the Earth who were responsible for bringing the case and should be congratulated for their boldness.

In May 2000, the House of Commons Select Committee on Environment Transport and Regional Affairs published a report on the Agency urging it to take a more high-profile role on environment issues: 'As an important advisor to Government on environmental issues, we would like to see the Agency engage more vigorously in public debate and raise its profile on matters of importance where protection and enhancement of the environment and sustainable development are concerned. Clearly, the Agency must conduct itself in accordance with Government policy, but it should also play an important role in influencing that policy as it is formed'. The Committee wanted the Agency to become a 'champion' of the environment and sustainable development. In evidence to the committee, the minister, Michael Meacher, seemed comfortable with such a role: 'I have always taken the view – and I have to be careful because I am not sure this is necessarily shared by all my colleagues – that I do believe in open discussion. I would not expect the chairman of the Agency to make an outright attack on the government. If he felt the need to make that kind of criticism, I would expect him to come to me and say it very frankly to me. If any of these public officials at a high-level wish to take a view which was different from the government's, perhaps particularly where they had given forewarning that they wished to do that, I see no reason why they should not do so. I think the important thing is the genuine frankness of public debate and there are issues, as we all know, where there is more than one view, which is perfectly reasonable.'

The Agency remains legally independent but the political times have changed. Tucked away in the Coalition Agreement between the Conservative and Liberal Democrats in 2010 was a commitment to reduce the number and cost of quangos. The reforms, headed by Francis Maude in the Cabinet Office, led to the Public Bodies Act 2011, which as initially drafted gave wide power to ministers to make regulations to abolish, merge or change the status of a large list of bodies specified in the legislation. The extensive powers being given to government caused controversy in the House of Lords where many peers questioned the constitutionality of the proposals. Amendments were introduced to allow wider consultations before the exercise of the powers and to introduce a sunset clause so that they did not remain permanent. The Environment Agency had survived any proposals to abolish it on the grounds that it was exercising functions requiring impartiality and technical expertise. However, the government proposals were not simply about cost-saving and there was an underlying philosophy that, in future, policy should more clearly be a function of government. As Francis Maude put it in the House of Commons in 2014: 'A major part of the programme of public bodies reform has been bringing policy functions back to the government in a way that provides

direct accountability to parliament.' The Agency is empowered to give advice and assistance to the Secretary of State as requested[20] and its operational and technical expertise can clearly be of immense value to government in developing policy. But it seems that the trend is moving away from the Agency acting as an environmental champion in the sense of publicly critiquing the general direction of government thinking on the environment. The government regularly produces what it terms as a 'Framework Document' setting out the respective responsibilities of government departments and their non-departmental bodies. The most recent Framework Document, agreed between the Environment Agency and the Department of the Environment Food and Rural Affairs, describes its role as including being a 'technical adviser of the state of the environment'. Government ministers began referring to the 'DEFRA' family as including the Environment Agency, Natural England and other bodies it sponsored. Common services in many areas are now provided by DEFRA rather than each being carried out by the independent bodies and the Agency's London office has been transferred into the same building as DEFRA. Furthermore, the creation of the 'gov.uk' information website in 2012 means that the Agency's own online presence has considerably diminished. In a recent report concerning Natural England, a House of Lords select committee[21] commented: 'Non-departmental public bodies, while playing a part in the processes of national government, should operate at arm's length from ministers and departments. We share the concerns of witnesses who have told us that Natural England no longer has a distinctive voice. We urge the government to recognise these concerns and to take steps to enable Natural England to operate with the appropriate degree of independence.' Unlike Natural England, the Agency has yet to lose its own press and communications office, but nevertheless there remains unease as to how far its independence will be further compromised. As is often the case, much will depend on the character of the chair and chief executive in how they handle the sensitivities that are inevitably involved. As a lawyer, I remain comforted by the fact that the Agency still maintains a large team of in-house lawyers, probably the largest group of environmental lawyers in the country. There are, as yet, no proposals that these lawyers should be transferred to general government legal services or, indeed, that the Agency's legal work be put out to private tender, even though this would be likely to impose more costs on the public purse. If either of these developments were to occur, I would have grave concerns. For the future, it may be that the role of providing independent and critical analysis of the effectiveness of government environmental policies will be taken up by the post-Brexit proposed Office for Environment Protection.[22] But the Environment Agency's influence on policy development is bound to continue, even if not quite so visibly as before and, no doubt, the new body will find itself drawing on the Agency's information and expertise to assist it in its work.

[20] Environment Act 1995, s 37(2).

[21] *The Countryside At A Crossroads – Is the Natural Environment and Rural Communities Act 2006 Still Fit for Purpose?* (London, House of Lords, Report of Session 2017–2019 HL Paper 99, 2018).

[22] See further ch 13.