

Enforcing Environmental Responsibilities

Annika K. Nilsson

Enforcing Environmental Responsibilities

A Comparative Study of Environmental Administrative Law



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Abstract

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This thesis is about the distribution of responsibilities in the environmental law enforcement procedure, between the State and the individual environmental actor. The State and its public authorities have a fundamental environmental responsibility. This responsibility is however shared with the actors. Actor responsibilities include taking sufficient precautionary measures, and controlling the own activities. This also covers responsibilities for knowledge and investigation, which are in focus in the thesis analysis. Such responsibilities are enforced by administrative authorities. Enforcement, however, also entails exercise of public power against the individual, and thus warrants proper procedure and safeguards of legal certainty. Such procedural responsibilities include ensuring decision making materials to support their exercise of authority. It also means that the authority has to formulate clearly to the actor what their legal duties are, and what they need to do to avoid further enforcement. These administrative duties may entail the authority taking over the actor's information responsibilities under environmental law. Enforcement of actor responsibilities thus becomes inconsistent, or even counter-productive.

This thesis comprises analysis of the meeting of environmental and administrative law in the enforcement situation. The analysis is focused on balancing effective implementation and enforcement of policy aims, and the safeguards of the individual's rights and freedoms. The aim is to find ways to coordinate instead of prioritising these objectives. The research is based on a comparative study and analysis of the enforcement systems of Sweden, the United Kingdom (England and Wales), and the Netherlands. The importance of distinguishing between the different purposes and aims of the responsibilities is argued. Actor responsibilities for precaution and information should be recognised also in the enforcement procedure. A communicative enforcement procedure, and more purposive assessment of the proper distribution of responsibilities in the individual case may provide both effective enforcement and legal certainty.

Keywords:

Enforcement, environmental law, legal certainty, rule of law, Rechtsstaat, administrative procedure, investigatory principle, inquisitorial principle, evidence, burden of proof

Annika K. Nilsson, Department of Law, Box 512, Uppsala University, SE-75120 Uppsala, Sweden.

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Abbreviations

ABRvS	Afdeling bestuursrechtspraak Raad van State (Administrative Jurisdiction Division of the Council of State) (Netherlands)
A.C.	Law Reports Appeal Cases (UK)
Art.	Article
Awb	Wet Algemene Bestuursrecht (General Administrative Law Act) (Netherlands)
All E.R.	All England Law Reports (UK))
BC	Borough Council
CC	City Council/County Council
DC	District Council
Defra	Department for Environment, Food and Rural Affairs (UK)
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Union
Ed.	editor
Eds.	editors
e.g	for example (<i>exemplia gratia</i>)
Env. L.R.	Environmental Law Reports
EP Regulations	Environmental Permitting (England and Wales) Regulations 2010 (UK)
EPA	Environmental Protection Act 1990 (UK))
ERT	Europarättslig tidskrift
EU	European Union
FL	Förvaltningslagen (Administrative Procedure Code) (Sweden)
FPL	Förvaltningsprocesslagen (Administrative Court Procedure Code) (Sweden)
FT	Förvaltningsrättslig tidskrift
IED	Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (Recast)
JFT	Tidskrift utgiven av Juridiska Föreningen i Finland
JO	Justitieombudsmannen (Parliamentary Ombudsman (Sweden), and also the Ombudsman's publication

J.P.L.	Journal of Planning Law (England)
LBC	London Borough Council
LJN	Landelijk Jurisprudentie Nummer (case numbering in national official database) (Netherlands)
MB	Miljöbalken (Environmental Code) (Sweden)
ML	Miljöskyddslag (Environmental Protection Act from 1969) (Sweden)
MR	Master of the Rolls, Head of Civil Justice (UK)
MÖD	”Miljööverdomstolen” – the reference mark of the referred cases of the Swedish Environmental Court of Appeal
no.	number
NVV	Naturvårdsverket (Environmental Protection Agency) (Sweden)
OECD	Organisation for Economic Co-operation and Development
p./pp.	Page/pages
para.	paragraph
PPP	Pollutor Pays Principle
Prop.	proposition (Swedish legislative bill)
Q.B.D.	Queen’s Bench Division (UK)
R.	Regina (or Rex in older references), in English case law reference stating a case between the state (the Crown or Queen – Regina) and someone else.
Sch.	schedule
SvJT	Svensk juristtidning
TEU	Treaty on European Union
TFUE	Treaty on the Functioning of the European Union
TfR	Tidsskrift for Rettsvitenskap
UK	The United Kingdom
v.	versus (in case law references)
VR0M	Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (Netherlands)
Wabo	Wet algemene bepalingen omgevingsrecht (Environmental Law Provisions Act) (Netherlands)
Wm	Wet milieubeheer (Environmental Management Act) (Netherlands)
W.L.R.	The Weekly Law Reports (UK)

The Subject and Form of the Thesis

1 Introducing the Thesis – What, Why and How?

1.1 Introduction

Environmental policy strives to reach environmental goals – ultimately sustainable development. This is fundamental. The world’s natural resource base is limited.¹ These fundamental preconditions call for resource management. The discourse about the necessity for sustainable management has a long history, but has become more topical with the increasingly rapid development of human society.² The now established principle of sustainable development entails a common responsibility for Mankind to manage the resource base so as to meet the needs of both present and future generations.³ The breakthrough of the idea of sustainable development is generally ascribed to the World Commission on Environment and Development (the Brundtland Commission) and their report “Our Common Future”. Sustainable development entails, among other things, that the laws of man have to be reformulated so as to keep human activities in harmony with the universal and unchangeable laws of nature.⁴ This is the basis for environmental law research, which will argue for such a sustainable legal system. This thesis comprises an exploration of what that means in the context of procedures for the enforcement of environmental law.

Swedish environmental law imposes responsibilities for sustainable management into the administrative enforcement procedure by stating “actor”⁵ responsibilities as regards the control of their activities. The actor has general duties in relation to knowledge, investigation, reporting, and also the burden of proof in the enforcement case. These special rules of environmental law enforcement can be claimed to challenge the traditional adminis-

¹ *Our Common Future* pp. 32–33. See, also Hardin, G., *The Tragedy of the Commons*.

² Ebbesson, J., *Miljörätt* pp. 11–12, and *Nytt och gammalt i ”modern” miljörätt*; Gipperth, L., *Miljö kvalitetsnormer* p. 75.

³ *Our Common Future* pp. 40 and 43.

⁴ *Our Common Future* p. 330.

⁵ I use the term “environmental actor” for persons acting in a way that has effects of any significance on the relevant environmental interests, mainly resource management in a wide sense. See, further: Section 2.3.3.2.

trative law structures. The subject of the following investigation is the environmental actor's responsibility for information, and his consequent involvement in the enforcement of environmental law against himself.

In the enforcement situation generally prescribed environmental standards and collective responsibilities of Mankind are transformed into individual legal duties, which can be enforced through authoritative coercion and sanctions of different kinds. In this procedure, the environmental management strategy of realising a common responsibility encounters procedural safeguards of legal certainty.⁶ The function of these safeguards is to control and delimit the exercise of public authority over the individual. Such safeguards will also entail control and limitation of the juridical steering, that is the public control and direction of the environmental actors,⁷ and thus of the public administration's environmental management powers. From an environmental law perspective, procedural safeguards of legal certainty may therefore be seen as obstacles to environmental steering towards sustainability. Such legal structures should, according to the theory of sustainability, be challenged. The stronghold of the fundamental principle of legal certainty has indeed been subject to such critical arguments, sometimes leading to calls for a new concept of legal certainty.⁸

This thesis is an analysis of legal responsibilities in the course of environmental steering through administrative enforcement – the distribution of these responsibilities between the public institutions and the individual actor – and the legal roots and consequences of this order. I have chosen to analyse the enforcement of the actors' information duties, and the duty for the administrative enforcer to issue clear and precise orders. These issues manifest two sides of enforcement of the actor's involvement in the control of his activities. The analysis is based on a comparative study of the enforcement law of Sweden, the UK (England and Wales), and the Netherlands. The focus is nevertheless on Swedish law. If nothing else is indicated in the text, the statements refer to the Swedish legal order.

⁶ I use the term “legal certainty” for the Swedish term “rättssäkerhet”, which is a general and very complex term that embodies the fundamental Rechtsstaat ideas. The term “legal certainty” conveys a more limited meaning, but has been used for lack of better alternatives. For further discussion of the concept go to Section 2.2.1.3.

⁷ See: Section 1.2.1.

⁸ Basse, E.M., *Retssikkerhed i miljøretten – hvilke begreber kan anvendes?* pp. 121–139, esp. pp. 129–133; Michanek, G., *Miljøretten och de uthålliga hushållen* pp. 58–59; Nilsson, A., *Rättssäkerhet och miljöhänsyn* pp. 179–186.

1.2 The Thesis in Context

1.2.1 Environmental Control – Steering Human Behaviour

The state has a responsibility under international law to realise environmental goals.⁹ It should implement sustainable development and the fundamental principles of environmental law. Environmental legislation implements international law. It establishes and operationalises the environmental fundamentals and limits, thus making them more concrete and operational to apply.¹⁰ The Swedish Constitution moreover states a responsibility for “the public”¹¹ to further sustainable development and a good environment for present and future generations. The public authorities then steer the behaviour of the citizen in order to reach sustainability. Poor functioning in this system is argued to entail implementation deficits, and as such, a failure to resolve environmental problems.¹² In fact, since the legal order rests on the fundamental Rechtsstaat idea of legality,¹³ poor regulation of an environmental problem may also entail “counter-productiveness” in that it indirectly supports and protects the problematic behaviour. This is a systematic legal problem tackled in environmental law research.¹⁴

Responsibility for acting towards environmental goals is not only with the Government. Each and every individual actor should be involved in the management of natural resources. Even though the public authorities have a leading role in ensuring and furthering the necessary preconditions for such work, sustainable development and resource management should, according

⁹ Declaration of the UN Conference on the Human Environment, Stockholm, 5–16 June 1972 (Stockholm Declaration), especially Principle 1–11; Declaration of the UN Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992 (Rio Declaration), esp. Principle 3, 7–8; and Agenda 21[1992] Report of the United Nations Conference on Environment and Development (UNCED), stating what must be done in the 21st century. See, also: Decleris, M., *The Law on Sustainable Development* p. 17.

¹⁰ See further: Westerlund, S., *Miljörättsliga grundfrågor 2.0* Chapter 7, on the theory on operationalisation of general rules and goals, that is to step by step make them precise and concrete so that they are legally operational.

¹¹ In Swedish: ”det allmänna”, meaning the state and the municipalities – and distinguishable from ”the private”, meaning private citizen and associations, etc. (On the definition, see: Bohlin, A., and Warnling-Nerup, W., *Förvaltningsrättens grunder* pp. 2 and 23; Marcusson, L., *Offentlig förvaltning utanför myndighetsområdet* pp. 59–60.)

¹² Westerlund, S., *Miljörättsliga grundfrågor 2.0* Chapter 4, esp. p. 65.

¹³ Referred to as ”rule of law”, and in Swedish “legalitetsprincipen”, meaning the demand of legal grounds for public use of power, and described as a fundament of the Rechtsstaat.

¹⁴ Carlman, I., *Adaptiv miljöplanering nästa* pp. 286–287, *Do not Miss the Forest for all the Trees* pp. 69–78; and *The Rule of Sustainability and Planning Adaptivity* pp. 163–164; Westerlund, S., *Lagstiftningstekniska mikrotesser 1–7*, p. 3; *Miljörättsliga grundfrågor 2.0* pp. 46–53, *Miljörättsvetenskap – med nödvändighet interaktiv* p. 197, *Rätt och riktig vetenskap* pp. 3 and 18. See, also: Decleris, M., *The law on sustainable development* for an analysis within the Greek system, propagating the establishment of such a legal system, and referring to the basis of rule of law at pp. 8 and 14.

to valid environmental law, be decentralised and preventive in its approach. The aim is that individual environmental actors should formulate their own environmental policy strategies, based on the framework and platform of environmental legislation.¹⁵ Despite this individual and decentralised responsibility, public authorities will to some extent need to ensure the furthering of the environmental goals, and direct and control the actors.¹⁶ This is done through different modes of environmental steering, generally exercised by administrative authorities, and thus essentially regulated by public law.

There are different kinds of instruments for steering towards environmental goals, some, but not all, of them working mainly through the legal system. I will refer to the use of these legal instruments as juridical steering. The specific character of juridical steering is that the public authorities have the power to order and coerce actors to change their behaviour.¹⁷ This entails a fundamental and unique role for the legal system compared to other manners of steering that are exercised mainly through information or economic instruments. Such instruments are characterised by a “softer” approach, focusing on voluntary measures.

Environmental policy goals are implemented through a multi-functional steering system.¹⁸ Often the different manners of steering are described as alternative, like tools in a toolbox. The different tools may alternatively be seen to complement each other and be used in combination. Sometimes they are also viewed as components or steps within a steering system.¹⁹ A systematic idea has been illustrated by Westerlund in terms of a filter model. In this model different modes of environmental steering for environmental policy purposes are seen as sequential, not alternative. The legal system, juridical steering, is described as the last filter, stopping environmentally harmful activities where informative/ethical or economic instruments are not successful.²⁰ A view advanced within environmental law research has been that that behaviour that is not prohibited (caught in the filter of juridical steering) is authorised, and thus upheld by the legal order. This entails “counter-productiveness” in the steering system. This view is based on the concept of

¹⁵ Prop. 1997/98:45 Part 1 pp. 159–161, 170, and 512–513; SOU 1996:103 Part 2 pp. 312–13. See, also: Decleris, M., *The law on sustainable development* pp. 30–32, referring to Agenda 21.

¹⁶ SOU 2002:50 p. 227; SOU 2004:37 p. 56.

¹⁷ Peczenik, A., *Vad är rätt?* p. 112; Tuori, K., *Från ideologikritik till kritisk positivism* p. 5.

¹⁸ Prop. 1997/98:45 Part 1 p. 161, and Part 2 p. 8. See, also: Prop. 1987/88:85 pp. 289–300, emphasising the role of economic steering instruments to complement juridical, or administrative steering.

¹⁹ For example, the law may provide procedural forms for voluntary agreements, ensuring the fairness of the situation, or it may sanction free-riders in a voluntary system. Informative instruments are also generally necessary for providing a possibility for large scale control through the legal system.

²⁰ Carlman, I., *Adaptiv miljöplanering nästa* p. 286 (and footnote 7); Westerlund, S., *Miljö-rättsliga grundfrågor 2.0* pp. 53–56. Compare to: Eckhoff, T., *Statens styringsmuligheter, särskilt i resurs- og miljöspörsmål*.

rule of law, or the Rechtsstaat, resting on a demand for legal regulation of public control over the individual and his behaviour.²¹ The Swedish legislator has expressed that it is crucial that environmental law is implemented so as to provide, in combination with other steering instruments, an optimal effect in reaching sustainable development.²²

1.2.2 Enforcement and Effective Steering from the Environmental Law Perspective

As stated earlier, the specific coercive character of juridical steering is fundamental. It affects the function and purpose, and the limits of the system. The coercive character of juridical steering is held as crucial for the effective realisation of environmental goals. This is topical for the following investigation. Enforcement makes it possible to force those who will not voluntarily change their behaviour to do so, in order to reach the desired environmental results. Enforcement is a way for the state to further environmental goals, but it is also an instrument for the relevantly interested individual party to protect their rights, and their interests under environmental law.²³ Apart from assuring environmental results in the individual case, it responds to free-riders,²⁴ and should, at least ideally, promote fairness in environmental burdens, and equal preconditions for competition. The realistic threat of a potential coercive or punitive enforcement measure may also provide incentives to take voluntary measures.

Enforcement has another important role in operationalising the general principles and rules, comprising common and collective interests and responsibilities, and concretising for the actors what these general rules actually require of them.²⁵ Environmental law is to a great extent of framework law character, and needs to be translated to more concrete rules,²⁶ both

²¹ Carlman, I., *Do not Miss the Forest for all the Trees* pp. 69–78, *The Rule of Sustainability and Planning Adaptivity* pp. 163–164; Westerlund, S., *Lagstiftningstekniska mikrotoser 1–7*, p. 3, *Miljörättsliga mikrotoser 26–28*, *Miljörättsliga grundfrågor 2.0* pp. 46–49, and *Rätt och riktig vetenskap* pp. 3 and 18. See, also: Decleris, M., *The law of sustainable development* pp. 8 and 14.

²² Prop. 1997/98:45 Part 2 p. 8.

²³ SOU 2002:14 pp. 139–140. Interestingly, already in the 1956 reform of the regulation on enforcement of water law rules on pollution measures, did the legal preparations include arguments that the then existing problems in water protection were rather due to the insufficient resources for monitoring and enforcement, than to shortcomings in the substantive contents of the legislation (see: NJA II 1956 pp. 212 and 214).

²⁴ Carlman, I., *The Rule of Sustainability and Planning Adaptivity* p. 163.

²⁵ SOU 2002:14 pp. 147–149; SOU 2002:50 p. 228.

²⁶ Carlman, I., *The Rule of Sustainability and Planning Adaptivity* p. 164; Gipperth, L., *Miljö-kvalitetsnormer* p. 26, and on operationalising environmental goals in Chapter 3; Nilsson, A., *Rättssäkerhet och miljöhänsyn* p. 22. On operationalisation of general goals and standards, see principally: Westerlund, S., *En hållbar rättsordning*, Chapters 4 and 5, and *Miljörättsliga grundfrågor 2.0*, Chapter 7.

through general and individual regulation. Enforcement operationalises environmental policy and law in the individual case, and translates them into individual duties for the actor. The enforcers provide authoritative communication on what the law demands of them. This can entail stating an individual duty to act a certain way, or to ensure a functional standard in his activity, or a wanted result in nature. This operationalising function is of different character and weight in different areas of enforcement. It is perhaps most evident in different kinds of permitting procedures.

The importance of enforcement is stated in international documents and in the preparatory works of the Swedish Environmental Code (1998:808) (MB²⁷), where administrative enforcement and permitting are described as vital concrete instruments to steer away from harmful activities and towards sustainability.²⁸ Regulation through sanctions is also intended to have a conduct-steering role, supporting and strengthening the environmental law system, and thus furthering the goal of sustainable development, as regulated purpose of the Environmental Code. The central function of effective enforcement is a feature of the environmental law literature.²⁹ It is even held that without effective enforcement of environmental law designed to secure sustainable development, attaining such development is highly improbable.³⁰ In this perspective, enforcement is a central topic.

1.2.3 Administrative Enforcement

There are different kinds of enforcement. Enforcement of environmental law takes place through criminal sanctions of different kinds, tort law instruments, and administrative enforcement. This thesis is focused on administrative enforcement. Administrative enforcement fundamentally involves the exercise of authority by the administration towards citizens, making them comply with the environmental demands of the law. I will focus on the supervision and control by the environmental authorities (henceforth referred to as “administrative enforcement”).

Administrative enforcement is an essential part of the environmental control system.³¹ In the Swedish terminology, the administrative enforcement concept (“tillsyn”) comprises both supervision and control, including deciding on sanctions and reporting suspected crime, and also affording soft steering, such as information and advice, and generally to further legal aims and

²⁷ In Swedish: “Miljöbalken”.

²⁸ Prop. 1997/98:45 Part 1 pp. 170–172, and. 491–493. For similar statements in the context of previous environmental legislation, see: Prop. 1987/88:85 p. 251.

²⁹ Christensen, J., *Rätt och kretslopp* pp. 87–89; and Gipperth, L., *Miljö kvalitetsnormer* p. 44.

³⁰ Westerlund, S., *En hållbar rättsordning* pp. 32 and 59.

³¹ Prop. 1997/98:45 Part 1 pp. 1–2, 171–172 and 491.

tasks (MB 26:1).³² The focus in this thesis is on authoritative administrative action (the exercise of administrative power)³³ even though the administrative enforcement of environmental law does also – to a considerable extent – rely on “soft” steering approaches.

Permitting procedures of different kinds are also an important part of the administrative enforcement work of the environmental authorities, but these procedures are not the focus of this thesis. The thesis is part of a research programme called Enforcement of Environmental Law in Europe (ENFORCE)³⁴ comprising projects on other aspects of enforcement, such as criminal enforcement and permitting. To some extent it will be necessary to consider the relationship between administrative and other manners of enforcement, and to put administrative enforcement in a relevant context.³⁵ The thesis is however concentrated on administrative enforcement.

1.2.4 European Law and Effective Enforcement

1.2.4.1 The Central Role of European Law

Enforcement of environmental law has, to a growing extent, a European law dimension.³⁶ EU law³⁷ contains extensive environmental regulation, and a concept of good administration, and includes a demand for effective en-

³² Prop. 1997/98:45 Part 1 pp. 493 and 495, and Part 2 pp. 266–267; Ds 1998:50 pp. 47–57; SOU 2004:37 p. 56; and SOU 2005:59 p. 207. Sometimes, guidance from higher level authorities (“tillsynsvägledning”) to the operative enforcement authorities has been described as “tillsyn”. I will refer to that as “enforcement guidance”. The concept “tillsyn” has been heavily debated and a more exact terminology has been suggested, distinguishing the use of administrative authority (“myndighetsutövning”) from the other tasks of the enforcement authorities. See: Ds 1998:50 pp. 57–58; SOU 1996:103 Part 1 pp. 108 and 542, and Part 2 pp. 295–296, suggesting a narrower concept defined in law; SOU 2002:14 pp. 141 and 151–155; and SOU 2004:100 suggesting a general statute for administrative enforcement (“tillsynslag”) with a narrower enforcement concept, see pp. 21 and 50–52. These suggestions have to this date not been realised.

³³ In Swedish terminology, authoritative exercise of administrative power is tied to the concept “myndighetsutövning”. For a thorough discussion of the concept, see: Marcusson, L., *Offentlig förvaltning utanför myndighetsområdet* Chapter 5.

³⁴ Further information about the ENFORCE programme can be found at: <http://www.naturvardsverket.se/sv/Forskning/Var-forskning/Forskning-om-lagar-och-andra-strymedel/Forskningsprogrammet-Enforce>.

³⁵ For the ENFORCE projects on licensing and criminal enforcement, see: Darpö, J., *Rätt tillstånd för miljön*; and Jönsson, S., *Miljöstraffrätt – ett sätt att genomdriva lagstiftningens mål?*.

³⁶ See: Schwarze, J., *European Administrative Law* Chapter 1. Note that I use the term European law as including EU law as well as other common international law in the region, especially that of the European Council. The central body of European law outside the EU is the European Convention on Human Rights (ECHR).

³⁷ I have chosen to use generally the current terminology when referring to institutions and the legal acts of the European Union, originally called the European Economic Community, and later the European Community.

forcement.³⁸ The field of environmental law is one of shared competence between the EU and the member states, but in fact the area is comprehensively regulated in EU law.³⁹ An introduction to the European law influence is therefore warranted, right here in the introduction to the topic of the thesis.

Today much of administrative enforcement of environmental law at the Member State level will involve application of EU law. There are large framework directives and regulations on, for example water,⁴⁰ waste,⁴¹ and chemicals.⁴² Moreover, the rules on air quality,⁴³ nature protection,⁴⁴ and industrial emissions control,⁴⁵ have pushed forward the development of environmental law in all the studied legal orders. EU law will also implement international environmental law conventions, for example in the emissions trading scheme,⁴⁶ and the Aarhus convention.⁴⁷ Apart from substantive demands on water quality, species protection, etc., EU law will prescribe different procedural requirements, for example in the context of permitting,⁴⁸ EIA,⁴⁹ and access to justice, and to environmental information.⁵⁰ These must be fulfilled at the national level, in the public control of environmental activities, generally and in individual cases. There is therefore a basic EU law demand for enforcement.

1.2.4.2 Effective Implementation of European Environmental Law

The Member State must ensure implementation and enforcement of the discussed EU rules. Failure to enforce domestic law quite often entails, at the

³⁸ Reichel, J., *EU:s påverkan på medlemsstaternas förvaltningsprocess* pp. 760–761.

³⁹ Compare: Jans, J., and Scott, J., *The Convention on the Future of Europe: An Environmental Perspective* pp. 327–328.

⁴⁰ Directive 2000/60/EC establishing a framework for the Community action in the field of water policy.

⁴¹ Directive 1991/156/EEC on waste.

⁴² Regulation (EC) 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

⁴³ Directive 96/62/EC on ambient air quality assessment and management.

⁴⁴ Directive 79/409/EEC on the conservation of wild birds; Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

⁴⁵ Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) (Recast). (Note also the earlier IPPC directive 2008/1(EC).

⁴⁶ Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, as amended by Directive 2004/101/EC.

⁴⁷ Directive 2003/4/EC on public access to environmental information. The directive replaced the former environmental information directive (90/313/EEC), partly with the aim of implementing the Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, UN Doc. ECE/CEP/43 (1998), 38 ILM 1999).

⁴⁸ Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) (Recast).

⁴⁹ Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11/EC, and Directive 2003/35/EC. See also: Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.

⁵⁰ Directive 2003/4/EC on public access to environmental information.

same time, a failure to enforce EU law. The enforcer must therefore always consider European law, as regards the content of substantial environmental standards, and the administrative and judicial procedure.⁵¹ Effective implementation⁵² of EU law by the Member States is elementary and essential to the functioning of the EU, and stated in Art. 197 of the Treaty on the Functioning of the European Union (TFEU) as a matter of common interest that the EU may take measures to support, and to regulate.

Art. 4 of the Treaty of the European Union (TEU) demands sincere cooperation – or loyalty – by the Member states of the EU. Member States, and their authorities, shall take any appropriate measures to ensure the implementation and effect of EU law. They are obligated to implement EU law, through their legislation and their administrative actions.⁵³ The Court of Justice of the European Union (ECJ) has also held that the Member States must enforce EU law. The actual meaning and consequence of this duty of effective enforcement is complex and still under development. The fundamental point of departure is that the Member State has procedural autonomy,⁵⁴ but the principle of sincere cooperation entails some limitations. Ultimately, the implementation of EU law must be effective. Non-enforcement or under-enforcement of breaches of law can entail a failure to fulfil a Member State's obligations⁵⁵ under EU law.⁵⁶ It should also be noted, in this context, that a person with access to justice⁵⁷ may challenge the administrative authority's under-implementation and under-enforcement of EU law with direct effect.⁵⁸

⁵¹ These demands of EU law were noted already in: Basse, E.M., *Miljøansvarlighed og reguleringstraditioner – en introduktion* p. 28.

⁵² I use the term “implementation” widely, expressing the putting into effect of something within the legal order – a policy, legal aim, or an international law regulation. Functionally, this means a fulfillment of a public task. In the EU law discourse, the term has a more specific meaning. There, the different steps of putting EU law and policy into effect are described as “implementation”, “application”, and “enforcement”, where implementation has to do with putting into effect EU law through national legislative measures.

⁵³ Wennerås, P., *EC environmental law in the national legal order* pp. 68–71.

⁵⁴ Craig, P., de Búrca, G., *EU Law* pp. 306–307; and Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*. See, also SOU 2010:29 p. 66, referring to the case law of the ECJ.

⁵⁵ In Swedish: “fördragsbrott”.

⁵⁶ Cases C-68/88 *Commission v. Greece*, and C-265/95 *Commission v. France*; Craig, P., de Búrca, G., *EU Law* p. 447.

⁵⁷ In environmental law access to justice is regulated in the Aarhus Convention, to which the EU and all Member States but one are parties, including the countries compared in this study.

⁵⁸ Direct effect is developed by the Court of Justice, starting from case 26/62 *Van Gend en Loos*. On direct effect in environmental law cases see for example cases C-236/92 *Comitato di Coordinamento per la Difesa della Cava v. Regione Lombardia*, C-431/92 *Commission v. Germany*, C-72/95 *Kraaijveld* (on the duty to require environmental impact assessments in permitting procedures for certain operations), C-435/97 *WWF v. Autonome Provinz Bozen*, C-201/02 *Wells v. Secretary of State for Transport, Local Government and the Regions*, C-127/02 *Waddenzee* (on nature conservancy interests), and C-237/07 *Janacek v. Freistaat Bayern* (concerning the authority's duty to decide on a specified plan). On the direct effect and precedence of EU law also for decision-making by the administrative authorities. See, cases C-103/88 *Fratelli Costanzo v. Comune di Milano* (on the duty for domestic administra-

Potentially, failure to enforce EU environmental law could also give rise to liability to pay damages as a matter of European law.⁵⁹

EU environmental law sometimes contains provisions demanding enforcement, either stating generally that Member States take measures to ensure adherence to the relevant rules, or making more explicit provisions on enforcement matters.⁶⁰ These provisions indicate that the Member State must take enforcement action in cases of infringement of the provisions. In fact, the mere fact that a Member State has not achieved a regulated environmental quality may indicate poor implementation. Defences that all practicable steps have been taken, etc., cannot undo this breach of EU law.⁶¹ Additionally, a series of non-enforcement situations can be seen as systematic non-enforcement by the ECJ, thus proving a systematic failure to fulfil the obligations of the Member State authorities under EU law.⁶² This suggests that the EU may take action against individual infringements of EU law, and also demand more fundamental and structural changes in the enforcement policies of the administrative authorities.⁶³

To some extent sanctions for breaches of EU law are required.⁶⁴ These must be effective, proportionate and dissuasive, and enforced similarly to breaches of analogous national legislation.⁶⁵

tive body to give precedence to directly effective EU law); C-198/01 *CIF v. Autorità Garante della Concorrenza e del Mercato* (stating such precedence of a wider range of EU law). See: Wennerås, P., *EC environmental law in the national legal order* pp. 42–44, noting the case law history of EU environmental law with direct effect – typically fixed uniform emissions standards, but also the more recent trend of legislating more dynamic and flexible norms such as “best techniques”, which has negative impacts on the enforceability of EU law.

⁵⁹ Cases C-6/90 *Franco v. Italy*; C-46/93 and C 48/93 *Brasseri du Pêcheur v. Germany and The Queen v. Secretary of State for Transport, ex p. Factortame Ltd*; and C-178–179/94 and C-188–190/94 *Dillenkofer v. Germany*. It should, however, be noted that the environmental directives are commonly aimed at protecting the public in general. It could be problematic to argue that they confer rights to individuals in a tort case; see: de Graaf, K.J., and Jans, J.H., *Liability of Public Authorities in Cases of Non-Enforcement of Environmental Standards* pp. 396–397.

⁶⁰ Examples include: Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control, Art. 3 and 5 (now recast in Directive 2010/75/EU (IED)); Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators and repealing Directive 91/57/EEC, Art. 6(2), as amended by Directive 2008/103/EC. See, also: Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (see, also, para. 53 of the preamble).

⁶¹ C-42/89 *Commission v. Belgium*, and C-56/90 *Commission v. UK*. See, also: de Graaf, K.J., and Jans, J.H., *Liability of Public Authorities in Cases of Non-Enforcement of Environmental Standards* p. 383.

⁶² See: Case C-494/01 *Commission v. Ireland*; and Craig, P., de Burca, G., *EU Law* pp. 447–448.

⁶³ De Graaf, K.J., and Jans, J.H., *Liability of Public Authorities in Cases of Non-Enforcement of Environmental Standards* p. 385.

⁶⁴ SOU 2004:37 pp. 19 and 53–54. To some extent the community may have a competence to legislate on enforcement measures and sanctions (see: ECJ case: C-186/98, *Nunes and de Matos*). The area of criminal law is developing more and more under EU law, thus shifting

1.2.4.3 Networking for Effective Implementation and Enforcement

The importance of effective enforcement is indicated also by the organisation of national European environment authorities into a network – IMPEL⁶⁶. The mission of IMPEL is protection of the environment through promoting effective implementation and enforcement of EU environmental law. The participating administrative authorities exchange information and experiences, and work for better consistency of approach in interpreting, implementing, and enforcing EU environmental law.⁶⁷ More or less connected to this network, there is some soft law on effective implementation and enforcement of environmental law. Central such documents are Recommendation 2001/331/EC providing for minimum criteria for environmental inspections (RMCEI), adopted by the European Parliament and the Council in 2001, and IMPEL guidance on how to live up to the criteria of the RMCEI.⁶⁸

1.2.4.4 Concluding Remarks on the European Law Demands for Effective Enforcement

In summary, national administrative enforcement authorities have to apply and enforce EU law – not only the implemented norms in domestic legislation, but also directly. The enforcers are involved in cooperative work with their European colleagues, and have agreed mutual standards on effective enforcement. Even though the Member State has procedural autonomy, EU law makes substantive and qualitative demands as regards enforcement, in order to work actively to ensure effective implementation of EU law. The idea is that legal rights and duties are futile without effective enforcement of these rules, either in domestic law or within EU law. In the words of the Court of Justice:⁶⁹

The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals

the power of punishment of the Member States' citizen to the Union (see for example on this debate: Michiels, F.C.M.A., *Houdbaar handhavingsrecht* pp. 13–15; and Blomberg, A., and Michiels, J., *Between Enforcement and Tolerance in Dutch Law* p. 185).

⁶⁵ Cases 68/88, *Commission v. Greece*; and C-186/98 *Nunes and de Matos*.

⁶⁶ European Union Network for the Implementation and Enforcement of Environmental Law. For more information go to <http://impel.eu/>.

⁶⁷ The European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) Statute Art. 3.

⁶⁸ *General Principles* (Nov. 1997), *Frequency of Inspections* (Dec. 1998), *Operator Self-Monitoring* (Dec. 1998), and *Planning and Reporting of Inspections* (June. 1999), and later on published guidance reports such as: *Management Reference Book for Environmental Inspectorates* (Nov. 2003), *Best Practices concerning Training and Qualification for Environmental Inspectorates* (March 2003), *Benchmarking on Quality Parameters for Environmental Inspectorates* (June 2006), etc.

⁶⁹ Case C-265/95 *Commission v. France* Section 31. In this case the police and other enforcing authorities were argued to have under-enforced violent protests relating to imported fruit and vegetables, thus affecting negatively the free movement of goods.

on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act.

It should be noted that effective enforcement is also to some extent demanded, and monitored, in the context of fundamental human rights – centrally the European Convention on Human Rights.⁷⁰ Bodies like the European Court of Human Rights and the European Committee of Social Rights will assess whether or not the relevant government has taken the requisite enforcement action in order to achieve a demanded environmental standard. While EU law contains clear and specific regulations of such standards, these other European bodies will use more generally formulated norms tied to health and environment, which are then realised through national and international environmental law. The state must not only refrain from infringements of the rights of their citizen themselves, but also protect the exercise of these rights against private actors. The state is on the other hand allowed a wide margin of appreciation in environmental matters.⁷¹

1.2.5 Researching Environmental Enforcement Law

The above-discussed importance of enforcement provides incentives for closer research within the field of environmental administrative law. This field has started to be explored within the Nordic environmental law discourse.⁷² In the Swedish discourse there has been some discussion about the difficulties of enforcers to live up to their tasks under environmental law.⁷³ There is also some valuable study of legal certainty and environmental considerations in the context of the Parliamentary ombudsman's supervision over the administration.⁷⁴ This thesis continues this work, and focuses on the administrative law area of environmental law – the actual enforcement pro-

⁷⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 005.

⁷¹ Kiss, A., and Shelton, D., *International Environmental Law* p. 661; Shelton, D., *Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration* (UNEP draft paper) pp. 11–18. See, for examples: *Kyrtatos v. Greece*, Judgment of 22 May 2003; *Fadeyeva v. Russia*, Judgment of 9 June 2005; and *Marangopoulous Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, Decision on the Merits, 6 December 2006, of the European Committee of Social Rights. See, also: Section 2.3.1.4.

⁷² See: Møller-Sørensen, A., *Administrative Håndhævelse*; Wennerås, P., *The Enforcement of EC Environmental Law*. Note also the university course book: Bugge, H.C., *Lærebok i miljøforvaltningsrett*.

⁷³ Examples include: Spangenberg, C.G., *Matteus, Aristoteles, Ibsen, Westerlund och de besvärliga miljöinspektörerna*; Björkman, U., *Miljö och polis – en historia i flera delar*; Hansson, H., *Miljötillsyn i praktiken – fallet ScanDust*; and Christensen, J., *Goda förutsättningar för tillsyn*. There is also a handbook on administrative enforcement published after the entering into force of the Environmental Code; Setterlid, R., *Offentlig tillsyn enligt miljöbalken*.

⁷⁴ Nilsson, A., *Rättssäkerhet och miljöhänsyn, and Något om JO:s syn på miljöskydd och rättssäkerhet*.

cedure. This builds on the research tradition of environmental law but brings that tradition to the law on administrative procedure. This approach warrants some comment on the role and task of this thesis in the context of environmental law research.

As suggested above, environmental law research focuses principally on the task of reformulating the law to harmonise with the laws of nature, and to best further sustainable development. The idea is that the laws of nature should be decisive in the substantive regulations, stating what is allowed and what is not. The research methodology generally rests on two fundamental points: Firstly that ecological sustainability sets limits for the human actions and development that may be accepted in a legal order; and secondly that the Rechtsstaat theory, fundamentally the principle of legality, delimits juridical steering.⁷⁵ These features have served as the point of departure for constructive research in order to bring about legal regulation that ensures a certain substantive legal position; that the unsustainable behaviour is prohibited.⁷⁶ The Rechtsstaat principles entail that only then may relevant juridical environmental steering be carried out. Such research deals with for example operationalisation of goals and environmental quality standards and limits,⁷⁷ adaptivity in planning instruments,⁷⁸ eco-cycle thinking,⁷⁹ and the development of criteria for biological diversity.⁸⁰

This thesis is focused on the integration of environmental law theory and principles into the procedural regulations for administrative enforcement. The idea is that the Rechtsstaat principles necessitating clear and relevant substantive environmental law also have implications on the procedural aspects of environmental law steering and control. This fundamental restriction of the state's exercise of power restricts also its competence to interfere with the actor's private business; when they have competence, how it should be exercised and to what extent. This fundamental structure of the legal order may be applied, by way of presumptions of legal interpretation, to the advantage of the individual citizen. Environmental law research will point to the need for appropriate statutory basis for environmental steering. The public control authority must however also show that they have a legal basis for what they do, and any ambiguities or uncertainties will be resolved so as to

⁷⁵ Carlman, I., *Do not Miss the Forest for all the Trees* pp. 69–78, *The Rule of Sustainability and Planning Adaptivity* pp. 163–164; Westerlund, S., *Lagstiftningstekniska mikrotesser* 1–7, p. 3; *Miljörättsliga grundfrågor 2.0* pp. 46–49, and *Rätt och riktig vetenskap* pp. 3 and 18. See, also: Section 1.5.2.

⁷⁶ See: Westerlund, S., *En hållbar rättsordning* pp. 18–19, and *Miljörättsliga grundfrågor 2.0* Chapter 6 (note the statement on pp. 93–94), with a following extensive analysis of different kinds of substantive legal regulations and operationalisation of the environmental goals. In this discourse, the Swedish term for the substantive legal position is "materiellt rättsläge".

⁷⁷ Gipperth, L., *Miljö kvalitetsnormer*.

⁷⁸ Carlman, I., *Adaptiv miljöplanering nästa*.

⁷⁹ Christensen, J., *Rätt och kretslopp*.

⁸⁰ Christiernsson, A., *Skyddet av biologisk mångfald vid jakt*.

benefit the individual. The individual is given the benefit of a doubt, which may work to the advantage of so called free-riders.⁸¹

In the preparation of the Environmental Code, it was pointed out that despite the central role of juridical environmental control; this is not the only instrument for reaching ecological sustainability. Juridical steering may to some extent be limited in its potential. Environmental goals can be difficult to fit into a legal framework and to serve as grounds for regulating the actor's behaviour in an individual case, with breaches of the regulations being sanctioned.⁸² Environmental policy involves ideas of collective rights and responsibilities, which are hard to individualise to specific addressees. It addresses problems that stretch over time and space, as trans-boundary pollution and intergenerational resource interests, which challenge traditional concepts of the legal order. The legal tradition with its principles and theories thus delimits the legal argumentation, and slows down the settlement of new legal perspectives.⁸³ Therefore environmental goals are hard to implement in legal regulations and even harder to enforce. This could lead us to question the role and potential of environmental law, but also, oppositely, to question the principles and traditions of law, and to reform these, as the Bruntland commission call for action suggests.

The task of this thesis, in the context of environmental law research, is thus to investigate the dynamics of juridical steering in the environmental challenge of administrative procedure. The fundamental demand for sustainability, in conjunction with the Rechtsstaat principles, necessitates critical and indeed constructive reformulation of procedural regulation. At the same time the Rechtsstaat principles will delimit the scope of such changes.

1.2.6 New Developments within Administrative Enforcement

There are some new developments that have brought the dynamics of the research topic to attention. As indicated above, administrative enforcement is instrumental in ensuring observance of environmental law, and thus also essential for reaching the environmental goals set up in the Environmental Code. This role is well rooted in the legal tradition, but it is changing with the development of environmental law.⁸⁴ The Government held in the preparatory works to the Environmental Code that while the environmental efforts have before been based on the public authorities stating legal demands that the actors are expected to follow, their steering and authoritative

⁸¹ Carlman, I., *Do not Miss the Forest for all the Trees* pp. 72–74; and Westerlund, S., *Rätt och riktig vetenskap* p. 16.

⁸² Prop. 1997/98:45 Part 1 p. 166.

⁸³ Herler, C., *Konkurs och miljöansvar* p. 510.

⁸⁴ Prop. 1997/98:45 Part 1 pp. 2–3, 169–172 and 493. Similarly the central role of enforcement is expressed in the context of reviewing the system for environmental sanctions specifically, in SOU 2004:37 pp. 19 and 53.

control should now be focused on the situations where the decentralised environmental management fails.⁸⁵ It is further declared that the environmental principles of the Code should be permeated in the enforcement work too, and they stress the focus on actor responsibilities in the supervision and control of the own activities.⁸⁶

The actor driven supervision and control system means that the administrative enforcement authorities have a new role of enforcing the actors' self-control.⁸⁷ This thesis investigates this new role. The developments of environmental law and of the role of the enforcer pose some legal challenges. These developments and challenges will be studied in comparison with the English and Dutch enforcement systems. The question is whether this establishing environmental law culture of public steering of actor driven environmental control is paralleled in these systems. On the surface it seems this development has been more pronounced in the Swedish system.

The policy movement for "Better Regulation" should also be noted in this context. Better Regulation is generally a move to facilitate better preconditions for business and economic development, entailing cutting administrative burdens considerably. The measures involve simplifying legislation, and administrative procedures, but also eliminating perceived unnecessary regulations, and paperwork.⁸⁸ This is stated not to entail lower regulatory ambitions, but only better, more efficient regulation. Nevertheless, Better Regulation is often realised through deregulation measures. The main reforms in the environmental law system entail more limited authorisation procedures and less reporting duties and that fewer and fewer activities need mandatory permits to operate.⁸⁹ Consequently, more and more responsibility for controlling and enforcing the implementation of environmental law and the legal aim of sustainable development is placed upon the supervisory authorities, through their exercise of administrative enforcement through enforcement orders, etc. This means that for Better Regulation not to entail lower environmental policy ambitions, the administrative enforcement work must be very effective. This accentuates the crucial importance of their task. But this regulatory trend may also change the general character of the enforcement work. It may mean redistribution of information duties within environmental

⁸⁵ Prop. 1997/98:45 Part 1 pp. 160–161. See, also Ds 1998:22 p. 68.

⁸⁶ Prop. 1997/98:45 Part 1 pp. 170–171.

⁸⁷ In Swedish: "egenkontroll". I have chosen not to translate this with the term "self supervision" as that implies a narrower scope of the duty. Self-control does not only entail monitoring and reporting, but also taking measures such as planning, improving, changing, investigating, etc., the relevant activity and the environmental effects in a wide sense.

⁸⁸ For further information on Better Regulations, see: http://ec.europa.eu/governance/better_regulation/index_en.htm (European Commission); <http://www.berr.gov.uk/bre> (British Government); <http://www.sweden.gov.se/sb/d/5720> (Swedish government); <http://www.naturvardsverket.se/sv/Nedre-meny/Yttranden/Yttranden-2007/Regeringsuppdrag-om-regelforenkling/> (Swedish Environmental Protection Agency).

⁸⁹ The Swedish permitting obligation was subject to reform in 2008 (SFS 2008:690). See, also: Darpö, J., *Rätt tillstånd för miljön* p. 56, and further down under Section 3.3.2.5.

control, as the information provided by the applicant for a permit must now be gathered in some way by the administrative enforcer. Administrative enforcement and the distribution of investigatory duties therein, is therefore a very topical subject.

1.3 Aim and Tasks

Having described the central role and function of enforcement, and the significance of research on administrative enforcement in the environmental context, the aims and tasks of this thesis will now be presented in summary.

Environmental law research has pointed out that new regulatory methods motivated by environmental circumstances do not always fit very well with existing legal systems. It is argued that the environmental principles that serve as the basis for these new regulatory measures have problems achieving the essential legal status. The norms are therefore hard to implement and to enforce. Obstacles to achieving sustainability arise.⁹⁰ This thesis is an investigation of the integration of environmental law theory and principles in the enforcement procedure.

The general aim of the thesis is to study how the principles of environmental law challenge the existing structures and principles of administrative enforcement law. The study is motivated by the Bruntland report's call for reform of the laws of man so as to harmonise with the laws of nature, and for the central function and importance of administrative enforcement to further sustainability. A point of departure is the argument that obstacles to effective enforcement of environmental law arise in the encounter with the fundamental administrative law safeguards of legal certainty. The study of this encounter is therefore the general idea of this thesis. Swedish case law on the subject illustrates the friction that appears in the encounter.⁹¹

The study is focused on the environmental actor's responsibilities for information – knowledge, investigation and proof – specifically in the enforcement context. In this context environmental actor responsibilities encounter regulations governing the administrative decision-making procedure; the enforcers' responsibilities for the procedure and for the decision-making materials. These regulations seek to safeguard legal certainty. The actor responsibilities for information relate to (and implement) the environmental

⁹⁰ Basse, E.M., *Miljøansvarlighed og reguleringstraditioner – en introduktion* pp. 15–16; Gipperth, L., *Miljøkvalitetsnormer* p. 29; Herler, C., *Konkurs och miljösvar* pp. 510–511; and Westerlund, S., *En hållbar rättsordning* p. 32. Compare the discussion in Westerlund, S., *Proportionalitetsprincipen – verklighet, missförstånd eller nydaning?*

⁹¹ Such friction in the encounter of legal disciplines, and their general principles can be found in many different legal areas. See for examples on analysis of such situations: Herler, C., *Konkurs och miljösvar – Går kolliderande allmänna läror att sammanjämka?*; Tuori, K., *En sista tillflyktsort för polisens allmänna befogenhet?*; Bengtsson, B., *Miljörätt och civilrätt*.

law principles of precaution, prevention and polluter pays. These principles motivate the actor's responsibility to make sure that his or her activities are in adherence with environmental law, and fundamentally with sustainability. Failure so to do should mean that the activity cannot be carried out. The actor stands the risk of the lack of decision-making materials. In this context, the above presented argument of administrative obstacles to effective enforcement entails that the environmental actor responsibilities will not be able to be implemented and enforced because of the safeguards of legal certainty. This can be described as ineffective enforcement and could suggest poor implementation of environmental law and policy. That, in turn could put into question the legitimacy of the enforcement authorities.

The more specific aims of the thesis are therefore

- to investigate the integration of environmental law theory and principles in the regulatory procedure, especially in enforcement; in Swedish Environmental law in comparison with two other legal orders – the Netherlands and the United Kingdom (England and Wales);
- to investigate administrative law structures that might delimit such integration; and
- to discuss some appropriate reinterpretation or reconstruction of such limitations.

I will first describe and compare the environmental enforcement orders of the studied legal orders, and then make a more detailed investigation and critical analysis of the implementation of the actor information duties. I have chosen two different topics of enforcement law in this study:

- Firstly, responsibilities for the decision-making materials, including actor responsibilities for information, and their enforcement, are investigated in Chapter 7.
- Secondly, demands on the formulation of enforcement orders are analysed in Chapter 8.

The central question is whether, and how much, procedural responsibility and co-operation can be demanded of the actor in the authoritative enforcement situation. I will argue that the environmental law context can in some situations warrant a new understanding of established administrative law structures. But I will also point to some situations where the enforcing actor responsibility and self-control may legitimately be considered problematic, primarily from a perspective of legal certainty.

1.4 Delimitations

The limits of the scope of this thesis can be seen from the presentation of aims, tasks, method and materials, in this chapter. It is normally more interesting to discuss what the investigation comprises, than what it does not. For the sake of clarity, however, such delimitations are summarised here.

The topic of the thesis is administrative enforcement, by which I mean the authoritative supervision and control by the administrative enforcement authorities. From this should be distinguished criminal enforcement and also the administrative enforcement carried out through different kinds of permitting procedures. The distinguished topics are analysed in other parts of the research programme ENFORCE. The focus and delimitation of this thesis should be seen in this perspective.⁹²

From the above stated aims it can be concluded that I have focused my more detailed analysis on two different topics relating to actor responsibilities for information.⁹³ There are many other topical enforcement law issues that could be studied closely, but I have made this choice in order to make room for a more detailed study. This also means a conscious choice to go from the more general discussion of environmental theory and principle, to a study of its actual expression, application and meaning in enforcement.

This thesis contains a study of the regulation of procedural responsibilities in the context of environmental law enforcement. This means that substantive environmental standards and their formulation to best further sustainability are not in focus. The substantive and procedural regulations can never be studied in complete isolation from each other. Nevertheless, the study approach is not focused on *what* is demanded but rather *how*. These procedural rules and structures involve aspects that should be challenged in the environmental law context.⁹⁴

The actor's self-control duties will also be studied. These are their duties to continuously monitor, investigate, document, and improve the environmental control of the operation, independently from the involvement of the enforcement authorities. The study of the actor's self-control is limited to the demands regulated generally in environmental law. I will not describe in detail all the specific reporting duties of different sectors and different types of installations. Furthermore, voluntary schemes such as environmental revision, etc., are outside the scope of this study.⁹⁵

The field of environmental law is very wide and covers many different kinds of activities and environmental problems. The regulation of these areas

⁹² See: Section 1.2.3.

⁹³ See: Section 1.3.

⁹⁴ See: Section 1.2.5

⁹⁵ The EMAS and ISO 14000-systems for environmental revision and management are often argued as an important part of self-control, but they have different character and motives, and cannot be seen as interchangeable. See: Section 3.4.3, and footnote 614.

may be very different. The study is therefore generally limited to the regulation of polluting installations, and of smaller environmental nuisance cases, typically local problems with noise and smoke disturbing neighbours. These areas of environmental law can be described as emission control, and as sanitary law regulations of the traditional environmental law of the early industrialised era. In the comparative study, some planning law is also involved. Nature conservation control is not studied at all, and specific water law will not be described in any detail. These areas of law are generally quite specific and separate areas of environmental law, tied very much to the history and tradition of the specific country, with special ties to ownership of land, etc. The specific area of contaminated land is also left outside the study, due to its special features of retrospective responsibilities and several responsible actors. Because of the wide scope of the investigation I ended the search for new materials by May 2010. Some more recent legislative reforms have nonetheless been included. I have also made sure that there have been no changes in the relevant case law or administrative practice.

The thesis analysis is made with the perspective of the Swedish legal system, viewed within the relevant international and comparative context. This is an important delimitating factor. The problems studied are formulated from a standpoint of Swedish law, and the analysis is made with focus on the same. This limits the analysis of the foreign legal orders.⁹⁶

It should also be noted that while I believe that many of the problematic issues and the arguments, as well as an external methodological approach, are not unique for the enforcement of environmental law, the study is limited to this area. The reader who is knowledgeable in enforcement of food safety, animal welfare, financial law or other areas of law characterised by their important public interests, may very well recognise the problems discussed. These areas of law commonly regulate extensive actor responsibilities for self-control, etc., and the enforcement of the public interests will often compete with private interests, often business interests. Nevertheless, despite my awareness of such common ground in other legal sectors, this thesis is a study of environmental law and it is limited to this particular area and its specific character. Hopefully it may lead to a further debate in communication with other areas of law.

⁹⁶ See: Section 1.5.6.

1.5 Methodology and Materials

1.5.1 Introduction

This work is based on a legal dogmatic approach. It is however also based in environmental law, and the understanding of environmental law as instrumental in reaching goals in the factual natural environment. It is, if you will, an internal critical legal study in an external non-legal context. My point of departure and the fuel for this study is the furthering of sustainable development, and the call for challenges to the existing legal structures and principles. This is nevertheless done with basis on the legal sources, and the legal discourse context which establishes and protects the integrity of the legal system.⁹⁷ This approach might to some extent be distinguished from an environmental methodological approach of taking an external critical and constructive approach, using environmental facts to analyse, criticise and develop the legal system.⁹⁸ It is, however, a topical approach in furthering the development of environmental law as an effective instrument for steering towards environmental goals. This approach develops environmental law research based on the points of sustainability and legality. While environmental law researchers will sometimes find legal dogmatic research insufficient for their studies,⁹⁹ I believe that such research plays an important role in the present study. This belief relies on a perception of legal dogmatic research theory as comprehensive and generous. It has the same core as other legal practices, but the different aims and tasks of research widen the scope of legal dogmatic research, and provide support for critical reflection.¹⁰⁰

1.5.2 Environmental Law Methodology

The development of environmental law research, and its establishment as an independent area of law and of legal research, has been described as moving from an internal and more restricted analysis of valid law and the appropriate

⁹⁷ Compare: Westerlund, S., *Rätt och riktig vetenskap* p. 17.

⁹⁸ Compare: Westerlund, S., *En hållbar rättsordning* pp. 167–168; *Rätt och riktig vetenskap*; and Michanek, G., *Utvecklingen av miljörätten i Sverige* p. 25.

⁹⁹ See, for examples: Gipperth, L., *Miljö kvalitetsnormer* p. 15; Westerlund, S., *Miljörättsliga grundfrågor 2.0* pp. 31–32, and 370, *Miljörättsvetenskap – med nödvändighet interaktiv* p. 198, and *Rätt och riktig vetenskap* p. 20.

¹⁰⁰ Graver, H.P., *Hva er rettsvitenskap?* pp. 564 and 566. On the concept of legal dogmatic research, see, also: Graver, H.P., *Vanlig juridisk metode? Om rettsdogmatikken som juridisk sjanger*; Lavin, R., *Är den förvaltningsrättsliga forskningen rättsdogmatisk?*, and the following debate in: Peczenik, A., *Om den förvaltningsrättsliga forskningen och rättsdogmatiken*, and Lavin, R., *Om förvaltningsrättslig forskning; en replik*, and Peczenik, A., *Vad är rätt?* pp. 312–316. See, also: Jareborg, N., *Rättsdogmatik som vetenskap* p. 4; Olsen, L., *Rättsvetenskapliga perspektiv* p. 111; Sandgren, C., *Vad är rättsvetenskap?*; Tuori, K., *Har förvaltningsrätten en framtid?* p. 553, and *Från ideologikritik till kritisk positivism* p. 17.

interpretation thereof, to more critical and systematic research focused on reaching environmental goals, and arguing for norms that better can assure, for example, a certain environmental quality.¹⁰¹ The latest and foremost research approach is that which is called “environmental law methodology”. While environmental researchers have long since before given great attention to environmental preconditions in their critical analysis, the environmental, natural scientific preconditions now form a core of legal research. Environmental law methodology will ideally start with an environmental problem, an unsustainable situation in the natural environment, outside the legal system, and go from there to an independent and constructive analysis of how the problem can best be treated within the legal system.¹⁰² A shift of paradigms is argued, going from an internal legal perspective of what the law can bear to an environmental perspective of what the natural resources can bear.¹⁰³ Crucially, inspired by the theory of sustainable development, the natural preconditions are decisive – not existing legal structures or principles. The research will often rest on the principles and goals of sustainable development as argued by the Bruntland Commission in *Our Common Future*, supported by relevant natural scientific circumstances.¹⁰⁴ This core doctrine is argued to have given environmental law its specific identity and position as a research subject. It becomes the fundamental function and purpose of environmental law.¹⁰⁵

Environmental law methodology generally presupposes a second fundamental point of consideration; the fundamental principles of the Rechtsstaat, demanding legal grounds for public control over the individual and his behaviour.¹⁰⁶ The combination of the compelling character of ecological pre-

¹⁰¹ Michanek, G., *Utvecklingen av miljöretten i Sverige* Section 2.2. See, also, on the development in, relation to this, of environmental law: Basse, E.M., *Miljöansvarighet og reguleringsstraditioner – en introduktion* pp. 9–38; Gipperth, L., *Miljö kvalitetsnormer* pp. 22–34, and Westerlund, S., *Miljörättslig utveckling. Tendenser 1960-talet och framåt*. For an earlier description (and prediction): Westerlund, S., *Miljörättsligt perspektiv* pp. 13–18.

¹⁰² Gipperth, L., *Miljö kvalitetsnormer* pp. 10–11; and Westerlund, S., *Rätt och riktig vetenskap* p. 14. See: Christensen, J., *Rätt och kretslopp* for an example of such a study. Swedish environmental law research comprises many examples of critical analysis of the ability of the legal order to meet a certain environmental problem. See, for example: Darpö, J., *Eftertanke och förutseende*; Michanek, G., *Energirätt*; and Zetterberg, C., *Miljörättslig kontroll av genetik*, etc.

¹⁰³ Westerlund, S., *En hållbar rättsordning* p. 27, and *Miljörättsvetenskap – med nödvändighet interaktiv* p. 181.

¹⁰⁴ See, for example: Christensen, J., *Rätt och kretslopp* pp. 43 and 45. On occasion it is even stated that the legal statements of sustainability in international documents or national legislation are not the basis for the research, but rather the situation in our environment which those legal texts relate to. See, for example: Gipperth, L., *Miljö kvalitetsnormer* p. 9.

¹⁰⁵ Michanek, G., *Utvecklingen av miljöretten i Sverige* p. 25.

¹⁰⁶ Carlman, I., *Do not Miss the Forest for all the Trees* pp. 69–78, *The Rule of Sustainability and Planning Adaptivity* pp. 163–164; Westerlund, S., *Lagstiftningstekniska mikrotelser* 1–7, p. 3, *Miljörättsliga grundfrågor 2.0* pp. 46–49 and p. 373, and *Rätt och riktig vetenskap* pp. 3 and 18. See, also: Decleris, M., *The law of sustainable development* pp. 8 and 14, etc., and above under Section 1.2.1 and 1.2.5.

conditions and the restrictions of the Rechtsstaat principles is a fundamental dynamic factor in the constructive environmental law methodology, arguing environmental challenges to the legal system. This thesis continues in that tradition, with an investigation of the implications of this combination on the procedural aspects of environmental law steering and control.

1.5.3 Legal Dogmatic Environmental Law

In environmental law research the laws of nature and the state of the environment are sometimes described as normative in the legal context.¹⁰⁷ I would nevertheless emphasise that the legal system is not essentially and primarily determined by external factors without connection to some authority based in the legal system.¹⁰⁸ This follows from the idea of law as positive,¹⁰⁹ and of the legal scientific community, and indeed the legal order, as constituted by the practitioners thereof.¹¹⁰ The subject of study is the law and the legal system. The legal system has an internal structure of validity and authority, like game rules, and arguing environmental facts outside these internal game rules will only amount to external criticism which does not in a direct way affect the law.¹¹¹ This criticism may be very valid and quite serious and acute, but it needs to be introduced into the legal discourse.¹¹² Such external factors are internalised through different expressions in national and international legal texts. Sustainable development, precaution, actor responsibilities, etc., are regulated in authoritative sources of law, and they are emphasised as guiding principles.

The subject that is investigated in this thesis is that of the position of the environmental law theory and principles within the law and the legal system. The law is primarily drawn from investigating and interpreting legal texts, centrally relying on the doctrine of legal sources.¹¹³ However, this is only the face of the law. The law also comprises a legal culture; a system of theory,

¹⁰⁷ See, for example: Christiensen, A., *Skyddet av biologisk mångfald vid jakt* pp. 12–13; Gipperth, L., *Miljökvalitetsnormer* p. 9; Westerlund, S., *Miljörättsliga grundfrågor 2.0* p. 374.

¹⁰⁸ Compare, however: Westerlund, S., *Rätt och riktig vetenskap* p. 11.

¹⁰⁹ Tuori, K., *Critical Legal Positivism* pp. 6, 23–24, and 28, and *Har förvaltningsrätten en framtid?* p. 558. Compare, also: Westerlund, S., *Rätt och riktig vetenskap* pp. 19 and 20.

¹¹⁰ Graver, H.P., *Hva er rettsvitenskap?* pp. 565–566; Sandgren, C., *Vad är rättsvetenskap?* p. 532; Tuori, K., *Critical Legal Positivism* pp. 147 and 161, and *Har förvaltningsrätten en framtid?* p. 553. Compare: Westerlund, S., for example in *En hållbar rättsordning* p. 8 and Chapter 2, etc, and in *Rätt och riktig vetenskap* p. 21.

¹¹¹ Tuori, K., *Critical Legal Positivism* pp. 165, 283, 293 and 307–308. See, also: Tuori, K., *Från ideologikritik till kritisk positivism* p. 10; Samuelsson, J., *Recenserandets villkor i det postrealistiska tillståndet* pp. 159–160 and 166–167. Further, on law as the study object and its relation to "reality", see: Jareborg, N., *Rättsdogmatik som vetenskap* pp. 8–9, in comparison with: Westerlund, S., *Miljörättsliga grundfrågor 2.0* pp. 366–370, and *Miljörättsvetenskap – med nödvändighet interaktiv* p. 195.

¹¹² Westerlund, S., *Rätt och riktig vetenskap* p. 11.

¹¹³ However not limited to the traditional most authoritative sources. See: Section 1.5.5.

practice and principles, created, recreated and upheld by the participants in the legal field; legal practitioners of different kinds.¹¹⁴ It seems on the face of the law that actor responsibilities are well based in the legal order, and should be prioritised. Nevertheless, some implementation and enforcement problems may arise when encountering traditional principles of administrative law – a more established legal cultural structure. These traditional principles have grown roots, further down in the subsurface legal culture.¹¹⁵ Based on such legal culture, or tradition, legal practice will therefore impose such fundamental limits to the application of environmental law.

It takes time for new legal thinking and changes in principles and fundamental perspectives to settle in a legal system – to grow roots in the legal culture which make for the game rules for legal practices. Once there, they will serve to justify, and to delimit the meaning and application of law.¹¹⁶ A more established and mature legal culture may hinder such settlement.¹¹⁷ Environmental law principles, such as the precautionary principle, and sustainable resource management, are starting to settle in the legal system, even though they are still not as established as the safeguards of legal certainty which have long roots into the legal core, the very deep structure of the Rechtsstaat idea and of fundamental human rights.¹¹⁸ Continued notice and discussion of the environmental law aspect of Rechtsstaat principles and procedures – within the legal practice – is essential for establishment of the environmental law culture. This thesis aims to contribute to this discussion.

I have thus chosen to analyse the environmental law perspective inside the legal system, and based on the legal sources. This is an internal critical research analysis; a practice that is fundamentally located at the surface of the law. The study materials, the legal texts and practices, are generally found here. These materials will be studied to try to see the expressions of the different legal cultures of administrative and environmental law.¹¹⁹ Swedish case law indicates friction in this encounter.¹²⁰ I will study how the different legal perspectives interact, and what happens where friction arises. The arguments there, on the dynamic surface, have the potential of furthering the establishment of environmental law principles in the legal system.

¹¹⁴ Sandgren, C., *Vad är rättsvetenskap?* p. 532; and Tuori, K., *Critical Legal Positivism* pp. 147, 161, etc. See: Tuori, K., *Från ideologikritik till kritisk positivism*, for a summarising commentary of critical legal positivism.

¹¹⁵ Tuori, K., *Critical Legal Positivism* p. 177, and *Från ideologikritik till kritisk positivism* p. 11.

¹¹⁶ Tuori, K., *Critical Legal Positivism* pp. 218 and 245.

¹¹⁷ Herler, C., *Konkurs och miljöansvar* p. 510.

¹¹⁸ Tuori, K., *Critical Legal Positivism* pp. 112–113 and 190 (referring to discussion on Habermas presented at pp. 85–86).

¹¹⁹ Tuori, K., *Critical Legal Positivism* p. 179.

¹²⁰ Further illustrated in Chapter 2.

1.5.4 Communicative Approach

The hypothesis is that there is friction between environmental law and administrative law perspectives.¹²¹ From an environmental law perspective, this may be regarded as an obstacle to reaching sustainable development in the enforcement of environmental law (as expressed in Section 1.3). I will conduct an analysis adopting an integrating, horizontally communicative approach.¹²² This means analysing the different perspectives of environmental law and administrative law, each in the light of the other, putting each in context and studying how the different perspectives interrelate. The analysis involves considering the aims, purposes, structures, etc., of both perspectives; weighing and combining them, and analysing the different functions, each in the context of the other. I believe that the environmental law context should influence the meaning and application of the administrative law regulations and principles.¹²³ The challenge is integrating in a system such general principles and traditions, often described as irreconcilable, without having to prioritise one before the other.¹²⁴ The environmental law methodology involves the legal task of seeking to solve environmental problems.¹²⁵ This echoes the call for challenging the existing laws of man in order to bring them into harmony with the laws of nature. The determining circumstance of ecological sustainability can thus be argued to mean that any legal norms that entail obstacles, or contra-productiveness, in achieving such goals, must be changed. This view is supplemented with a perspective of fundamental Rechtsstaat principles.¹²⁶ Departing from my perception of the legal system, and the internal critical approach that I have chosen, it is important to show understanding of, and respect for, the legal culture, and the limits thereof. The communicative horizontal perspective is therefore more relevant and in my view has more potential of success.

¹²¹ Such frictional encounters can be noted and analysed in many different legal areas, connecting to environmental law and other areas, see: Herler, C., *Konkurs och miljöansvar*; Tuori, K., *En sista tillflyktsort för polisens allmänna befogenhet?* p. 492.

¹²² Herler, C., *Konkurs och miljöansvar* p. 505.

¹²³ Compare: Herler, C., *Konkurs och miljöansvar* p. 507, Kuusiniemi, K., *Biodiversiteetin suojelu ja oikeusjärjestyksen ristiriidat* pp. 233–235; and Tuori, K., *En sista tillflyktsort för polisens allmänna befogenhet?* p. 492.

¹²⁴ Compare: Marcusson, L., *Principer inom den offentliga rätten* p. 10; Westerlund *En hållbar rättsordning* pp. 94–96; and Herler, C., *Konkurs och miljöansvar* p. 514.

¹²⁵ Christensen, J., *Rätt och kretslopp* p. 35; Westerlund, S., *Miljörättsvetenskap – med nödvändighet interaktiv* p. 181.

¹²⁶ Note in this context: Westerlund, S., *Miljörättsliga grundfrågor 2.0* p. 373, stating that the Rechtsstaat principles should be safeguarded, and when necessary developed, but not invalidated, and discussing what this means for environmental law development.

1.5.5 Sources of Law, and More

This thesis is based on a legal dogmatic approach. Its investigation and analysis is guided by a traditional doctrine of legal sources. Its aims involve seeing law in the context of the encountering legal cultures. The legal dogmatic basis in this thesis is thus enriched by a generous view of the scope of studied issues and sources of law. The chosen scope and the methodological perspective warrant some comments on the studied materials.

In this thesis valid law is presented, and critically analysed, based on the traditionally authoritative sources of law; legislation, preparatory works, case law and to some extent literature, and other relevant materials. The position of valid and relevant law is however to be determined in the context of the legal culture, comprising traditional principles, theories, and structures. Knowledge about such often intangible cultural factors is generally drawn from their implicit and explicit expression in the authoritative legal sources.¹²⁷ The analysis is therefore to some extent characterised by an attempt to see what lies behind the bare statements in the legal texts. Materials reflecting administrative practice, as well as cases and decisions from the different public bodies, are useful in this analysis. With this task of analysing such implicitly stated matters, in a wide scope of sources, follows some challenges, which warrant some comment here.

This is a study of the friction that appears between environmental law actor responsibilities and administrative law fundamentals, in an enforcement case. A challenge is that such friction is often not explicitly adverted to in the traditionally most authoritative sources. There is often a lack of case law with explicit precedential value, and the existing case law will commonly point in different directions. The relevant legal discourse will have to be drawn from a wider range of legal practices; including case law without formal precedential status, and statements of administrative practice.¹²⁸ Of interest in this thesis are administrative guidance documents, policies and handbooks, and decisions which are perceived as authoritative, for example statements by the Parliamentary Ombudsman.¹²⁹ These sources express an administrative practice, which guides the authorities and promotes legal certainty also in the context of extensive administrative discretion.¹³⁰ The matters discussed in this thesis cannot be given proper justice without discussing

¹²⁷ See: Sandgren, C., *Vad är rättsvetenskap?* p. 530.

¹²⁸ Lavin, R., *Är den förvaltningsrättsliga forskningen rättsdogmatisk?* p. 121; Peczenik, A., *Om den förvaltningsrättsliga forskningen och rättsdogmatiken* pp. 43 and 47–48.

¹²⁹ See: Bonnor, P., *Ombudsmen and the Development of Public Law* for further development on the role of ombudsmen as sources of public law.

¹³⁰ Sundberg, H., *Allmän förvaltningsrätt* pp. 116–117, and *Förvaltningen och rätts säkerheten* p. 325. On legal materials, and the doctrine of sources of law in scientific research, see: Lavin, R., *Är den förvaltningsrättsliga forskningen rättsdogmatisk?*, esp. p. 119; Peczenik, A., *Om den förvaltningsrättsliga forskningen och rättsdogmatiken* pp. 47–49; and Sandgren C., *Vad är rättsvetenskap?* pp. 530–532.

this comprehensive context of legal practice. It should, however, be noted that this is not an empirical study in the sense of making a full record of the existent administrative practice to subsume some valid legal position.¹³¹ The study is still based in the authoritative legal sources, but supplemented by the investigation and discussion of examples of their expression in practice.

Existing case law is, moreover, often dominated by certain areas of law; typically neighbour conflicts and nuisance traditionally referred to as public health law. Noise nuisance is a common case, both regarding neighbour conflicts such as barking dogs, or large scale noise problems around roads and rail roads. In Swedish case law, private sewerage is a reoccurring issue. Some cases seem to hardly ever go to the courts, for example the administrative supervision and control of very large industrial activities. Such existent case law can, however, be discussed as an indication of a wider scope of environmental law, as regards the encounter between environmental law responsibilities and administrative enforcement law. It will serve as an authoritative source of law in the actual exercise of enforcement powers within the environmental law order.¹³²

It is important to be aware of the legal authority of sources of lower formal status, especially the authority of statements in a singular case. Each case is so dependant on the circumstances in the individual situation, that it is difficult to use cases to draw any conclusions on more general aspects of law.¹³³ There may therefore be inconsistencies or contradictory statements in the materials, and some areas of environmental law are not represented at all. I conduct my analysis in awareness of this.¹³⁴ It should be noted, however, that this is the reality of the legal context. The enforcement authority, and its personnel (the environmental inspector or the administrative decision-maker) have no more or different materials. (And neither do the actors that are subject to enforcement measures.) In the context of the often wide administrative discretion, equal treatment of like cases is an important safeguard of legal certainty.¹³⁵ The enforcement authority will aspire for consistency in their decision-making. They will look to the authoritative sources that they have, and try to interpret them. In this task, they will go to administrative practice in guidance, policies and former cases. Such practice will therefore play an essential role in this field of law. These sources are what the legal

¹³¹ Compare: Basse, E.M., *Juridisk empirisk forskning med administrative praksis som studieobject*, esp. p. 80.

¹³² Compare: Graver, H.P., *Normative systemer – skisse til en oppløsning av rettsbegrepet* esp. p. 60.

¹³³ This is a common feature when it comes to case law on administrative law, compare for example statements in: Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisføring i forvaltningsmål* p. 14; von Essen, U., *Processramen i forvaltningsmål* pp. 16 and 22.

¹³⁴ Pezcenik, A., *Om den forvaltningsrättsliga forskningen och rättsdogmatiken* p. 49.

¹³⁵ Compare: Marcusson, L., *Offentlig förvaltning utanför myndighetsområdet* pp. 401–402; and: Tuori, K., *Om rättssäkerhet och sociala rättigheter (samt mycket annat)* pp. 363–364.

practitioner works with, and they are therefore studied in the context of this thesis, with the stated relevant caution.

Legal materials from other legal orders are also studied and compared in this thesis, in order to broaden and enrich the critical analysis. The structure of these different legal orders, and the relevant sources and materials are more specifically discussed within the descriptions of the respective legal orders. The use of the foreign materials will be considered next, in describing the purpose and method of the comparative study.

1.5.6 Comparative Study

1.5.6.1 Why this Comparison?

This thesis comprises a comparative law approach. It is part of the comparative research programme ENFORCE. The Swedish enforcement system is compared to that of the United Kingdom (England and Wales), and that of the Netherlands. These countries are chosen in cooperation in the ENFORCE program. The choice is primarily based on the common European law foundation; especially in the law of the European Union (EU), and of the European Convention on Human rights (ECHR), and of the different legal cultures involved; common law and continental civil law, as opposed to the Nordic civil law tradition.

The comparative study has been performed with a view to analyse the investigated legal problem in a wider – and so some extent new – context. This has been done through a study of the different legal systems, and presented in separate chapters (a so called *Länderbericht* presentation).¹³⁶ As the area of administrative enforcement of environmental law has been subject to so little legal research, this presentation in itself serves a purpose. Apart from providing a valuable starting point for the following comparative thematic systematic analysis, the description of the enforcement orders provides some interesting insights into the specifics of the different systems. Some systematic differences and similarities, such as organisation, procedures and instruments, are noted in this context. After this presentation, concluded with a summary, noting some general comparative results, the two different chosen legal problems are subject to comparison and critical analysis.

The central purpose of the comparative study is to broaden and enrich the materials for the analysis.¹³⁷ The comparison supports the analysis of Swedish law, but is also valuable for more general study of the enforcement of

¹³⁶ See: Lando, O., *Kort inføring i komparative ret* pp. 98.

¹³⁷ Zweigert, K., and Kötz, H., *Introduction to Comparative Law* p. 15. On different purposes of comparative law see: Bogdan, M., *Jämförande juridik – vad, varför, hur?* p. 2; and Jyränki, A., *”Im fremden Spiegel” – Tankar om jämförande rättsforskning* p. 12.

environmental law, and the legal challenges involved.¹³⁸ Established legal structures, and critical debate within one country, can seem quite different in context of a comparison, when reflected in a “fremden Spiegel”.¹³⁹ This provides an interesting, valuable, and sometimes quite entertaining perspective.

1.5.6.2 Comparative Materials

The essence of comparative law is comparison: that is, to place comparable legal elements in different legal orders against each other and investigate and describe their similarities and differences.¹⁴⁰ The proper use of foreign materials is sometimes a problem in the context of a traditional legal dogmatic approach and the doctrine of sources of law.¹⁴¹ This is tied to the perception of the task of legal research as solving legal problems based on no more than the traditional authoritative sources, serving as a suggestion to the courts of how to solve difficult cases. As stated earlier, the doctrine of legal sources is an essential guide to the evaluation of sources, but to the legal researcher it is not absolutely limiting, especially when put in the context of a wide range of research tasks and problems. Foreign materials can serve as valuable materials for critical analysis in legal research, even though the use of such materials is much more restricted in the judge’s solving of cases in court.¹⁴²

The status and authority of legal sources is different in the different compared legal orders. A classical difference is the key position and status of case law in the common law system. Another is the central role of the preparatory works in the Swedish system. The real meaning of the law of a legal order can only be seen in the actual functioning of the normative system in the context of its cultural tradition.¹⁴³ I will consider such differences in the comparative study, in an effort to get the best understanding of the law in the context of that legal culture. I will look at a range of different sources, as this may provide insight to how the law is applied, and how the domestic practitioners understand the relevant system, including some critical voices.¹⁴⁴ Nevertheless, precise and comprehensive statements of the full extent of environmental enforcement law in the compared legal orders are not needed for the purpose of this study. The thesis focuses on analysis of the friction between environmental and administrative law in the enforcement situation,

¹³⁸ Strömholm, S., *Användning av utländskt material i juridiska monografier* p. 252; and *Har den komparativa rätten en metod?* pp. 462–463.

¹³⁹ Jyränki, A., “*Im fremden Spiegel*” – *Tankar om jämförande rättsforskning* p. 11, with references.

¹⁴⁰ Bogdan, M., *Komparativ rättskunskap* p. 56.

¹⁴¹ Strömholm, S., *Har den komparativa rätten en metod?*; and Reitz, J.C., *How to Do Comparative Law* p. 624.

¹⁴² Peczenik, A., *Om den förvaltningsrättsliga forskningen och rättsdogmatiken* p. 48; and Strömholm, S., *Har den komparativa rätten en metod?* p. 458.

¹⁴³ Husa, J., *Vertaileva oikeustiede ja voimassaoleva oikeus – Eräitä juomioita valtiosääntöoikeudellisen oikeusvertailun näkökulmasta* p. 86.

¹⁴⁴ Lando, O., *Kort införelse i komparativ ret* pp. 90–91; and Bogdan, M., *Komparativ rättskunskap* pp. 41–42.

departing from a problem in the Swedish context. The hope is that the foreign materials will enrich the analysis which comparative reflections.¹⁴⁵

1.5.6.3 Comparative Methodology

Comparative methodology has been extensively debated over the years, with many arguments about what a comparative study should (or must) involve.¹⁴⁶ An authoritative approach is that of functional comparison.¹⁴⁷ In this comparative study, the functional comparative method serves as a methodological point of departure, and a practical working method.¹⁴⁸

The central point in the functional comparative methodology is to lift the research from a study of rules to a study of functions. The researcher does not look to common terminology and areas of legislation, but for comparative functions in the different systems. Thus, the common function is that which is compared; the *tertium comparationis*.¹⁴⁹ This idea is central and runs through the different parts of this study. Functionality thus determines the formulation of the problem, the scope of the undertaking, the creation of a system of comparative law, and so on.¹⁵⁰ Such an approach is useful. In the present study, the public authorities' enforcement competences, and duties, are studied. Relevant functions are those of authoritative decision-making that imposes a binding demand of changed behaviour to the addressee. Other interesting functions express the competence to coerce the addressees to follow the decisions, or to punish them when they do not. A central functional aspect to study to learn about the encounter between environmental and administrative law is the different limits to the powers in the purpose of safeguarding legal certainty.

It should be noted that there are significant legal cultural differences between the different countries. A comparatist is studying different legal systems (and in some sense always comparing apples and oranges). One should be careful of what conclusions to draw from the comparison.¹⁵¹ The cultural differences may however also provide a dynamic force to the critical analy-

¹⁴⁵ See: Strömholm, S., *Användning av utländskt material i juridiska monografier* pp. 252–253 and 259.

¹⁴⁶ See: Palmer, V.V., *From Lertholi to Lando*, for a discussion of the debate. Palmer argues against the unrealistic standards, and for a more pluralistic comparative methodology, and describes different perspectives and approaches that open up the field.

¹⁴⁷ Zweigert, K., and Kötz, H., *Introduction to Comparative Law*.

¹⁴⁸ Authoritatively described in: Zweigert, K., and Kötz, H., *Introduction to Comparative Law*. The comparative method has also been further discussed in Darpö, J., and Nilsson, A., *On the Comparison of Environmental Law* pp. 261–282.

¹⁴⁹ Bogdan, M., *Jämförande juridik – vad, varför, hur?* p. 7; and Lando, O., *Kort införing i komparative ret* pp. 87–89. See, also: Reitz, J.C., *How to Do Comparative Law* p. 622, for comment on this point of departure.

¹⁵⁰ See: Zweigert, K., and Kötz, H., *Introduction to Comparative Law* pp. 34–47.

¹⁵¹ Bogdan, M., *Komparativ rättskunskap* pp. 28–29; Reitz, J.C., *How to Do Comparative Law* p. 622. See, further: Darpö, J., and Nilsson, A., *On the Comparison of Environmental Law* Section 4.

sis.¹⁵² This is relevant in a study such as this, which relates to the meeting of two different areas of law, their fundamental principles and structures, etc.

A functional comparative method does risk oversimplifying legal structures and discourses when looking at the issue from the writer's own perspective, through his own legal "glasses". The lawyer and the law cannot transcend themselves, but inevitably relate to their surrounding culture. They tend to reformulate the issues in the perspective of their own legal order.¹⁵³ The present comparative study is made with an awareness of law's unbreakable connection to the cultural context. This cultural dynamic is used to refresh the analysis of the writer's own legal discourse. The functional approach is quite useful and practical as a working method,¹⁵⁴ as long as the materials are used with sensitivity to these issues. The expressions of the legal culture are found within the legal texts. I have studied a range of texts to ensure a relevant investigation into the relevant legal system. The aim has been to see where friction arises in the enforcement of environmental law, and how such friction is discussed in those texts. Through this, I believe I can gain an indication of some relevant characteristics useful for the analysis of the Swedish legal order, and the investigated problem.

1.6 Outline

This account of the outline of the thesis will conclude Chapter 1, in which the aims and tasks of the thesis have been introduced, together with its methodology and position in the relevant context. Following this introduction the interested reader may in Chapter 2 find the legal problem at hand, illustrating the encounter of the different legal perspectives and the problematic legal situation that have emerged in this area. This is based in Swedish law, and the enforcement of environmental law in Sweden. This concludes Part I of the thesis, which is an introduction that sets the scene for the comparative studies and the analysis.

Part II comprises reports of the different legal systems to be compared ("country reports"); Sweden, the United Kingdom (England and Wales), and the Netherlands, in Chapters 3 through 5 respectively. Part II is concluded with comparative remarks in Chapter 6. This part of the thesis serves as a structured presentation, and comparison of the administrative enforcement systems.

Part III, lastly, contains a comparative analysis of two different, but related, enforcement problems, that arise in the meeting of administrative law

¹⁵² Darpö, J., and Nilsson, A., *On the Comparison of Environmental Law* Section 3.

¹⁵³ See, for example: Legrand, P., *Paradoxically Derrida* pp. 631–717, *On the Singularity of Law* pp. 517–530, and *How to Compare Now* pp. 232–242; and Teubner, G., *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, esp. p. 12.

¹⁵⁴ Bogdan, M., *Komparativ rättskunskap* p. 84.

and environmental law. This analysis is based on the problems raised in Chapter 2, and relate to administrative enforcement in the context of actor responsibilities. In Chapter 7 the question of the distribution of responsibilities for information between the enforcer and the addressee is analysed. Chapter 8 analyses the issue of precision of orders and goal steering. The thesis is finalised with Chapter 9, where the analysis of these problematic encounters will be concluded by discussing some of the themes of the analysis and the conclusions thereof.

The main aim of the thesis analysis is to bring to the surface a discussion that until now has mainly been silent but still rooted in the subsurface structure of the law. With this discussion I want to provide a basis for furthering effective and legally certain enforcement – through the enhancement of systematic understanding and earnestness. This can lead to better enforcement because it provides basis for critical reflection of the practice, and incitements for the legislator and the practitioners to steer the system in a different, perhaps better, direction. Perhaps the different private actors of the enforcement procedures may also gain more understanding of the enforcement order, and thus argue more effectively, thus improving the procedures.

The comparative perspective of this study poses some terminological challenges, especially in the area of administrative law. There are differences both in terminology and understanding of fundamental principles. Considerable care is taken to respect the fundamental singularity of the legal cultures in this respect. Relevant terminological differences in the compared legal orders will be commented on in Part II. The choice to write this thesis in English has also brought some terminological challenges. The thesis investigation and analysis is however made with the perspective and terminology of the Swedish legal system, but in the relevant international and comparative context. This means that legal concepts and arguments have to be translated. Some general terminological remarks and explanations will be stated as they concepts are introduced. This is especially done in Chapters 1 and 2.

A terminological note should however be made at this point, to help the reader navigate in the text: I use the terms “Part”, “Chapter”, and “Section”, for the different parts of this text, describing in order the functional parts of the thesis, its Chapters 1–9, and the subordinate sections under the chapters, all with separate headings. When describing articles of national legislation I use the English terms “Section” and “Subsection” when referring to Swedish legislation, instead of the typically Swedish term “Paragraph” (“paragraf”). In Dutch law, however, the term “Article” (“Artikel”) will be used. It is so established in English translations and legal writing that diverging from this terminology would only confuse the reader.

2 The Encountering Legal Cultures

2.1 Introduction

Having stated, in the introductory chapter, the aims and purposes of this study, the presentation of the thesis subject will now move on to a presentation of some fundamentals of the relevant area of law. Concepts expressing such fundamentals are *Rechtsstaat*, legal certainty, and good administration, but also environmental law concepts like sustainable development. These concepts are often filled with value judgments and prestige, idealised and used as rhetorical arguments; sometimes to a point of exhaustion and diffusion of meaning. This makes the principles hard to interpret and apply.¹⁵⁵ The presentation strives to point out a core meaning of such fundamental concepts, and their function and application in the administrative procedure. This is instrumental in the following thesis analysis.

Some basic but fundamental features of administrative and environmental law will be discussed, and the context of European law noted. The presentation is made with a Swedish perspective and terminology.¹⁵⁶ The purpose is to prepare the grounds for the analysis; to illustrate some relevant characteristics of the encountering legal cultures, and of the suggested friction in this encounter. An introductory discussion of the environmental law challenges to administrative will conclude Chapter 2, and thus also Part I and the introduction to the subject of this thesis.

2.2 Administrative Law

2.2.1 *Rechtsstaat* Ideals and Legal Certainty

2.2.1.1 The Foundation of the *Rechtsstaat* Doctrine

Our legal culture's fundamental theory, structure and principles are rooted in the *Rechtsstaat* doctrine.¹⁵⁷ Without deeper analysis into the doctrinal discus-

¹⁵⁵ Frändberg, Å., *Begreppet rättsstat* pp. 22–23.

¹⁵⁶ Compare: Section 1.4.

¹⁵⁷ The rule of law is supported by different international documents, such as the Statute of the Council of Europe, Art. 3, and also the ECHR. The support in the ECHR for this fundamental

sions, or the history of the Rechtsstaat, I will therefore describe some aspects of this theory that is relevant for the present investigation.

The Rechtsstaat is based on a liberal legal discourse, and civil and political rights. Based on its historical development, the Rechtsstaat has been distinguished from a police state, where the state agent was free to act in accordance with a sort of legitimate discretion, based on instrumentalistic purposive aspects.¹⁵⁸ A Rechtsstaat will rule through law, and be ruled by law. The individual shall have a private autonomy that is legally protected against both the state, and other individuals.¹⁵⁹ Fundamentally, the Rechtsstaat doctrine demands clear regulation through law, in order to respect the rights and freedoms of the individual against the power of the state. This is essential. In principle, the limitation of the state's exercise of power is a protection against totalitarianism.¹⁶⁰ It is connected to the idea of division of power, where the executive power is independent but ruled by law and controlled through the review of the judiciary.¹⁶¹

The vertical character of public law relations, the state exercising authority over the individual, base the legal principles and structures that are at the core of administrative law.¹⁶² Recollection of this basis helps us understand the principles and structures that aim to protect the individual in these relations. The essential feature is that of the regulation of the exercise of public authority by law. The state (in practice the public administration) may only intervene in the legal positions of individuals based on competence set out in law.¹⁶³ This connects to the concept of legality. Foreseeability and the role of law in public steering are thus emphasised.¹⁶⁴

The described Rechtsstaat concept can be seen as structural or formal. But Rechtsstaat ideals can be discussed also in a more substantive perspective, that the state has a duty to actively protect the individual and collective interests of the public.¹⁶⁵ It is not enough that there is a clear statute to base the intrusion of a public body in the life of a citizen. The state and its authorities

principle of the Swedish system is noted by Halvar Sundberg already in 1955, see: *Allmän förvaltningsrätt* pp. V–VI.

¹⁵⁸ Fahlbeck, E., et.al., *Medborgarrätt* pp. 7–10; Tuori, K., *Har förvaltningsrätten en framtid?* pp. 556–560.

¹⁵⁹ Peczenik, S., *Vad är rätt?* p. 46; Sundberg, H., *Allmän förvaltningsrätt* pp. 112–113, and *Förvaltningen och rättssäkerheten* pp. 323–324; Tuori, K., *Har förvaltningsrätten en framtid?* p. 557.

¹⁶⁰ Tuori, K., *Critical Legal Positivism* p. 16, and *Har förvaltningsrätten en framtid?* pp. 555–557.

¹⁶¹ Frändberg, Å., *Begreppet rättsstat* pp. 25–26; Sundberg, H., *Förvaltningen och rättssäkerheten* pp. 322–323, and *Allmän förvaltningsrätt* p. 3; Vahlne Westerhäll, L., *Statlig och kommunal styrning av social trygghet – försörjningsbehov som en rättssäkerhetsfråga* p. 36.

¹⁶² Sundberg, H., *Allmän förvaltningsrätt* pp. 53–54; Tuori, K., *Har förvaltningsrätten en framtid?* p. 559.

¹⁶³ Peczenik, A., *Vad är rätt?* p. 50; Tuori, K., *Har förvaltningsrätten en framtid?* p. 557. See, also in environmental law context: Nilsson, A., *Man ska vara försiktig* p. 408.

¹⁶⁴ Peczenik, A., *Vad är rätt?* p. 46.

¹⁶⁵ Peczenik, A., *Vad är rätt?* pp. 46–47.

have a fundamental task of realising public policy. The individual should be able to trust that the state realises the policy stated in law, and protects the rights and assures the expectations that emanate from there. The administration will consequently protect the legitimate public interest, and the rights of individuals, as their public task requires. This is not only done through upholding the law against offenders, but also through active, and proactive measures to actually further certain political aims that are implemented into the law. That calls for effective administrative authority, with the power to realise the democratically based policy.¹⁶⁶ The exercise of such power is limited as described, but it must be noted that the Rechtsstaat and legal certainty entails more than limiting state power as much as possible. This illustrates the delicate balance between the interests of effective exercise of public authority, and safeguards against arbitrary or excessive such use of the power of the state.¹⁶⁷

The Rechtsstaat involves aspects of democracy also, where the legitimate regulation of authority is based in democratic representation.¹⁶⁸ The focus is then on the purpose and tasks of the state and on the active furthering of the relevant interests – on its public responsibility – than on the limitation of the exercise of power by the freedom of the individual (which can be more tied to its legitimacy). Administrative power is controlled by law, and consequently by the legislator – the democratic representation. The administration is to loyally carry out their task according to law, and not to further other interests.¹⁶⁹ The Rechtsstaat is expressed in, and supported by the interwoven principles of legality, objectivity, and proportionality. These are in turn realised in norms on proper procedure. These different layers of the Rechtsstaat structure will be presented in the following sections.

2.2.1.2 The Rechtsstaat under Development

The different perspectives on the Rechtsstaat, basically the relationship between state power and the citizens, are reflected in historical developments and critical discussion of the Rechtsstaat concept. The formal concept is familiar and deeply rooted in our legal culture. It is tied to liberal legal theory, and the positivisation of law.¹⁷⁰ As hinted in the above, it is illustrated by the move from a legitimate discretion of state authority, to formally regulated use of power. The insufficiency of the formal features of the Rechtsstaat doctrine has been discussed, especially in the context of the wel-

¹⁶⁶ Compare: Sundberg, H., *Allmän förvaltningsrätt* p. 112, and *Förvaltningen och Rättssäkerheten* p. 321. Note, also: Nilsson, A., *Man ska vara försiktig* p. 408, arguing that while the interests of the addressee of administrative decisions are protected, those of third parties such as neighbours are not.

¹⁶⁷ Helmius, I., *Proportionalitetsprincipen* p. 107; Sundberg, H., *Förvaltningen och rättssäkerheten* p. 122.

¹⁶⁸ Bull, T., *Objektivitetsprincipen* pp. 103–105; Peczenik, A., *Vad är rätt?* pp. 84–85.

¹⁶⁹ Bull, T., *Objektivitetsprincipen* pp. 103–104.

¹⁷⁰ Tuori, K., *Har förvaltningsrätten en framtid?* p. 557.

fare state. In this context, the substantive rights and interests of the public, both as individuals and collectively, are central. This entails an instrumentalistic perception of the law; seeing law as an instrument of goal oriented steering of human society.¹⁷¹ The principles of the Rechtsstaat still serve as an important structural framework, or minimum rules. The administrative task will then be to find an appropriate balance between formal safeguards of Rechtsstaat ideals, and a more substantive sense of justice, which protects the legitimate rights and interests of its citizen.¹⁷²

More recently, the focus seems to have been shifting again, to a new situation in which the power of the state is diminishing, or rather being dispersed into a more pluralistic reality of public power. Different actors are now involved in the administration of public policy, and exercise of power; private actors are to a greater extent involved, and public power is set in an internationalised context. The financial market is also extensively influential. This again puts the Rechtsstaat and its administrative law expression in a new perspective.¹⁷³ In a way, this thesis touches on all the described perspectives of the Rechtsstaat doctrine. Principles tied to the formal character of the Rechtsstaat meets the state's responsibilities of actively furthering environmental interests, but in the context of a decentralised method of steering where the actor himself is involved in the control of his own activities, in protection of the interests of others.

2.2.1.3 Legal Certainty

An expression of the Rechtsstaat is legal certainty, in the sense that public power is to a high degree exercised under law.¹⁷⁴ The citizen can trust that the authorities are loyal to their public task as regulated by law, and that they apply the law correctly and appropriately. What's more, the citizen can control that they do – because of openness, communication, and access to remedies.¹⁷⁵ Legal certainty may be seen as the citizen's perspective of the Rechtsstaat, or the Rechtsstaat in practice.

This is tied to the legitimacy of public authority in the Rechtsstaat. Crucially, legal certainty has to do with foreseeability of the exercise of power. The exercise of power is foreseeable with support of the law, and not arbi-

¹⁷¹ Peczenik, A., *Vad är rätt?* pp. 60–63; Tuori, K., *Har förvaltningsrätten en framtid?* pp. 560–565.

¹⁷² Lind, A., *Sociala rättigheter i förändring* pp. 436–439; Peczenik, A., *Vad är rätt?* pp. 62–63. See, for example: Vahlne Westerhäll, L., *Statlig och kommunal styrning av social trygghet – försörjningsbehov som en rättssäkerhetsfråga*. Note, also: Tuori, K., *Om rättssäkerhet och sociala rättigheter (samt mycket annat)* pp. 255, and 360–362. Tuori argues against the contradiction between the Rechtsstaat and the welfare state, instead promoting a relationship where one complements the other.

¹⁷³ See, for example: Vahlne Westerhäll, L., *Rättsliga förändringar av social trygghet i Sverige under 1950–2000 i ett subsidiaritets- och solidaritetsperspektiv*, esp. p. 118.

¹⁷⁴ Peczenik, A., *Vad är rätt?* p. 51.

¹⁷⁵ Prop. 1971:30 pp. 278–279.

trary. Foreseeability is safeguarded through clear and precise general rules, transparency, and the public authorities' responsibility for proper exercise of authority. It promotes the security that makes it possible for the citizen to plan their actions, and thus also to act responsibly – to think about how to act.¹⁷⁶ This may be referred to as formal legal certainty and constitutes the core of legal certainty and of the Rechtsstaat doctrine. Nonetheless, formal legal certainty alone is generally not enough, but needs the complement of a substantive aspect of legal certainty.¹⁷⁷ Substantive legal certainty is related to legal protection of legitimate interests. In the context of Swedish terminology, legal certainty is a concept that is used in a very wide sense reflecting a notion of legitimate and clear exercise of public power and legal protection of the individual.¹⁷⁸ Substantive legal certainty can also be connected to a more result-oriented concept of legal certainty, where the citizen is ensured the right and legitimate interests and expectations of law, and nothing more. This perspective means that not only the addressee of an administrative decision, but also other concerned parties and interests are protected and provided with a wider sense of legal certainty.¹⁷⁹

In public administration, the exercise of power must seem legitimately based in law, and in the public interest. This calls for fair and appropriate exercise of public authority, which is often expressed in ideals such as purposiveness, equality and reasonableness, and institutional safeguards such as independence of the courts in the control of the administrative authority. Administrative legitimacy also demands openness, foreseeability and clear communication in the exercise of power, so as to manifest the correct and

¹⁷⁶ Frändberg, Å., *Begreppet rättsstat* pp. 27 and 32–37; Peczenik, A., *Vad är rätt?* pp. 50–51, and 89–90; Sundberg, H., *Förvaltningen och rättssäkerheten* p. 322.

¹⁷⁷ Peczenik, A., *Rätt och moral i olika juristroller* pp. 42–43 and 53, and *Vad är rätt?* See, also: Basse, E.M., *Retssikkerhed i miljøretten – hvilke begreber kan anvendes?* p. 122; and Nilsson, A., *Rättssäkerhet och miljöhänsyn* p. 19.

¹⁷⁸ The Swedish term "rättssäkerhet" is difficult to translate into English. To some extent it resembles, but is not quite the same, as the term "rule of law". Fundamentally, and historically, it is related to the continental concepts of "Rechtsicherheit" (German), and "rechtszekerheid" (Dutch). My terminology is fundamentally based in the Swedish legal terminology. I have chosen to use the term "legal certainty", for easier reading, without involving any discussion on the fundamental conceptual differences to the "rule of law" which is often closer to the formal concept of legal certainty and legality. See for example Fogelklou, A., *Rättsstaten – idéhistorisk exposé*, for a conceptual discussion in historical context. Moreover, the aspect of safeguarding legal protection of the individuals legitimate interests is sometimes discussed in the Swedish term "rättsskydd", which relates equally to the German terminology and theory. I will not go further into this terminological issue, but rest in the idea that protection of legitimate substantive interests of the individual, and the procedural safeguards thereof, are part of the wider concept of legal certainty and the doctrine of the Rechtsstaat (see, for example: Prop. 1971:30 pp. 278–279; SOU 1981:46 pp. 61–64).

¹⁷⁹ Basse, E.M., *Retssikkerhed i miljøretten – hvilke begreber kan anvendes?* pp. 122–123, and 131. See, also: de Graaf, K.J., et.al., *Administrative decision-making and legal quality: an introduction* p. 3.

appropriate use of legitimate power.¹⁸⁰ The respect for, and furthering of legitimate substantive rights and interests is sometimes also associated to the concept of legal certainty. This follows the above mentioned discussion of the Rechtsstaat in substantive perspective. Legal certainty is also promoted through the strive for legal coherence, which supports foreseeability and legitimacy of the exercise of public power, and thus expresses equal treatment and justice.

Administrative law thus serves to safeguard the legal certainty of the citizen in relation to the exercise of public power, but it also serves to ensure effective implementation of the policy and law of the state. These functions are often seen as contradictory, or conflicting.¹⁸¹ High standards for due procedural care promote legal certainty, but can sometimes be argued to consume a lot of time and other resources, and therefore not to be effective. A quick and simple procedure is claimed to promote legal certainty in a wider sense.¹⁸² On the other hand, the overzealous strive for effective law enforcement can be argued to entail risks in view of legal certainty.¹⁸³ Careful and communicative decision-making procedures suggests qualitatively better decision-making, and may thus lower the number complaints and appeals, as well as making appealed cases more easily reviewed.¹⁸⁴ In this case the procedural rules will safeguard legal certainty as well as effectiveness. Careful and communicative procedure also promotes the legitimacy of the decision in the eyes of the individual, and could therefore promote adherence of the decision, and lessen the incitement for appeal.

2.2.1.4 EU Administrative Law and Good Administration

Administrative law is often seen as an inherently internal affair in the national legal order.¹⁸⁵ Even though states have duties under international law, they have fundamental procedural autonomy. They can choose for themselves how to live up to these duties. This basic idea is found in EU law. The

¹⁸⁰ See: Peczenik, A., *Vad är rätt?* pp. 47–50; and Sundberg, H., *Förvaltningen och rättssäkerheten*.

¹⁸¹ SOU 1981:46 p. 21; Sundberg, H., *Allmän förvaltningsrätt* p. 112, and *Förvaltningen och rättssäkerheten* p. 321.

¹⁸² See: Prop. 1985/86:80 pp. 10–15, arguing effective procedure (emphasising speed and simplicity) and service in relation to legal certainty. Compare: Vahlne Westerhäll, L., *Rättsliga förändringar av social trygghet i Sverige under 1950–2000 i ett subsidiaritets- och solidaritetsperspektiv* p. 101, about the debate on bureaucracy in the middle of the 20th century.

¹⁸³ Compare: Prop. 1971:30 pp. 250–251 and 281, on the discussion of the extent and detail of general regulation of administrative procedure; and also later in: SOU 1981:46 p. 26, noting the Swedish debate on bureaucracy in the context of administrative law codification and reform. SOU 1981:46 proposed a partial reform to slim the Administrative Procedure Code (FL), and make it more accessible. Service to the citizen was very much in focus.

¹⁸⁴ SOU 2010:29 p. 27.

¹⁸⁵ Reichel, J., *God förvaltning i EU och i Sverige* p. 259; Schwarze, J., *European Administrative Law* p. 3.

Member States, and their administrative bodies, have procedural autonomy, but also a duty of loyal cooperation under Art. 4 TEU.¹⁸⁶ The Swedish administrative authority will apply the Swedish administrative procedure, even when implementing and enforcing substantive EU law.¹⁸⁷ Nevertheless, EU law is to a growing extent becoming a relevant source of influence.¹⁸⁸ European administrative law is generally under development, both in the auspice of the European Council and the EU.¹⁸⁹ The latter will be developed further in the following.

EU law comprises general legal principles that must be considered in this procedure,¹⁹⁰ as has been argued in the context of effective enforcement under the principle of loyalty.¹⁹¹ There may, moreover, be some special procedural regulation in specific secondary legislation.¹⁹² But there is also an increasingly developed body of general principles of European administrative law. These general principles include rules stating principal requirements or a minimum standard of administrative procedure, as well as principles formulated as fundamental rights. This compilation of principles has come to be referred to as “good administration”, a concept that is increasingly being discussed in different national and international contexts.¹⁹³ Much of the principles, or standards, comprised by the concept of good administration have thus been codified in the Charter of Fundamental Rights of the Euro-

¹⁸⁶ See: 1.2.4, with reference to Craig, P., de Búrca, G., *EU Law* pp. 306–307; and Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, on procedural autonomy. See, also: SOU 2010:29 p. 66.

¹⁸⁷ SOU 2010:29 p. 64, and Prop. 1994/95:19 pp. 530.

¹⁸⁸ SOU 2010:29 pp. 65 and 108–109; Reichel, J., *EU:s påverkan på medlemsstaternas förvaltningsprocess*.

¹⁸⁹ Initiatives by the European Council, include instating the Project Group on Administrative Law (CJ-DA) and publishing different statements of common principles of administrative procedure and legal protection; e.g: Council of Europe Committee of Ministers Resolution (77) 31 on the protection of the individual in relation to the acts of administrative authorities; *The Administration and You. A Handbook*, published by the Council in 1998. The EU has through the Lisbon Treaty been provided with explicit competence to regulate the internal administrative procedure (Art. 298 TFEU), and to take measures to support, coordinate, and supplement Member States efforts of administrative cooperation (Art. 197 TFEU). This may illustrate the successive development of EU administrative law. Art. 6 TFEU also emphasises the importance of effective implementation in the Member States, which reflects on their administrative procedure. See, also: Marcusson, L., *God förvaltning – en rättslig princip?* pp. 9–14, on the European developments in general; and Reichel, J., *God förvaltning i EU och i Sverige* pp. 298–299 on the arguments for an Administrative Code for the EU.

¹⁹⁰ Prop. 1994/95:19 pp. 530; SOU 2010:29 p. 64.

¹⁹¹ See: Section 1.2.4.

¹⁹² For example on notification and authorisation, etc., of chemicals: Regulation 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), Title XIII.

¹⁹³ SOU 2010:29 pp. 66–67; and Reichel, J., *EU:s påverkan på medlemsstaternas förvaltningsprocess* pp. 762–766. See, also: Marcusson, L., *God förvaltning – en rättslig princip?* p. 17; and Reichel, J., *God förvaltning i EU och i Sverige* pp. 257–276, for a thorough presentation of this development.

pean Union (The Charter).¹⁹⁴ The concept of good administration is explicitly expressed in Art. 41 of the Charter, which is primarily directed at the EU institutions but according to Art. 51(1) applies also to the Member States, at least when applying EU law.¹⁹⁵ This latter application has nevertheless been somewhat debated.¹⁹⁶ The matter is under development.

While there is no precise common understanding of the concept of good administration, Art. 41 of the Charter of Fundamental Rights states some features of the concept. To begin with, everyone has a right to have their affairs handled impartially, fairly, and within reasonable time. They have the right to access the case file, a right to be heard, and the authority has a duty to give reasons for their decision. Although not explicitly stated in the Charter, a principle of due care¹⁹⁷ is also an essential part of good administration. It can partly be drawn from the first paragraph of Art. 41, and has been developed in case law.¹⁹⁸ It demands that the administrative decision-maker should conduct careful investigations, where all relevant facts and circumstances are considered, and to weigh them in the decision. This includes being objective and not considering other, irrelevant, factors. Moreover, the European Ombudsman has developed a non-binding Code for Good Administration, stating due care, fairness, reasonableness, and different expressions of objectivity.¹⁹⁹

The described principle of good administration thus involves procedural minimum standards, but also more substantive features and principles such as equal treatment and proportionality.²⁰⁰ There is a tendency to view good administration as part of the concept of rule of law, or the Rechtsstaat doctrine.²⁰¹ EU law also expresses principles of legality, equal treatment, proportionality, etc., in the Charter of Fundamental Rights,²⁰² in primary law,²⁰³ and

¹⁹⁴ The Charter is through Art. 6(1) TEU recognised as having the same legal value as the EU treaties. The ECJ interpretation of this statement is awaited, for guidance on the meaning of the principle of good administration for the the member state's administrations (Reichel, J., *EU:s påverkan på medlemsstaternas förvaltningsprocess* p. 770).

¹⁹⁵ Reichel, J., *EU:s påverkan på medlemsstaternas förvaltningsprocess* p. 769.

¹⁹⁶ SOU 2010:29 pp. 68 and 92; Reichel, J., *God förvaltning i EU och i Sverige* pp. 291–292, and *EU:s påverkan på medlemsstaternas förvaltningsprocess* p. 770

¹⁹⁷ Sometimes "principle of care" or "principle of due diligence". In Swedish: "omsorgsprincipen".

¹⁹⁸ Cases C-16/90 *Nölle v. Council and Commission*, and C-269/90 *Technische Universität München v. Hauptzollamt München-Mitte*; SOU 2010:29 pp. 70–71 and 78–79; Reichel, J., *God förvaltning i EU och i Sverige* p. 345.

¹⁹⁹ *The European Code of Good Administrative Behaviour* Art. 8, 9, and 11. The Ombudsman Code has been argued to comprise a more detailed statement of the principle of good administration stated in Art 41 of the Charter (see: Marcusson, L., *God förvaltning – en rättslig princip?* p. 12).

²⁰⁰ Reichel, J., *EU:s påverkan på medlemsstaternas förvaltningsprocess* pp. 764–766, and *God förvaltning i EU och i Sverige* pp. 257–258.

²⁰¹ Reichel, J., *God förvaltning i EU och i Sverige* pp. 261–263; Schwarze, J., *European Administrative Law* p. 1174.

²⁰² Art. 20, 49 and 41(1).

²⁰³ Fundamentally: Art. 5 TEU.

in case law.²⁰⁴ The principles fundamental to administrative law, are of course interconnected. In this study, the more specific substantive and procedural principles and rights, connected to the concept of good administration, will be studied from a Swedish legal perspective, but with appropriate consideration of relevant European law.

2.2.1.5 Human rights and the European Convention on Human Rights

The fundamentals of administrative law are tied to human rights, also in the context of this investigation. Basic rights, as part of good administration and human rights are central features of the Rechtsstaat and of legal certainty.²⁰⁵ A fundamental feature, emanating from the liberal roots of these ideals is the protection of the individual against excessive use of public power which intrudes on the rights and freedoms of the individual. This might delimit the exercise of administrative power. The human rights aspects can also entail a duty for the administrative authority to take positive measures, to effectively ensure that the rights of the involved persons are safeguarded.²⁰⁶

When relating to human rights, the norms commonly referred are found in the ECHR. The EU is not yet party to the Convention. Nevertheless, the law on fundamental rights stated in the ECHR and by the European Court of Human Rights (European Court) is accepted and applied in EU law.²⁰⁷ All the Member States are parties to the convention, including the countries which legal orders are studied in this thesis. The ECHR is incorporated in Swedish law.²⁰⁸ It has a kind of indirect constitutional status in that the Instrument of Government (SFS 1974:152) (RF)²⁰⁹ 2:19²¹⁰ prohibits legislation

²⁰⁴ For example: Case C-303/05 *Advocaten voor de Wereld*.

²⁰⁵ Fogelklou, A., *Rättsstaten – en idéhistorisk exposé* pp. 13–14; Vahlne Westerhäll, L., *Statlig och kommunal styrning av social trygghet – försörjningsbehov som en rättssäkerhetsfråga* p. 37.

²⁰⁶ This expression of rights is typically discussed in the context of social rights, or so called second generation rights. See: Lind, A., *Sociala rättigheter i förändring* pp. 35–36; Vahlne Westerhäll, L., *Statlig och kommunal styrning av social trygghet – försörjningsbehov som en rättssäkerhetsfråga* p. 37. Note in comparison the much earlier discussion of the difference between individualised rights and rights for the public, in Sundberg, H., *Allmän förvaltningsrätt* pp. 54–56. The rights of the public, seem comparable to collective rights, and are argued to be implemented through state responsibilities rather than executable individual rights.

²⁰⁷ See: Charter of Fundamental Rights of the European Union Art. 52(3), concurring the case law of the ECJ, e.g. in joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v. Council and Commission*.

²⁰⁸ Lagen (SFS 1994:1219) om den europeiska konventionen angående de mänskliga rättigheterna och de grundläggande friheterna.

²⁰⁹ The Instrument of Government (in Swedish: “Regeringsformen”) is the basic constitutional regulation which states the fundamentals for the exercise of government, legislative competence, the position of the courts, and fundamental rights of the citizen, etc. It has recently been amended (Prop. 2009/10:80). The reformed Instrument of Government entered into force 1 January 2011.

²¹⁰ Note, on method of reference: 2:19 refers to Chapter 2 Section 19 of the Instrument of Government.

conflicting with the duties stemming from the ECHR, which includes the case law of the European Court.²¹¹

2.2.2 Legality, Objectivity, and Proportionality – Fundamental Principles of Public Law.

2.2.2.1 Legality

As described above, legality establishes and delimits the grounds for exercise of public authority in the Rechtsstaat. The exercise of power is thus bound by law, as opposed to being arbitrary.²¹² Legality has an essential position in constitutional law, and the Swedish Instrument of Government states in its opening paragraph that public power is exercised under law.²¹³ This is the core of the principle of legality. The principle has evolved into different aspects of retroactivity, statutory interpretation, and discussion on the appropriate level of regulation, for example in the context of criminal sanctions, and other intrusive measures of the authorities.²¹⁴ A feature that is central for the individual is the foreseeability that comes with the demand for legal grounds for intrusion in their basic autonomy, their freedom of action. This is tied to the concept of legal certainty.²¹⁵

A crucial aspect of legality is that public authority must be based on competence in law. The law provides – and delimits – the administrative decision-making powers,²¹⁶ as well as the sufficient support for their substantive demands.²¹⁷ In other words, the law answers the questions: “who can decide?” and “what can they decide?” Legal grounds for administrative competence are not only required for coercive or penal measures, or intrusions into

²¹¹ Cameron, I., *An Introduction to the European Convention on Human Rights* p. 181.

²¹² SOU 2010:20 p. 142; Sterzel, F., *Författning i utveckling* p. 113; Tuori, K., *Critical Legal Positivism* p. 16, and *Har förvaltningsrätten en framtid?* pp. 555–557.

²¹³ Prop. 2009/10:80 p. 126; SOU 2008:125 pp. 354–355. Moreover, a codifying statement of legality has been proposed in the preparations of reform of the Administrative Procedure Act. The purpose of the proposed codification is to signal the principle’s fundamental importance to the administrative authorities; see SOU 2010:29 p. 147.

²¹⁴ SOU 2010:29 pp. 142–143; Sterzel, F., *Författning i utveckling* pp. 113–128.

²¹⁵ Sterzel, F., *Författning i utveckling* p. 114.

²¹⁶ See, for examples: RÅ 2004 ref. 8 where the authority had not kept their administrative tasks appropriately separate, thus exceeding their competence in the task to inform the public; and JO 2002/03 p. 452, with criticism of a municipal board that had falsely given the impression, in their communication with an individual, that they had competence to decide on coercive measures under the relevant legislation.

²¹⁷ See: RÅ 2004 ref. 54 on administrative decision demanding interest in the context of reimbursement of social benefits; and RÅ 2003 ref. 69, RÅ 2004 ref. 91, and RÅ 2010 ref. 5, where different authorities had demanded the fulfilment of specific conditions to receive authorisations or benefits. All without sufficient legal grounds. See, also: JO 1990/91 p. 283, where the Parliamentary Ombudsman criticised a municipal board that denied an application for authorisation based on their opinion that the legislation was old and in need of reform.

fundamental rights of the individual. General procedural competence and administrative decision-making powers have also to be based on a public task given in law.²¹⁸ However, legality has a specific weight in administrative tasks involving measures that are onerous to the individual.²¹⁹ And the more onerous the decision is the stronger is the call for legality. Criminal enforcement is normally perceived as the strictest and most intrusive exercise of public authority. Within criminal law, legality holds particular importance and character. The purposes and functions of legality – centrally foreseeability and safeguards against arbitrary use of power – are therefore particularly important. Criminalised acts must be clearly regulated, preferably in statutory law – not lower level legislation.²²⁰ Legality in criminal law is also formulated as a fundamental right, in Art. 7 ECHR and Art. 49 of the Charter of Fundamental Rights.

The control of intrusive and coercive exercise of public power has consequently been central in the establishment of the principle of legality. Coercive demands, for example, an enforcement order to take certain measures, or to otherwise stand for an intrusion in his fundamental rights or freedom, call for explicit legal competence. The idea has developed from the area of criminal law punishment, through administrative deprivation of freedom, and into a more general administrative law principle of legality.²²¹ A general statement of legality was introduced with the Instrument of Government in 1974.²²² Apart from the opening paragraph of the Instrument of Government stating the fundamental norm of exercise of power under the law, the principle of legality can also be drawn from the rules on legislative powers in Chapter 8, and regulation of legitimate intrusions in fundamental rights in 2:20, etc.²²³ The latter application is also essential in the context of the ECHR, where legitimate infringements of the stated rights have to be in accordance with law.²²⁴

²¹⁸ SOU 2010:29 p. 143, hinting that all activities by a public authority may be argued to need legal basis. See, also: Marcusson, L., *Offentlig förvaltning utanför myndighetsområdet* p. 399; Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* p. 64.

²¹⁹ Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* pp. 64–65.

²²⁰ On environmental criminal law see: SOU 2004:37 pp. 19–20, and SOU 2002:50 pp. 229–230. The sanction system of the Environmental Code was moreover reformed in order to clarify, delimit, and refine the criminal regulations, so as to improve foreseeability and to reserve criminal enforcement for the most serious offences. See: Prop. 2005/06:182 pp. 1 and 37–40; SOU 2004:37, stating the motives for such reform at pp. 54–56.

²²¹ Sterzel, F., *Författning i utveckling* p. 116, referring to Swedish historical development of the principle. For examples on earlier discourse reflecting this development see: Petré, G., *Om offentligrättslig användning av våld mot person* Chapter VI; and Sundberg, H., *Allmän förvaltningsrätt* pp. 113–115.

²²² Prop. 1973:90 p. 228.

²²³ In Chapter 2 we can also see the demand for more qualified legal support for intrusive administrative measures.

²²⁴ Cameron, I., *An Introduction to the European Convention on Human Rights* pp. 105–106; Åhman, K., *Europadomstolens principer* p. 25. See, for example: ECHR Art. 8 para. 2 and Art. 10 para. 2, and the development by the European Court of the requirement in: *Sunday*

Thus based in the constitutional rules, and the Rechtsstaat ideal, the role and function of the authority is to implement law and to realise public policy and the limits of their competence is similarly limited. Administrative competence under law is, however, more complex than simply finding basis in law.²²⁵ A narrow sense of legality does not sufficiently describe the limits of the legitimate action of the administrative authorities. This is certainly the case for municipal bodies exercising administrative authority. The municipalities have a large scope for local self governance, but they also have administrative tasks from the state, regulated by law,²²⁶ for example in the enforcement of environmental law. Public law norms will as a rule leave more or less room for administrative discretion. It is simply not effective – or even possible – to regulate very precisely for the range of situations that the administration will encounter. Public law regulation is often constructed as so called framework law, to be supplemented by lower level legislation and guidance, and leaving room for the consideration of relevant circumstances and the weighing of interests in the individual situation, in order to come to the substantively best decision.²²⁷ This echoes the development of the welfare state, and the administrative execution of policy goals and furthering of substantive justice.²²⁸ The framework law construction generally entails goal steering under considerable administrative discretion. In this context effective administration will be balanced against Rechtsstaat principles, such as legal certainty, legality, and proportionality.²²⁹

It should be noted, in this context, that Swedish administrative authorities as a rule enjoy considerable independence. As a rule, no authority, not even higher authorities in the same sector, the relevant minister of government, or the national or municipal parliament, can intrude in the exercise of authority in an individual case.²³⁰ Administrative discretion is of however never total. The authority's chosen course of action must always fall under their general competence area, and it must be in line with that competence.²³¹ It is not

Times v. the UK, Judgment of 26 April 1979, where it was stated that legal support can be found not only in statutes, but also in common law rules (developed through precedents), and lower level legislation and *Silver and others v. the UK*, Judgment of 25 March 1983, discussing the requirement of legal support in a situation of wide administrative discretion.

²²⁵ Compare: Prop. 1987/88:69 pp. 23–24 and 234, on the scope of the trial in the context of right to trial.

²²⁶ See: Sterzel, F., *Kommunernas skyldigheter*; and Hydén, H., *Ram eller lag?*, Ds C 1984:12 pp. 16 and 96–103.

²²⁷ See: SOU 1981:46 p. 44; Hydén, H., *Ram eller lag?*, Ds C 1984:12; Sterzel, F., *Författning i utveckling* pp. 225–243.

²²⁸ Compare: Hydén, H., *Ram eller lag?*, Ds C 1984:12 pp. 12 and 78–79.

²²⁹ Note: Sundberg, H., *Allmän förvaltningsrätt* stating at p. 119 that “Discretion is not at all the same as arbitrariness” (my translation).

²³⁰ RF 12:2, discussed also in the presentation of the Swedish system, in Section 3.2.2. The new, more specific formulation of this principal constitutional rule prescribes the prohibition for exercise of authority (myndighetsutövning) towards an individual or a municipality, or concerning application of the law.

²³¹ Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* p. 62.

enough to consider if there are formal legal grounds. It must also be reasonably in line with the purpose of the applicable norms, according to the principle of purposiveness.²³² Purposiveness could be argued to constitute a wider formulation of legality, entailing a more contextual and functional understanding of public law. Another perspective is to see purposiveness as an appropriate limitation of the exercise of administrative discretion within the letter of the law.²³³ Such limits are also provided by the rules of objectivity and proportionality, which will be discussed next.

2.2.2.2 Objectivity

A principle of objectivity should guide all public administrative activity in the Rechtsstaat. The public authorities should not be influenced by other interests than those they are set to defend and promote. They must only consider legitimate and relevant considerations, and not favour or discriminate different private interests.²³⁴ Objectivity thus contains aspects of equality and impartiality. It will involve a demand for equal treatment. Impartial procedure based on relevant materials generally cannot be discriminating.²³⁵

This principle of objectivity is an old and fundamental principle of administrative law,²³⁶ which has also received constitutional status. The Swedish Instrument of Government states in 1:9 that public authorities, and others carrying out tasks within the public administration, shall be factual and impartial.²³⁷ Factual exercise of authority relates to the materials and other circumstances that the decision is based on, and the relevance and legitimacy thereof. The administrative authority should consider all relevant facts and statements, and disregard irrelevant or incorrect materials.²³⁸ Often, the rele-

²³² Petré, G., *Om offentligrättslig användning av våld mot person* pp. 27–28.

²³³ Petré, G., *Om offentligrättslig användning av våld mot person* p. 27.

²³⁴ SOU 2010:29 p. 149; Bull, T., *Objektivitetsprincipen* p. 101; Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* p. 66, Sundberg, H., *Allmän förvaltningsrätt* pp. 119–120, and *Förvaltningen och rättssäkerheten* p. 327. See, for examples: JO 1992/93 p. 481, about a local environmental board's catalogue of named products to avoid and to use; and JO 1999/2000 p. 366 about a local planning and building board letting a private company pay the expenses of an extra board meeting, in order to speed up its own case handling.

²³⁵ SOU 2010:29 p. 150; Holmberg, E., et al., *Grundlagarna; Regeringsformen, Successionsordningen, Riksdagsordningen* pp. 56 and 76; Marcusson, L., *Offentlig förvaltning utanför myndighetsområdet* p. 401. See, for example: JO 2008/09 p. 396, on exclusion of certain political parties in school information campaigns where several other parties had been accepted. Sometimes the principle of equal treatment is distinguished from objectivity. Equal treatment may then be argued to emphasise, or go further in the demands for equality, and also add a demand for consequence in administrative practice. For discussion, see: Bull, T., *Objektivitetsprincipen* pp. 72–73 and 76 with references; and Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* pp. 66–67.

²³⁶ Prop. 1971:30 p. 241.

²³⁷ The Swedish expression is "saklig och opartisk".

²³⁸ Examples include: RÅ 1996 ref. 28 where a planning and building board had based their decision on incorrect facts on the building history of a real property, even though there was valid information at hand, and RÅ 2003 not 131 on the authority's duties to supplement the materials in order to be considered making a decision on factual grounds. See, also: JO

vant legislation will state more or less explicitly what materials or circumstances may or must be considered in specific decision-making procedures.²³⁹ Factual procedure is thus focused on the decision-making materials.

The demand for impartiality focuses on the decision-maker; his position in relation to the case and to the interests and the interested parties involved. This is a question of legal certainty, and of legitimacy.²⁴⁰ The impartiality of the decision-maker is safeguarded through rules on employment matters for civil servants, and the challenge of administrative decisions.²⁴¹

This bundle of principles requiring objectivity thus boils down to exercise of public power that is guided only by the legitimate considerations supported by law. Objectivity is therefore inherently tied to the Rechtsstaat ideal of administration ruled by law. Arbitrariness and private interests or preferences of the administrator have no place in administrative decision-making. And nor do internal preferences or interests of the administrative organisation.²⁴² Objectivity, and also proportionality, which will be presented next, can be seen as supplementing legality. A narrow sense of legality, requiring no more than basis in some legal text, may not say that much about the appropriateness of the application of the law, especially in the context of a wide administrative discretion.²⁴³ But, while the law states the outer limits of the discretionary use of public power, objectivity will regulate how this discretionary authority should appropriately be exercised.²⁴⁴ A core purpose is to control excessive and improper exercise of authority, also when based in legal competence regulation. The principle of objectivity is therefore related to the concept of “détournement de pouvoir”, referring to formally correct exercise of power for improper purposes. It is a concept more commonly

2008/09 pp. 396 and 400, on decisions by school headmasters to deny certain political parties participation in political information campaigns in the schools. The Parliamentary Ombudsman discussed the decisions with explicit reference to objectivity in RF 1:9, but also factual considerations of security in the school. Similar cases have been discussed by the Parliamentary Ombudsman before, see for example: JO 1991/92 p. 346, and by the Supreme Administrative Court in: RÅ 1981 2:26.

²³⁹ See, for examples: Environmental Code 6:19–21, or 16:2–11

²⁴⁰ Bull, T., *Objektivitetsprincipen* p. 77.

²⁴¹ See, for examples: Instrument of Government 11:9, the Act (1994:260) on Public Employment (Lagen om offentlig anställning) Sections 7–7d, FL Section 11, FPL Section 41, Judicial Procedure Code (SFS 1942:740) 4:12–14, etc.

²⁴² See: JO 1990/91 p. 283 where the local environmental board had based their decision to deny an application on the fact that they thought the valid legislation outdated and in need of reform. This reflects the difference between an administrative authority, like a municipal board exercising enforcement activities under the Environmental Code, on the one hand, and a municipality making political decisions based on the interests of the municipality, and the policy of the political majority, on the other.

²⁴³ See: Section 2.2.2.1.

²⁴⁴ SOU 2010:29 p. 149; Bull, T., *Objektivitetsprincipen* pp. 75–76. See, also: SOU 2010:29, arguing for codification of these fundamental principles for the administrative procedure, esp. at pp. 146–148, 155–156 and 181–185. On similar statements in the context of proportionality, see: Helmius, I., *Proportionalitetsprincipen* pp. 107–108.

used in the European context than in Sweden.²⁴⁵ The administration is to loyally carry out the administrative tasks stated in law, and in some respect also the policy behind it. Objective and loyal administration is thus tied to democratic ideals, and it furthers democratic legitimacy.²⁴⁶

European law does not contain an explicit formulation of a principle of objectivity, but the essence of the principle is to be found in its principal rules on equality and non-discrimination, fairness of trial, etc.²⁴⁷ In light of the above argued perspective of loyal exercise of administrative tasks, the fundamental EU principle of loyalty can be regarded as a demand for objectivity. Factual and impartial procedure is, as part of good administration, also an expression of the principle of objectivity. Due procedure, or procedural care is an expression, and a safeguard of objectivity.²⁴⁸ This will be further developed under Section 2.2.3.

2.2.2.3 Proportionality

2.2.2.3.1 *Legitimate Exercise of Power in a Multitude of Individual Cases*

Proportionality is probably the most complex, and the most debated principle.²⁴⁹ Proportionality is found in EU law and Swedish law, and is central in the fundamental rights discourse. However, the principles have somewhat different features and roles in the different contexts.

The core of the principle calls for weighing of the interests of the public and the individual.²⁵⁰ Proportionality thus regulates *how* power should be exercised in the individual situation, as opposed to merely requiring that there be legal basis for the exercise of power. A source of the principle is the notion of the liberal state, and the functionalist idea that the law must serve a useful purpose. Intervention by public authorities is justified by reference to legal and political aims in society. This connects to the principle of purposiveness. However, a strict application of purposiveness may be used to justify extensive measures against an individual. The lawful exercise of power is here judged according to its effectiveness and its proportionality considered in relation to the thus defended interest. The public authorities need powers to reach the important aims of public policy, but all exercise of

²⁴⁵ Bull, T., *Objektivitetsprincipen* pp. 79–80, and 98–99; Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* p. 66.

²⁴⁶ Bull, T., *Objektivitetsprincipen* pp. 103–104.

²⁴⁷ See: Bull, T., *Objektivitetsprincipen* pp. 73–74.

²⁴⁸ Note: JO 2008/09 p. 396, where a general routine to administer cases in the order they come in to the authority was stated to be based in the constitutional demand for objectivity.

²⁴⁹ See: Schwartze, J., *European Administrative Law* p. 677, stating a similar notion of the lack of satisfactory explanation of the principle within EU law.

²⁵⁰ Helmius, I., *Proportionalitetsprincipen* p. 109.

power beyond that which is necessary is not legitimate.²⁵¹ The actual standard of proportionality, the scales utilised in the weighing of interests, will differ as between different areas of law.²⁵² And the assessment of how much exercise of power is excessive will be determined in the individual case, by reference to individual circumstances.

2.2.2.3.2 *Proportionality and Fundamental Rights*

The principle of proportionality will often become central in the context of the fundamental rights of the individual. In different legal texts some rights are formulated as being absolute, while there is room for some infringement or delimitation of the rights in other cases. The prescribed grounds for such infringements can be different, but they will often be based in a fair balance of the individual right against important public interests. For that reason there are regulations on the legitimacy, and legality, of such infringements. We find such regulation in the context of some Swedish constitutional rights; in 2:20 of the Instrument of Government, and in the context of the ECHR, for example in Art. 8 para. 2. Proportionality is required in both contexts, demanding balance between the infringement and the interest behind it.²⁵³ A measure must be appropriate and necessary for reaching the relevant aim, and it must not place unnecessarily heavy burdens on the addressee. This entails a weighing of the benefit and detriment of the measure; the measure must seem reasonable in view of the effects for the individual.²⁵⁴ The principle of proportionality has been developed in the case law of the European Court.²⁵⁵ This case law is important also for the assessment of infringements of fundamental rights in the courts of Member States, and in the ECJ. The actual assessment of proportionality is done by the court trying the case, in light of the margin of appreciation, and with regard to the different circumstances in each country, and in each situation.²⁵⁶

2.2.2.3.3 *Proportionality and EU Law*

The principle of proportionality is an important feature of EU law.²⁵⁷ The exercise of power of the EU institutions is limited by such a principle in 5.4

²⁵¹ Petré, G., *Om offentlig rättslig användning av våld mot person* pp. 27–28; Sundberg, H., *Allmän förvaltningsrätt* pp. 120, and 669, and *Förvaltningen och rättssäkerheten* pp. 321–322. See, also: Graver, H.P., *Alminnelig förvaltningsrätt* p. 133.

²⁵² Graver, H.P., *Alminnelig förvaltningsrätt* p. 134.

²⁵³ Prop. 1975/76:209 p. 153; SOU 2010:29 p. 161; Cameron, I., *An Introduction to the European Convention on Human Rights* pp. 108–109; Danelius, H., *Mänskliga rättigheter i europeisk praxis* p. 50; Helmius, I., *Proportionalitetsprincipen* p. 108; Åhman, K., *Europadomstolens principer* p. 41.

²⁵⁴ SOU 2010:29 pp. 156–157.

²⁵⁵ See, for example: *Fredin v. Sweden*, Judgment of the 18 February 1991, para. 51–55; and *Janosevic v. Sweden*, Judgment of 23 July 2002, para. 80.

²⁵⁶ SOU 2010:29 pp. 161–165; Cameron, I., *An Introduction to the European Convention on Human Rights* pp. 107–110; Åhman, K., *Europadomstolens principer* p. 37.

²⁵⁷ Schwartze, J., *European Administrative Law* p. 677.

TEU, but it is has wider application also. Proportionality is vital when the ECJ assesses the Member States' claims for exceptions from the norms of free movement.²⁵⁸ The principle of proportionality is stated in the Charter of Fundamental Rights (Art. 52.1) and in the Code for Good Administration (Art. 6).

2.2.2.3.4 *Proportionality as a Fundamental Principle of Swedish Law*

Even though proportionality has long roots in Swedish public law history,²⁵⁹ it has been more explicitly recognised and expressly applied after the advancement of European law in the Swedish system.²⁶⁰ Proportionality can be found in many different statutes, regulating different sectors of public law.²⁶¹ It has been proposed to be codified in the Administrative Procedure Act (1986:223) (FL²⁶²).²⁶³ A summary description of the different features of proportionality states that public power may only be exercised if it can be perceived as necessary to achieve its purpose, the exercise of such power is in reasonable proportion to the weight of that purpose, and the means to reach this end is that which is least intrusive for individuals.²⁶⁴

An alternative description of roughly the same features of proportionality is made through distinguishing different parts of the principle; a narrower concept of proportionality,²⁶⁵ and a principle of necessity – or least intrusion. Proportionality in this narrower sense refers to the weighing of interests and stipulating that the disadvantage for the individual is reasonably related to the public benefit that the measure is aimed at. It also demands that the measure does not entail greater sacrifices for the individual than motivated

²⁵⁸ See, for example: Case C-55/94 *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (Gebhard)*, where the ECJ stated a formula for assessing the legitimacy of the infringements of the fundamental freedoms of EU law. This so called Gebhard test demands that the measure have an objective of necessary public interest, and that it is suitable for securing the attainment of that objective. Moreover, they must not discriminate, or go beyond what is necessary in order to attain the objective. The tests reflect demands for objectivity and proportionality in the restriction of fundamental freedoms of EU law.

²⁵⁹ Helmius, I., *Proportionalitetsprincipen* p. 109; Petrén, G., *Om offentlighetsprincipen* p. 27–30.

²⁶⁰ SOU 2010:29 p. 171; Helmius, I., *Proportionalitetsprincipen* pp. 122–130; Sterzel, F., *Författning i utveckling*; Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* p. 68; and Westerlund, S., *Proportionalitetsprincipen: verklighet, missförstånd eller nydaning?* p. 251; all with reference to landmark cases on the subject from the Supreme Administrative Court: RÅ 1996 ref. 40, 44 and 56. The cases all concerned different aspects of nature conservancy and balancing of public and private interests involved.

²⁶¹ See, for examples: the Police Act (SFS 1984:387) Section 8, and the Judicial Procedure Code (SFS 1942:740) 24:1 para. 2, 25:1 para. 2.

²⁶² In Swedish “Förvaltningslagen”.

²⁶³ SOU 2010:29 pp. 181–185.

²⁶⁴ Bull, T., *Mötes- och demonstrationsfriheten* pp. 446–448; Helmius, I., *Proportionalitetsprincipen* p. 111. The different parts of the principle can be seen in Sundberg, H., *Allmän förvaltningsrätt* p. 120, referring to such a general principle of proportionality as part of the demand for objectivity.

²⁶⁵ In Swedish: “behovsprincipen”.

by a strong public interest. The principle of necessity means that the public body may not use stricter measures than needed to reach the results sought. The measure must be necessary, purposive, and no stricter than necessary to reach its objective. It must end as soon as the measure is successful; or proven futile and consequently requiring other measures.²⁶⁶

2.2.2.3.5 *The Context of Administrative Discretion*

It should be noted that the weighing of interests involved in the administrative authority's assessment of proportionality is to a considerable degree a discretionary matter. The framework of the law leaves considerable room for the administrative authority's independent and professional assessment in the individual case. This links up with the above described relationship with legality. Proportionality regulates the exercise of administrative discretion. A decision does not merely have to be formally legal but also appropriate.²⁶⁷ Some benefit is generally afforded to the administrative authority's discretionary assessment. In the context of an appeals procedure, the courts will be careful not to intervene too readily in the administrative authorities' legitimate exercise of discretion. A procedural consequence of these considerations can be noted in the burden and standard of proof. If an administrative decision is argued to be accepted when case proceedings have not shown that the decision-maker has exceeded the limits of the discretion that suggests that the decision-maker does not have to prove that their decision is proportionate.

The discussed approach can be seen in case law indicating that the focus of the review by the court is to examine whether there is a clear disproportion in the weighing of interests,²⁶⁸ and investigating whether the decision is incompatible with the principle of proportionality.²⁶⁹ Sometimes it is expressly noted that the complainant has not shown that the decision is thus unlawful.²⁷⁰ These cases also commonly refer to the administrative decision-making discretion within the law, and reflect a more limited scope in assessing the legitimacy of the relevant decision. Such statements are drawn from judicial review cases, with a more limited scope of trial than in the appeal case, where the situation might be more complex. The idea of respecting the administrative discretion may not be as rooted in the full and reformative appeal procedure, trying also the merits of the case.²⁷¹ Here, the court may make their own assessment and decision on what the legal and appropriate

²⁶⁶ SOU 2010:29; Marcusson, L., *Offentlig förvaltning utanför myndighetsområdet* pp. 400–401; Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* p. 68.

²⁶⁷ SOU 2010:29 p. 182; Helmius, I., *Proportionalitetsprincipen* p. 131.

²⁶⁸ RÅ 1997 ref. 59, and RÅ 1999 ref. 76. See, also: SOU 2010:29 pp. 181, and 184.

²⁶⁹ See, for examples: RÅ 1998 not 228, RÅ 1998 not 258, RÅ 1999 not 21, RÅ 1999 not 144, RÅ 1999 not 171, 1999 not 237, RÅ 1999 not 238, RÅ 2000 not 6, RÅ 2000 not 25, RÅ 2000 not 152, RÅ 2000 not 184, RÅ 2001 not 31, RÅ 2001 not 104.

²⁷⁰ RÅ 1999 not 159.

²⁷¹ For an introduction to the Swedish administrative system see: Section 3.2.2.

exercise of power is in the individual case,²⁷² even though they sometimes use expressions suggesting a test of incompatibility with the principle of proportionality, rather than an actual assessment of proportionality.²⁷³ The issue is complex, and dependant on the individual situation and the context of the specific regulation. The general structural idea is that the focus of administrative decision-making is to be on the level of the first decision-making body.²⁷⁴

2.2.2.3.6 Reasonableness and Proportionality in Environmental Law

It should be noted that in environmental law discourse proportionality is sometimes described somewhat differently from the above described statements, focusing on the features of necessity, proportionality, and principal least intrusion. The relevant discourse relates on the one hand to a substantive concept or feature of proportionality, and on the other hand, to a more instrumental or procedural concept.²⁷⁵ In the administrative enforcement situation, I would refer to these concepts as reasonableness and proportionality. Reasonableness states the reasonable substantive standard demanded of the addressee, essentially through the Environmental Code (MB) 2:7.²⁷⁶ Proportionality is tied to the enforcement procedure – the exercise of power – deciding on the necessity and the appropriate method for such exercise of power, as stated in the second paragraph of MB 26:9. The idea is that the substantive demands of the Code are stated in law and are generally demanded, independently of the exercise of administrative power. All environmental actors are responsible for safeguarding these demands. Hence the reasonable substantive standard is the point of departure. The eventual enforcement entails exercise of power. It may then be questioned how and how much such power should be exercised. In this context, the proportionality of the administrative measures is considered. This exercise can not widen the frames of the law, thus allowing a less strict substantive standard than stated in law. The enforcers may however decide not to use their heaviest meas-

²⁷² See, for example: RÅ 2007 ref. 75.

²⁷³ See, for example: RÅ 2009 ref. 83, which concerned EU regulations on free movement of goods. Note however, the dissenting opinion of Justice Ståhl, arguing that it has not been shown that the relevant regulation was necessary for the public purpose argued, and thus quite oppositely demanding proof of the proportionality of the administrative measures.

²⁷⁴ See: Dir. 2008:36 stating at p. 8, the task for the reform of the Administrative Procedure Code. This is followed up and stated for example at SOU 2010:29 p. 397. Note also in earlier legal reforms: SOU 1981:46 pp. 13–14, 68–71, and 76–78.

²⁷⁵ Westerlund, S., *Proportionalitetsprincipen: verklighet, missförstånd eller nydaning?*, esp. pp. 254–256 and 284. See, also: Helmius, I., *Proportionalitetsprincipen*, for comments on Westerlund's discussion, esp. at pp. 126–129.

²⁷⁶ Or rather: Unreasonableness states the limits for reasonable substantive standards. The wording of the rule were changes with the introduction of MB, marking a higher standard of proof. See: Prop. 1997/98:45 Part 2 pp. 24–25. See, also: Michanek, G., *Att väga säkert och vikten av att säkra* p. 79, for a comparative discussion of this balancing under ML and MB.

ures, or at that specific time, in context of other available means, or other relevant circumstances.

The balancing of interests and also balancing of means and ends in exercise of authority, are fundamental in the assessment of the appropriate exercise of power within the frame of the law, both in administrative law generally and in environmental law enforcement specifically.

2.2.3 Administrative Procedure and Fair Trial

2.2.3.1 The Investigation; Due Care and the Inquisitorial Principle

A fundamental matter of due administrative procedure is that of responsibility for a sufficient investigation of a case to ensure a substantively correct decision. Central is the question of distribution of such responsibilities between the administrative authority and the involved individuals. This matter is topical in the analysis of this thesis. It will be introduced here, and further elaborated in Chapter 7, in the context of environmental law enforcement.²⁷⁷

The Swedish authorities, including the courts,²⁷⁸ have a principal responsibility for investigation in their decision-making. Notably, the Swedish administrative court procedure is generally one of full appeal, and reformatory character. The court thus functions similarly to the administrative decision-maker when considering the case anew. They investigate and assess the substantive circumstances, and may come to an altogether different decision.

The public authorities' investigatory duty is explicitly regulated for the courts in the Act (SFS 1971:291) on Administrative Court Procedure (FPL) (Section 8), but applies generally to administrative procedure.²⁷⁹ The authority shall aspire to acquire a comprehensive understanding of all the circumstances relevant for the case.²⁸⁰ This is called the inquisitorial principle.²⁸¹

²⁷⁷ See: Section 7.2.1.

²⁷⁸ Courts are categorised as authorities ("myndigheter") in Swedish law, albeit a quite particular kind of authority. I will distinguish the "ordinary" authority (in Swedish referred to as "förvaltningsmyndighet") by calling it an "administrative authority".

²⁷⁹ SOU 2010:29 p. 79; RÅ 2006 ref. 15, JO 1977/78 p. 310, and JO 2006/07 p. 172; Lundin, O., *Officialprincipen* p. 172; Sundberg, H., *Förvaltningen och rättssäkerheten* pp. 327–328. This falls well in line with the above noted structural idea that the focus of administrative procedure is to be at the first level – in the administrative authority (Compare: SOU 1981:46 p. 15). See, also: Prop. 1971:30 p. 284. In this Bill, resulting in the first general administrative procedural acts, the choice was made to not regulate investigatory responsibilities generally, due to variation of the duty in different situations. It was nevertheless stated that the administration is normally responsible for the investigation. The lack of regulation of the principle and the systematic problems and inconsistencies in relation to the rules for the administrative courts have been discussed since the early days of the general administrative statutes. See for example: RÅ 1974 ref. 29; Petrén, G., *Om förvaltningsdomstols utredningsplikt* p. 154. Codification of the principle in the FL is recently proposed in SOU 2010:29 pp. 397–419.

²⁸⁰ Prop. 1985/86:80 p. 19; SOU 1964:27 p. 294; SOU 1981:46 pp. 104–106; SOU 1983:73 p. 80; SOU 2010:29 pp. 416–417. See, also, the more general formulations in: Prop. 1971:30 pp. 284 and 388.

The public authority shall strive to reach the correct and appropriate decision, and it must be well informed in order to make such a decision.²⁸² The authority must investigate and prepare an authoritative decision, in order to ensure that the facts of the case matter match the rules providing the legal support for their decision. This shows that their decision is lawful, and appropriate to their public task. The procedural due care realised through sufficient investigation is thus connected to legality and purposiveness, to the Rechtsstaat principle of exercise of authority under law, and the democratic idea of realising public policy.²⁸³

The investigation responsibilities are linked to the earlier discussed principle of good government, demanding due care in the administrative procedure, as well as objectivity. The authority must strive for the right decision through making sure that all relevant facts and arguments are covered, instead of any subjective preference about the outcome.²⁸⁴ Without the necessary information it cannot make an objective and factual assessment of the case.²⁸⁵ The related principle of due care is recognised as a general legal principle of EU law. The principle calls for investigations of reasonable extent and quality, including gathering sufficient decision-making materials, and to carefully and impartially consider those materials.²⁸⁶

The meaning and application of the principle is quite complex. Despite an authority's general investigatory duties, the individual may to different extent be involved in the investigation. The distribution of investigatory duties between the authority and the individual varies in different situations.²⁸⁷ Generally speaking, cases that involve strict sanctions, or other very intrusive administrative measures, entail more extensive investigations, for which the authority cannot rely as much on the involvement of the individual.²⁸⁸ In

²⁸¹ In Swedish: "officialprincipen"; a decision-making procedure driven by the authority is likewise called "officialprövning". The wording "official" signifies that it is the public body, that is active. The legal theory and terminology is principally Nordic, and not easily translated. Comparative texts in English use the terms "inquisitorial" – or even "prosecutorial" – principle, and process. These terms do not fully reflect the communicative administrative procedure, but the term "inquisitorial" will, for lack of better options, be used in this study.

²⁸² Lundin, O., *Officialprincipen* pp. 172–173.

²⁸³ SOU 2010:29 p. 416.

²⁸⁴ The Charter of Fundamental Rights in the European Union Art. 41; SOU 2010:29 pp. 78–79. The application of the principle of due care by the national authorities has not been expressly stated in EU law, but based on the fundamental duty of loyalty a duty to carefully investigate the implementation of EU law should follow. Note also: SOU 1981:46 pp. 104–106 for pre-EU reflections on the relation to objective and factual procedure.

²⁸⁵ Sundberg, H., *Allmän förvaltningsrätt* pp. 120–121, and *Förvaltningen och rättssäkerheten* p. 327. Note also: SOU 1981:46 pp. 99 and 105, connecting the investigatory duties of the authority to the principle of objectivity.

²⁸⁶ See: Cases C-16/90 *Nölle*, and C-269/90 *Technische Universität München*.

²⁸⁷ Prop. 1985/86:80 p. 19.

²⁸⁸ SOU 2010:29 pp. 416–417; Petré, G., *Om förvaltningsdomstols utredningsplikt* p. 156 where the need for guidance through precedents is argued, followed by analysis at pp. 158–166. See, also: Lundin, O., *Officialprincipen* pp. 171 and 175–179; and Sundberg, H., *Förvaltningen och rättssäkerheten* p. 328.

the cases involving decisions which are onerous for the individual, an authority's investigatory duty will also lead to a consequential burden of proof. It follows from the duty to ensure adequate investigation that a poor investigation must not result in an individual's disadvantage.²⁸⁹

The general responsibilities of due care and the inquisitorial principles are ensured through procedural regulations. The authority has to communicate with the parties to the case, give them guidance, information, and access to the procedure, etc. The administrative procedure is hence a communicative procedure that strives to bring forward all relevant aspects, and necessary decision-making materials, to ensure the correct and appropriate decision.²⁹⁰ These procedural aspects will be presented next.

2.2.3.2 Communicative Procedure; Right to Be Heard, etc

When the administrative procedure involves an individual, it is particularly important that it is a communicative process where the relevantly interested parties are included. This is an expression of the fundamental Rechtsstaat principle of right to defence, or that no one should be convicted without first being heard.²⁹¹ This principle is primarily tied to criminal procedure, but it is often also reflected in the administrative law context, especially in the context of more intrusive or coercive exercise of authority. It is part of the concept of good administration, demanding due procedural care and communication.²⁹² A related expression in the administrative discourse, which illustrates the purposive relation to the right of defence, is that the individual's should be able to secure his rights.²⁹³

The communicative procedure entails that the authority has to let the involved persons know about the relevant information and steps being taken in the case. That gives these persons the opportunity to look after their interests, and the necessary insight into the case to do so relevantly.²⁹⁴ However, the communicative approach also has strong potential for improving the decision-making materials, rendering more likely the making of correct and

²⁸⁹ SOU 2010:29 p. 407; Ragnemalm, H., *Förvaltningsprocessrättens grunder* pp. 107–108; Petré, G., *Om förvaltningsdomstols utredningsplikt* pp. 155–156. For examples in case law see: RÅ 1989 ref. 67 and RÅ 2006 ref. 7. See, also: Sundberg, H., *Förvaltningen och rättssäkerheten* p. 324, basing administrative burden of proof on the fundamental liberal Rechtsstaat ideal of legality.

²⁹⁰ Prop. 1971:30 p. 465; SOU 2010:29 p. 425; Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* pp. 186–187; Sundberg, H., *Förvaltningen och rättssäkerheten*, stating at p. 328 the principle of communication as consequence of the inquisitorial principle.

²⁹¹ Prop. 1971:30 pp. 241, 445–447 and 465; SOU 2010:29 pp. 26, 71, 425, and 441; Sundberg, H., *Allmän förvaltningsrätt* p. 122, and *Förvaltningen och rättssäkerheten* p. 328.

²⁹² Charter of Fundamental Rights Art. 41; SOU 2010:29 p. 71.

²⁹³ In Swedish: "ta tillvara sin rätt", for example in: RÅ 2001 ref. 27 on the right of access to a closed case file. See, also: Prop. 1971:30 p. 241; SOU 2010:29 p. 74; and Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* p. 107. Sometimes, reference is made to a "principle of contradiction" ("kontradiktoriska principen").

²⁹⁴ Prop. 1971:30 p. 441.

appropriate decisions, as noted in the above.²⁹⁵ The involved parties may have important information that the authority has not considered, but will through the communication be given to the authority. The mere obligation to formulate the relevant information about the investigation, etc., may also lead to more careful and thorough preparation of the case, and thus promote due care. There are two sides of this procedural openness, the duty of the authority to actively hear the party, and the generally even wider right of the interested party to access the case materials. The party has a right to ask to be let into the case, but the authority also has a duty to take the initiative to communicate. These norms are regulated in Administrative Code (FL) Sections 16–17.²⁹⁶ They are, moreover, stated as part of good administration under 41 of the Charter of Fundamental Rights,²⁹⁷ and of the non-binding Code of Good Administrative Behaviour (Art. 16.1). Art. 41.1(a) of the Charter states a right to be heard before the authority makes a decision with adverse effects. This is a reflection of EU case law.²⁹⁸ The right to defence in criminal proceedings is specifically regulated, both in the Charter for Fundamental Rights (Art. 48) and in the ECHR (Art. 6 para. 1 and 3), in the context of fair trial rights.

Good administration also entails an administrative duty to provide reasons for decisions, at least those with adverse effects for the individual. This is established in the Swedish Act (1986:223) on Administrative Procedure (Sections 20–21),²⁹⁹ and in EU case law,³⁰⁰ in the Charter of Fundamental Rights (Art. 41.2(2)), and in the Code of Good Administrative Behaviour (Art. 18). This norm is fundamental for legal certainty.³⁰¹ It has similar purpose and benefits as for the right to be heard. It explains how they have reached the relevant decision – the legal grounds and decisive factual circumstances of the case, and the reasoning behind the interpretation and application of the law in the relevant situation. The reasons thus explain the legal support for their exercise of power. They summarise the information

²⁹⁵ SOU 2010:29 p. 425.

²⁹⁶ See: SOU 2010:29 pp. 245–251 and 425–456, for the proposed new regulations in FL Sections 9 and 21, stating application of the rules in a wider range of administrative decisions to reflect developments in case law and the administrative practice of the Parliamentary Ombudsman.

²⁹⁷ SOU 2010:29 p. 75.

²⁹⁸ Cases 49/88 *Al-Jubail Fertilizer Company v. Council*; C-135/92 *Fiskano v. Commission*, C-32/95 *Commission v. Lisrestal*; and joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v. Council and Commission*. See, also: Craig, P., and de Búrca, G., *EU Law* p. 540. See, also: Case C-349/07 *Sopropé v. Fazenda Pública*, establishing that the right of defence applies also to the Member States in their administration of cases within the EU law sphere.

²⁹⁹ See: Prop. 1971:30 pp. 477, 479 and 491; and also SOU 2010:29 for the proposed regulation in a reformed FL (Sections 27–28): pp. 491–518 on duty to give reasons, and 519–532 on notification of the decision. The proposal is to make these duties more clearly and functionally (and strictly) regulated.

³⁰⁰ Case 222/86 *Unectef v. Heylens*. See, also: SOU 2010:29 p. 495.

³⁰¹ SOU 1964:27 p. 443; SOU 2010:29 p. 491.

communicated in the procedure. The party concerned can then decide whether they should appeal.³⁰²

The discussed procedural rules facilitate due care in the administrative decision-making procedure, and make it possible for the individual to understand the decision and to defend their own interests. Communicative procedure is also part of the openness that promotes the legitimacy of the exercise of authority, as it makes the exercise of authority understandable.³⁰³ Due procedural care and a duty to give reasons are also connected to legality, specifically by ensuring proper preparation and the statement of legal grounds for the exercise of authority.³⁰⁴ This should promote correct and appropriate administrative decision-making.³⁰⁵

2.2.3.3 Right to Trial, etc

One way of securing the proper and lawful exercise of public power is control through the different kinds of judicial review of individual cases. For this purpose there are rules on fair trial and effective remedies.³⁰⁶ These rules can be found on all levels of law. Fair trial is today a general principle regulated in the UN Covenant on Civil and Political Rights (Art. 14),³⁰⁷ in the ECHR (Art. 6), the Charter of Fundamental Rights of the European Union (Art. 47). Related to this is the right to effective remedies, stated in Art. 13 of the ECHR, and Art. 47 of the Charter of Fundamental Rights. The right to judicial remedies is recognised as a fundamental principle of the EU, applying both to the institutions of the EU and the national authorities, and building on the common legal traditions of the Member States.³⁰⁸ The function of controlling the exercise of power links demands for effective remedies and fair trial to of the Rechtsstaat doctrine. It is a review of the legality of the decision, essentially checking that the authority had the competence and the grounds for the relevant decision.³⁰⁹

Developments as regards the right to trial have caused a fundamental reform of the Swedish administrative procedure in the last decades. This reform has been triggered by the European Court of Human Rights finding Swedish administrative appeals procedures in violation with Art 6 of the

³⁰² SOU 2010:29 p. 76, 491 and 510.

³⁰³ SOU 2010:29 p. 27 and 491.

³⁰⁴ Reichel, J., *God förvaltning i EU och i Sverige* p. 419. Moreover, the EU is, according to Art. 296 TFEU, also under explicit duty to motivate legal acts.

³⁰⁵ SOU 2010:29 p. 76.

³⁰⁶ See: SOU 2010:29 p. 79.

³⁰⁷ The United Nations International Covenant on Civil and Political Rights (1966).

³⁰⁸ Cases 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary*; C-222/86 *Uectef v. Heylens*; and joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v. Council and Commission*.

³⁰⁹ See, argument of the ECJ in: Case 294/83 *Parti Ecologiste "Le Verts" v. Parliament*, esp. para. 23; and joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v. Council and Commission*, esp. in para. 281–284 and 316–317.

ECHR.³¹⁰ Traditionally, administrative decisions have been appealed to a higher administrative authority, and often to the Government as last instance.³¹¹ This has been found to violate the right to a fair trial by an impartial and independent tribunal. Today, the general rule is appeal to an administrative court, and the right to trial is guaranteed in the Constitution through RF 2:11 para. 2,³¹² and specifically in Swedish administrative law through FL Sections 22–22a, as well as Section 3, with reference to the ECHR norm.³¹³ There is also special regulation of judicial review of governmental decisions.³¹⁴

The right to fair trial includes demands as regards the quality of the fair trial, especially for criminal proceedings. Examples of such demands include the presumption of innocence, and the protection against self incrimination.³¹⁵ This aspect of fair trial will be further discussed in the context of the actor's information duties.³¹⁶ Similar regulation of the fair trial procedure can be found in the Charter of Fundamental Rights (Art. 47–50) and of course also in different national procedural regulations.³¹⁷

2.2.4 Concluding the Administrative Law Perspective

I have presented some of the features and principles of the administrative law culture that is relevant for this study starting from the very basis of the Rechtsstaat, through general principles, to more specific principles for proper procedure. As noted, the principles fundamental to administrative law, are interconnected, and there is no need, in the context of the present investigation, to define the borders of the different concepts. I consider and apply, in my analysis, the more specific substantive and procedural principles and rights, connected to the concept of good administration, that are relevant to the studied administrative enforcement procedure.³¹⁸ This is done from a Swedish legal perspective, but with appropriate consideration of rele-

³¹⁰ Most famously in: *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982. See, further: SOU 2008:125 pp. 420–421. (Note, however, Halvar Sundberg, stating already in 1955, in *Allmän förvaltningsrätt* p. 13, that the Swedish administrative appeal system was not in adherence with the ECHR.) The Dutch system has undergone a reform that is very much ascribed to the case of *Bentham v. the Netherlands*, Judgment of 23 October 1985.

³¹¹ See: Sundberg, H., *Allmän förvaltningsrätt* pp. 7–15.

³¹² Prop. 2009/10:80 Section 9.3; SOU 2008:125 pp. 424–427.

³¹³ Notably, special sector regulation often includes appeals, sometimes to special courts; e.g. the Environmental Code Chapter 16, etc. These regulations generally follow the general rule of right to trial by a court.

³¹⁴ Lagen (SFS 2006:304) om rättsprövning av vissa regeringsbeslut (in translation: "the act on judicial review of certain governmental decisions").

³¹⁵ Expressed in the legal maxim of *nemo tenetur armare adversarium contra se* (no one is bound to arm his adversary against oneself).

³¹⁶ See: Section 7.7.6.

³¹⁷ See: Prop. 2009/10:80 pp. 159–161.

³¹⁸ Compare: Bull, T., *Objektivitetsprincipen* p. 71; and Marcusson, L., *Principer inom den offentliga rätten* p. 13, discussing the application of general principles of law.

vant European law. The more general statements of Rechtsstaat, good administration, and even legal certainty are wider and have a more general or theoretical application. They provide an important basis for the application of administrative law, especially when being weighed against potentially conflicting legal principles and structures. They connect deeper into the administrative law structure.

The presentation above makes several references to criminal procedure. The administrative procedure is to some extent influenced by criminal law. Criminal procedure should include the strictest safeguards of the rights and the legal certainty of the individual. This has to do with the seriousness of the exercise of power through penal sanctions. The border between criminal and administrative procedure is not always so clear, especially in the context of administrative sanctions. Administrative law discourse is therefore influenced by criminal law arguments, especially in the context of intrusive and coercive effects.³¹⁹ Sometimes, criminal procedural rules are used by way of analogy; or rather the administrative procedure is interpreted to entail criminal prosecution. This is topical in the area of administrative enforcement. Such influence of criminal law discourse on administrative procedure will be discussed in context of sanctions in Chapters 7 and 8.

2.3 Environmental Law

2.3.1 The Purpose and Character of Environmental Law

2.3.1.1 Introduction

Environmental law is a wide and pluralistic field of law. It has roots in civil law regulation of land and water use and neighbour conflicts, as well as regulations on fundamental public law control of dangers to human health. Following the social developments of urbanisation, industrialisation, and globalisation, the area of environmental law has emerged as a comprehensive regulatory field with the common aim and function of environmental protection and fair and sustainable management of natural resources. Each individual case – be it a neighbour conflict about noise disturbance, or regulation of the export of waste to a developing country – is tied to this collective task of resource management. The emphasis is therefore on the instrumentalistic task of realising policy goals, which has been discussed above under Section 2.2.1. The crucial legal issue is that of the distribution of the benefits and burdens involved. This links to discourse regarding fundamental

³¹⁹ Examples include: RÅ 1993 ref. 76 and JO 1998/99 p. 179. See, also: Sundberg, H., *Förvaltningen och rättssäkerheten*.

human rights. In the following I will describe some essential features of environmental law, so as to be able to show some challenges that this brings to the administrative law culture, specifically in the enforcement situation.

2.3.1.2 Achieving Sustainable Development

2.3.1.2.1 Sustainability as a Common Concern of Mankind

The main purpose of contemporary environmental law is to steer human behaviour so that the goal of sustainable development can be reached, and that such development may be maintained. Sustainable development is defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.³²⁰ Its breakthrough in global policy and law is generally ascribed to the Brundtland Commission, and their report on *Our Common Future*, and the Conferences and Declarations under the auspices of the UN engagement in environment and development issues in the lattermost decades of the 20th century.³²¹ Additionally, a global action programme for sustainability, Agenda 21, has been developed in this context.³²²

Sustainable development entails a call for action, to rethink and reform resource management.³²³ The basis of this doctrine is that Mankind is part of a large global ecosystem. We depend on our common resource base to satisfy our basic needs.³²⁴ We are also the only species that can actively affect the ecosystem, and destroy the resource base, but also manage it. Current resource management is not sustainable.³²⁵ We need to move towards sustainable management of resources in order to meet the needs of all of mankind, today and in the future.³²⁶

The concept of sustainable development is based on the political goal of development, and the fact that the natural resources necessary for such development and indeed for human life and society, as well as for other entities

³²⁰ *Our Common Future* pp. 40 och 43.

³²¹ Stockholm Declaration, Principles 1–11; Rio Declaration, Principles 3, 7–8. However, the ideas reflected in the concept are based in a long tradition of resource management and respect for nature (See: Ebbesson, J., *Nytt och gammalt i "modern" miljö rätt*, pp. 143–149; and *Miljö rätt* Chapter 1). For a developed description of the legal concept of sustainable development and its context and meaning and its legal relevance in legal research see for example: Christensen, J., *Rätt och kretslopp* p. 33, and Part BI; Gipperth, L., *Miljö kvalitetsnormer* Section 5.3; Westerlund, S., *En hållbar rättsordning*, Chapter 3; and also Decleris, M., *The law of sustainable development*.

³²² Agenda 21, A/CONF.151/26/REV.1, Annex II.

³²³ *Our Common Future* pp. 22–23.

³²⁴ *Our Common Future* pp. 44–46; World Charter for Nature, GA Res 37/7, UN GAOR 37th Sess, Supp. No 31, preamble para 3(a), UN Doc A/37/51 (1982).

³²⁵ *Our Common Future* pp. 44–46.

³²⁶ *Our Common Future* pp. 4 and 11, etc. See, also: Christensen, J., *Rätt och kretslopp* p. 38. Compare the annual reports of the World Watch Institute: *State of the World*, e.g. 1996 Chapter 1, and 1997 Chapter 1, and the therein referred scientific materials.

of the ecosystem, are limited. Human activities (industry, business, building, farming, etc) and the development thereof are beneficial – and necessary. Yet, they all involve environmental effects, and risks, and therefore have to be conducted with care and limits. The ideological point of departure in environmental law is that common natural resources, including resources like air and water, are not free to exploit, or damage.³²⁷ Nature is a common concern of Mankind.³²⁸ Its resources are limited and Mankind as a collective must manage it sustainably. The theory and concept of sustainable development means that the limits of the natural resource base have to be respected, and room for development created within these limits.³²⁹ This is where environmental steering comes in – to control human activities so as to manage the common resources appropriately and sustainably. A fundamental aspect, based on the idea of Man as not only a creature of nature but also moulder of his environment, is that the current unsustainable use of these resources can only be altered through the guidance and control of the actions of human actors.³³⁰ Put in other words, environmental law aims to achieve results in the physical environment – reactor orientation – through the steering of Man – actor control.³³¹ A dominating feature of environmental law is this focus on steering towards a result – its instrumentalistic character. Effectiveness is essential and influences interpretation and practice of the law. The aim and purpose of environmental law is thus focused on the environment, on protecting and preserving nature and biodiversity, and on reaching and maintaining sustainable resource management that will fulfil the appropriate needs of current and future generations of people – inter and intra generational equity.³³² The means to get to this end is to steer the actions of the environmental actors.

³²⁷ *Our Common Future* pp. 220–221. See, also: Birnie, P., et al., *International Law and the Environment* pp. 128–130, noting, at p. 129, a claim for international supervision of domestic environmental protection based on the idea of a common concern for sustainable development; Kiss, A., and Shelton, D., *International Environmental Law* pp. 31–35, for further presentation of the concept of common concern of humanity. Note also: Hardin, G., *The Tragedy of the Commons*, and his arguments about the problems of free access to common resources.

³²⁸ See: *Our Common Future* Part I.

³²⁹ Westerlund, S., *Miljörättsligt perspektiv* pp. 10–11.

³³⁰ See, for example: Stockholm Declaration Principle (opening statement); Westerlund, S., and *Miljörättsliga grundfrågor 2.0*, esp. p. 34, para. 303; Christensen, J., *Rätt och Kretslopp* pp. 86–98. Actor control may (and should) however be exercised through both actor and reactor related norms. See, further: Gipperth, L., *Miljökvalitetsnormer* p. 49; and Christensen, J., *Rätt och kretslopp* pp. 91–98.

³³¹ Christensen, J., *Rätt och kretslopp* p. 52; Westerlund, S., *Miljörättsligt perspektiv* p. 11, *Miljörättsliga grundfrågor 2.0* pp. 33–36.

³³² Stockholm Declaration Principle 2; Kiss, A., and Shelton, D., *International Environmental Law* pp. 15–18; Westerlund, S., *En hållbar rättsordning*, Chapter 3; Gipperth, L., *Miljökvalitetsnormer* pp. 6–7.

2.3.1.2.2 Sustainable Development as a Fundamental Principle of Law

There is some dispute as to the legal status of the international law concept of sustainable development.³³³ The concept is, however, authoritatively stated in EU law, as well as Swedish law. Sustainability will therefore be considered a principle of law in the context of this thesis. It is stated as a fundamental interest and objective to be furthered by the EU (TEU Art 3.5).³³⁴ The demands of environmental protection shall be integrated in all EU policy, especially with the purpose of achieving sustainable development (according to (TFEU Art. 11)). This principle of integration and the aim of sustainability are reiterated in the Charter of Fundamental Rights Art. 37. Sustainable development is also stated in the Swedish Instrument of Government 1:2 para. 3, as a fundamental public aim and task. The Swedish environmental law system is represented mainly by the Environmental Code, which explicitly states, in its opening paragraph, sustainable development as its goal and purpose. The second paragraph states essential steps in reaching sustainability, including pollution control, resource management, and preservation of biodiversity. The legislative intent in the Environmental Code proposal was to make international environmental principles legally binding and applicable to all activities of relevant environmental significance.³³⁵ Moreover, the Code and the National Environmental Objectives serve to implement Agenda 21.³³⁶ This illustrates the purpose and function of the Code. The National Environmental Objectives specify and elaborate further what sustainable development means. The principle is given more concrete meaning. The goals are to be considered in day-to-day environmental decision-making, for example when specifying the substantive demands of the Code in permit conditions, or in enforcement orders.³³⁷ The Environmental Code system is thus constructed so that the opening statement of the goal

³³³ Birnie, P., et al., *International Law and the Environment* pp. 125–127.

³³⁴ This objective was introduced with the Maastricht Treaty (Art. 2). It was then, and is still stated among the key articles stating the objectives of the EU. Its introduction has had great political significance. See: Jans, J., and Vedder, H., *European Environmental Law* pp. 7–8. See, also: on the preparations of the EU treaties, and the debate, in: Jans, J., and Scott, J., *The Convention on the Future of Europe: An Environmental Perspective*.

³³⁵ Prop. 1997/98:45 Part 1 pp. 1–2; SOU 1996:103 Part 1 pp. 22, 182 and 223–227, and Part 2 pp. 7–8.

³³⁶ Prop. 1997/98:45 Part 2 p. 5. The National Environmental Goals are established in the Government Bill Prop. 2000/01:130, and supplemented through Prop. 2004/05:150. Notably, these documents also operationalise the objectives through interim targets and action strategies. The fulfilment of the objectives are monitored and assessed annually. In 2010 (see: Prop 2009/10:155), the environmental objectives system has been reformulated, so that the interim targets are replaced by so called milestone targets, supplemented by priority strategies. These targets and strategies are set by the Government, and the Environmental Objectives are followed up by the Environmental Protection Agency. For more information go to: <http://www.miljomal.nu/Environmental-Objectives-Portal/>.

³³⁷ Prop. 1997/98:45 Part 2 pp. 7–8. See, also: Prop. 2009/10:155.

and purpose shall,³³⁸ where relevant, be considered in the application of every rule with reference to the protection of human health and environment. In the choice between different measures or decisions, for example in administrative enforcement, the one most likely to further sustainable development shall be chosen.³³⁹

This instrumentalistic basis of environmental steering sets the background for the theory and general principles of environmental law. In the following I will present some central aspects of this the environmental law culture, and indicate what this means for juridical steering in the environmental context.

2.3.1.3 Natural Scientific Factors

The specific characteristics of environmental law are based on natural scientific factors that have to be taken into consideration when working towards qualitative environmental goals.³⁴⁰ In the following, I will give some examples of natural scientific factors that will impact the legal handling of environmental risks, damage, liability and responsibility.

The elementary natural scientific factor is that the natural resources are limited. In response, environmental law and policy has the purpose of securing development within these limits, thus allowing external environmental factors to decide judicial steering. One problem is that the regeneration of renewable resources is so much slower than their utilization. Other resources are non-renewable (or regenerate very slowly compared to the history of mankind). In both these cases the resources risk being depleted. One should bear in mind that there is no addition of natural materials and energy in the system, with the exception of solar energy and meteorites. There are only different mixtures and concentrations. So biological systems and the activities of Man only spread or concentrate these materials and this energy and do not create any new. Resource management is therefore of the essence. A fundamental idea in the Environmental Code is that the present generations cannot uphold an environmentally damaging and resource depleting lifestyle. Social development should be steered into a route that is sustainable in the long run.³⁴¹ Crucially, resource management measures must generally be proactive. Apart from the economic advantages of avoiding damage instead of repairing it, environmental damage can be irreversible. This means that restoration is sometimes not an appropriate or sufficient means of action.

³³⁸ MB “shall” be applied so as to safeguard the different components of sustainability, and so that the stated goal and purpose is best ensured. This wording can be argued to strengthen the goal statement of the Code, and to influence its normative status.

³³⁹ Environmental Code 1:1 para. 2; Prop. 1997/98:45 Part 2 pp. 6–8. Note also, comments on the environmental law discourse, by Fredrik Sterzel in: *Ramlagar – nytt och gammalt* at p. 242, in the context of framework law and goal statements in law.

³⁴⁰ Christensen, J., *Rätt och kretslopp* p. 163; Kiss, A., and Shelton, D., *International Environmental Law* p. 21; Westerlund, S., *Miljörättsliga grundfrågor 2.0* pp. 10, 16 and 22.

³⁴¹ Prop. 1997/98:45 Part 2 p. 7.

Other natural scientific factors that have to be considered are different aspects of causality that do not fit with the perception of straight causality, which is generally the norm in the legal tradition. Nature does not always act in a linear way. Such factors are threshold effects, where the damaging effects arise at a certain point – a threshold – of critical load. The damaging effects may then suddenly set in with surprising force and speed after years or even decades of similar or even decreasing pollution without any visible effects.³⁴² Another challenging natural scientific factor is that of synergy effects, which mean that the effects of two different factors impacting the environment, are greater in combination than for each one separately. Two different chemicals, for example, may entail certain quite acceptable and manageable risks by themselves, but when put together, the effects increase, potentially creating a completely new risk situation. This means that environmental control in the individual situation cannot limit its focus to the addressed activity in itself, but must look at the broader environmental context and the environmental effects and risks which that picture presents.

The natural scientific reality is decisive for functional and purposive environmental steering. As described, it is very complex. There will often be a lack of scientific certainty, which has to be considered in all decision-making. Additionally, nature is under continuous change, both naturally, and as a result of human activities. This entails a demand for dynamic regulation which meets these changes in a relevantly purposive manner.³⁴³

2.3.1.4 An Evolving Right to Environment

It has been suggested above,³⁴⁴ that the fundamentals of administrative law are linked to fundamental human rights, and such rights are important features of the Rechtsstaat and of good government. There is therefore an environmental dimension to the fundamental rights discourse. Environmental law and human rights law are interrelated and interdependent.³⁴⁵ The human rights discourse includes environmental aspects, and a safe and healthy environment is seen as a precondition for civil and political rights,³⁴⁶ including the right to life.³⁴⁷ There is also an increasingly common claim for a right to environment, sometimes referred to as an independent and fundamental hu-

³⁴² See: Gipperth, L., *Miljö kvalitetsnormer* Sections 4.4 and 4.5.

³⁴³ Kiss, A., and Shelton, D., *International Environmental Law* pp. 22–23.

³⁴⁴ Section 2.2.1.5.

³⁴⁵ Cullet, P., *Definition of an Environmental Right in A Human Rights Context* pp. 2–3; Kiss, A., and Shelton, D., *International Environmental Law* pp. 661, 663–666 and 725–727; Shelton, D., *Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration* (UNEP draft paper) p. 2.

³⁴⁶ UN General Assembly Resolution 45/94 of 14 December 1990, para. 3. This can be tied to the discourse on social rights, see: Prop. 1975/76:209 pp. 99 and 137; Gustafsson, H., *Taking Social Rights Seriously (I)* p. 448; Lind, A., *Sociala rättigheter i förändring* p. 29.

³⁴⁷ Opening paragraph of the preamble of the Stockholm Declaration 1972, and the UN General Assembly Resolution 45/94 of 14 December 1990, para. 5.

man right.³⁴⁸ The Stockholm Declaration of 1972 opens with the declaration that Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.³⁴⁹ The Declaration of the Conference on Environment and Development in Rio 1992 reaffirms the Stockholm Declaration, and declares Man's right to a healthy and rich life in harmony with nature.³⁵⁰ A right to environment and the connection between environment and human rights is reflected in international documents,³⁵¹ and in many national constitutions.³⁵² Environmental policy is emphasised in the EU Charter of Fundamental Rights, however not in terms of individual rights.³⁵³ There is, however, no authoritative comprehensive declaration of environmental rights and the different expression of right to environment are not homogenous or even very clear. The legal status of the statements is therefore debatable, and the international law discourse has been apprehensive about the recognition of specific environmental rights.³⁵⁴ It is nevertheless clear that there are considerable claims for human rights connected to environmental issues.³⁵⁵ Some expressions of such claims will be discussed in the following.

³⁴⁸ Gipperth, L., *Miljö kvalitetsnormer* p. 73; Kiss, A., and Shelton, D., *International Environmental Law* p. 709.

³⁴⁹ Reaffirmed by the UN General Assembly in Resolution 45/94, 14 December 1990 para. 4.

³⁵⁰ Rio Declaration preamble, and Principle 1. Compare: Kiss, A., and Shelton, D., *International Environmental Law* pp. 666–668, discussing a weakened formulation in Rio.

³⁵¹ See, for example: International Covenant on Economic, Social and Cultural Rights (ICESCR, 16 December 1966), calling for steps to improve environmental and industrial hygiene, in the regulation of right to health (Art. 12.1.(b)); Convention on Rights of the Child, stating in the context of measures to combat disease and malnutrition, a duty to consider the dangers and risks of environmental pollution in Art. 24.2(c).

³⁵² Sometimes expressed as the duties of the state to protect environmental interests, e.g. Swedish Instrument of Government 1:2; the Constitution of Finland (731/1999) (Perustuslaki) Section 20; Constitution of Greece Section 24; but often also as a fundamental right for everyone to a safe and healthy environment, e.g. Constitution of the Republic of South Africa (Act 108 of 1996) Section 24; the 1988 Constitution of Brazil of 1988 Section 225; and the Constitution of the Russian Federation, 1996 Section 42.

³⁵³ Stating, in Art. 37, a rather more careful requirement of a high level of environmental protection, and integration of environmental issues in their policies.

³⁵⁴ Birnie, P., et.al., *International Law and the Environment* pp. 271–272, 280–281 and 301–302; Kiss, A., and Shelton, D., *International Environmental Law* p. 729. The Draft principles of 1994 did not result in authoritative regulation, and the issues were largely avoided at the Johannesburg summit. The issue of climate change has however pushed the agenda, in view of the potentially catastrophic consequences of mismanagement of natural resources, see: Human Rights Council Resolution 7/23; and further in: Humphreys, S., (Ed.) *Human Rights and Climate Change*.

³⁵⁵ Kiss, A., and Shelton, D., *International Environmental Law* p. 17. Note specifically the Stockholm Declaration; the Draft Principles on Human Rights and the Environment, E/CN.4/Sub.2/1994/9, Annex I (1994), proposing a right for all persons to a secure, healthy and ecologically sound environment, and to an environment adequate to meet equitably the needs of present and future generations. Right to freedom from pollution, environmental degradation and activities that adversely affect sustainability are also proposed, as well as protection of nature and its ecosystems, etc. See, also: European Council Parliamentary Assembly Recommendation 1614 (2003) furthering, with reference to the Stockholm Declara-

One way to ensure a good and healthy environment for everyone is to safeguard the involvement of the public in decision-making procedures.³⁵⁶ In this area there is a strong argument for specifically environmental rights.³⁵⁷ This is regulated in international instruments,³⁵⁸ and international human rights jurisprudence, such as the European Court of Human Rights, will uphold procedural rights in the context of environmental issues.³⁵⁹

A related development can be noted in the EU law system, which contains a good deal of regulation of environmental standards that specify Member State responsibilities. The EU environmental standards can be argued to specify a right which the individual may claim has been infringed. Through the doctrine of direct effect, such responsibilities may be relied upon in court by relevantly interested parties.³⁶⁰ This feature is not formulated as a fundamental human right, but it reflects a perception of executable individual rights to the level of environmental quality prescribed in EU law.

Environmental concerns have also influenced the interpretation and application of other established rights,³⁶¹ for example in the case law of the European Court of Human Rights. There is no explicit right to environment under the ECHR. The European Court will nevertheless recognise environmental issues as legitimate public interests that may justify necessary infringements

tion and the Aarhus Convention, the statutory protection of rights recognising a human right to a healthy, viable and decent environment, including procedural rights.

³⁵⁶ Cullet, P., *A Definition of an Environmental Right in a Human Rights Context* pp. 6, and 10; Kiss, A., and Shelton, D., *International Environmental Law* p. 665.

³⁵⁷ Birnie, P., et al., *International Law and the Environment* p. 288.

³⁵⁸ Art. 10 of the Rio Declaration, stating public participation as the best way to handle environmental issues; the Aarhus Convention, which argues a fundamental right to environment, and regulates a supporting access to information, public participation and access to justice. Notably, the EU Aarhus legislation through directives 2003/4/EC on environmental information, and 2003/35/EC supplementing the EIA and IPPC directives with further procedural regulation. Note, also: Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsörening v. Stockholms kommun*, where the ECJ argued for NGO access to justice based partly on the Aarhus convention. On international law on procedural rights, see: Birnie, P., et al., *International Law and the Environment* p. 291; Ebbesson, J., *Participatory and Procedural Rights in Environmental Matters: State of Play* (UNEP draft paper); Kiss, A., and Shelton, D., *International Environmental Law* pp. 669, 675 and 679, referring to international law documents.

³⁵⁹ *Taşkin and others v. Turkey*, Judgment of 10 November 2004, with reference to the Rio Declaration and the Aarhus Convention; *Öneryıldız v. Turkey*, Judgment of 30 November 2004. See, also: Birnie, P., et al., *International Law and the Environment* pp. 295–296.

³⁶⁰ See, for example: Case-237/07 *Janecek v. Freistaat Bayern*. where it was found that a directly concerned person has a right to demand that an administrative authority carry out prescribed measures to ensure a specified state of environmental quality. Mr. Janacek lived by a road with air pollution levels exceeding EU law limit values. The ECJ stated that he could demand that the competent authority set up the required action plan, when there was a risk of exceeding the said standard. The purpose of these quality norms was health protection, which could suggest that it was a specification of a substantive right to a healthy environment. Compare Darpö, J., *Rätten till en god miljö* p. 111. Note also the statement of the Advocate General Sharpston in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsörening v. Stockholms kommun*, that the environmental system provides rights that would be void of effect without relevant procedural access, see Celex 62008C063 para 80.

³⁶¹ See: Kiss, A., and Shelton, D., *International Environmental Law* pp. 682–708.

of other rights. These issues are weighed in a proportionality assessment, but a wide discretion is given to the regulator through the idea of the State's margin of appreciation.³⁶² A common conflict of legitimate interests is that of freedom to exercise ones property rights in view of environmental interests. Commonly, property rights are formulated such that they may be encroached upon, or delimited through proportionate regulations motivated by public interests such as environment, public health, etc. This construction is found in Swedish law (RF 2:15), and also in the context of the ECHR.³⁶³

Apart from the status of environmental interests as legitimate counter-interests, other established rights have been progressively developed so as to include environmental issues, for example in the interpretation of the concept of home and private life (Art. 8),³⁶⁴ and in serious cases also in the right to life (Art. 2).³⁶⁵ This entails both protection against infringements by the State, and a demand for a necessary state protection of the exercise of the rights. This means that the State's under-enforcement of legal safeguards of the relevant rights is also a breach of the duties under the ECHR.³⁶⁶

These developments illustrate the dynamic understanding of human rights, and the concept of a life in dignity and welfare, which today include environmental concerns. Interestingly, national and international environmental law standards have been utilised to specify the concrete meaning of existing human rights, especially in relation to constitutional support of environmental rights and duties.³⁶⁷ It must on the other hand be remembered that

³⁶² See, for example: *Fredin v. Sweden (No. 1)*, Judgment of 18 February 1991.

³⁶³ Michanek, G., and Zetterberg, C., *Den svenska miljörätten* pp. 45–47.

³⁶⁴ *López Ostra v. Spain*, Judgment of 9 December 1994; *Hatton and others v. the UK*, Judgment of 8 July 2003; *Taşkın and Others v. Turkey*, Judgment of 10 November 2004; and *Fadeyeva v. Russia*, Judgment of 9 June 2005. See, also: *Kyrtatos v. Greece*, Judgment of 22 May 2003, stating in para. 52 the limited scope of protection of environmental interests. For earlier statements that the ECHR includes neither a right to nature conservation, nor a right to peaceful environment or enjoyment of ones possessions in a pleasant environment, see: *Rayner v. UK*, Decision of 16 July 1986, and *X and Y v. Germany*, Decision of 13 May 1976, both on the admissability. See, also: Birnie, P., et.al., *International Law and the Environment* p. 284; and Kiss, A., and Shelton, D., *International Environmental Law* p. 692. Note, moreover: Decision of the European Committee of Social Rights *Marangopoulous Foundation for Human Rights (MFHR) v. Greece*, 6 December 2006, where they develop the idea of a right to a healthy environment in their review of complaints on failure of the Greek authorities to comply with the European Social Charter (Art. 2§4, 3§1 and 2 on just, safe, and healthy working conditions, and Art. 11 on right to protection of health).

³⁶⁵ *Öneriyıldız v. Turkey*, Judgment of 30 November 2004, about a mismanaged Turkish waste dump site which caused an accident which killed 39 people living next to it, and the subsequent failure to enforce the crimes and to provide remedies for injured parties.

³⁶⁶ See: *Guerra and others v. Italy*, Judgment of 19 February 1998; *Hatton and Others v. the UK*, Judgment of 2 October 2001; *Fadeyeva v. Russia*, Judgment of 9 June 2005. See, also: Darpö, J., *Rätten till en god miljö* p. 109.

³⁶⁷ *Marangopoulous Foundation for Human Rights (MFHR) v. Greece*, Compalint No. 30/2005, Decision on the Merits, 6 December 2006, of the European Committee of Social Rights, referring extensively to international law on climate change and procedural rights, WHO recommendations on limits values in view of health risks, as well as EU law and recommendations on procedural rights and best available technology; *Fadeyeva v. Russia*, Judgment of 9 June 2005.

the development described is not designed to provide protection of the environment as such, but rather expressed within the purpose and limits of the established rights.³⁶⁸ And the established rights are by definition of anthropocentric character and purpose. Moreover, a fair balance has to be struck between the relevant competing interests of the individual and the public. In that assessment, the State enjoys a margin of appreciation.³⁶⁹

Apart from these developments within the established concept of human rights, there is also a claim for a specific right to environment, sometimes including substantive environmental standards, comparable to existing regulations of quality standards.³⁷⁰ The perception of common resources and equity also entails fundamental claims for rights to food, water, and shelter, but also the rights to health, work, and education, which many lack today.³⁷¹ These concerns are growing in view of the Earth's growing population, and the current overuse of resources, meaning that more people will have to make do on less resources in the future. Sustainable development demands inter- and intragenerational equity, entailing that all should have the same fundamental right to fulfil their needs, including people of future generations.³⁷² On a level of principle, we might argue the notion of equity in a

ment of 9 June 2005, assessing national pollution control in view of the substantive standards; *Taşkin and others v. Turkey*, Judgment of 10 November 2004 noting international law on procedural rights; and *Tătar c. Roumanie*, Arrêt du 27 janvier 2009, focusing on procedural rights but also considering substantive international environmental standards.

³⁶⁸ Cullet, P., *A Definition of an Environmental Right in a Human Rights Context* p. 8. Note, also: Joint Dissenting Opinions of Judges Costa, et.al., in: *Hatton and others v. the UK*, Judgment of 8 July 2003, arguing development of Art. 8 in view of the Stockholm Declaration on right to environment, etc. Moreover, complainants arguing Art. 8 relating to environmental nuisances have to show actual interference with the applicant's private sphere, and that this interference was sufficiently severe, see: *Fadeyeva v. Russia*, Judgment of 9 June 2005, para. 69–70.

³⁶⁹ *López Ostra v. Spain*, Judgment of 9 December 1994, para. 51. Notably, the margin of appreciation may also be used the other way round – to give the state discretion in the manner of mitigation of environmental nuisance, see for example in *Hatton and Others v. the UK*, Judgment of 8 July 2003. See, also: Birnie, P., et.al., *International Law and the Environment* p. 287.

³⁷⁰ Kiss, A., and Shelton, D., *International Environmental Law* p. 710.

³⁷¹ *Our Common Future*, for example at pp. 29 and 43. Stockholm Declaration 1972 Sections 2 and 4 of the preamble, and Principles 8 and 11. Compare also to: the International Covenant on Economic, Social and Cultural Rights Part III; Kiss, A., and Shelton, D., *International Environmental Law* pp. 689–692; and Birnie, P., et.al *International Law and the Environment*, holding, at p. 281, that environmental issues fit best in the context of these so called second generation rights, which are of programmatic character and focused on government policies.

³⁷² *Our Common Future* pp. 4, 8, 11, 29 and 46–49. Equity is also central in the Stockholm and Rio Declarations, where the problems of inequity is recognised and instruments to reduce the inequities are introduced. See: Stockholm Declaration 1972 para. 4, and to some extent para. 2, of the preamble, and Principles 1, 2, 9 and implicitly in Section 21. Rio Declaration 1992 Principles 3, 5, 7, and 9. See, also: Birnie, P., et.al., *International Law and the Environment* p. 119–123; Christensen, J., *Rätt och kretslopp* p. 38; Kiss, A., and Shelton, D., *International Environmental Law* p. 15. Compare the annual reports of the World Watch Institute: *State of the World*, e.g. 1996 Chapter 1, and 1997 Chapter 1, and the scientific materials referred to.

further meaning than fulfilment of basic needs, and question fairness in the overall distribution of access to the common resources, and their benefits. Overuse of resources by some individuals is basically carried out at the expense of others and should be legitimated by general benefits. Fair and equitable access to natural resources is a central point of sustainable development. The principle thus features an idea of distributive justice, and a basic right of each and everyone to the common resources. Another aspect of this reasoning is that it includes a corresponding duty for every individual to protect and improve the environment in respect of these rights.³⁷³

In the end, the strengthening bonds between environment and human rights, and the call for a right to environment in a sustainable world, may shift the basis for our perception of public control in environmental issues. Human rights generally place extra weight on the protection of the individual against the public, and means priority for the individual freedom and autonomy. This emphasises the limits of public authority – of the exercise of administrative competence. I would argue that the above described concept of environmental rights means that the balance is changed, and that the protection of the environment and measures to manage the common resources sustainably is also seen as a protection of fundamental human rights, both collective and individual rights. This demands a more complex idea of the basic public law perception of state intrusion in the fundamental freedom of the environmental actor.

In view of the inter- and intragenerational equity promoted in the environmental law discourse on sustainable development, the claim for environmental rights is essentially valid. The appropriate expression of such suggested rights in practice is however debatable. While the legal discourse may be apprehensive in the acceptance of justiciable individual rights to environment based on the described sustainability doctrine, there is a wide acceptance of the responsibility for sustainability.³⁷⁴ Furthermore, expressions of right to environment for each and every one are commonly tied to corresponding duties.³⁷⁵ The distinction of those whose rights are to be protected and those they are to be protected from disappears in the context of the collective task of mankind, to manage the common resources fairly and sustainably. This will be discussed further in Section 2.3.3.2.

³⁷³ Stockholm Declaration Principle 1. See, also: Section 2.3.3.2.

³⁷⁴ Birnie, P., et al., *International Law and the Environment* pp. 120–121.

³⁷⁵ Stockholm Declaration Principle 1; Kiss, A., and Shelton, D., *International Environmental Law* p. 665; Shelton, D., *Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration* (UNEP draft paper) p. 3, for a comparison of environmental duties to similar statements in fundamental human rights documents, but arguing a preference of rights based approaches because of their maximum claims on society. See, also: *Guerra and Others v. Italy*, Judgment of 19 February 1998.

2.3.1.5 The Legal Challenges – Some Notes on the Way

From this description of the purpose and character of environmental law we may note a few things: First of all, environmental law is very much focused on the achievement of the goal of sustainable management of natural resources. This means that the fundamental purpose of the relevant law is to achieve results in the environment. This can be argued as an expression of the welfare state development of the Rechtsstaat ideals, as described in Section 2.2.1.2. Secondly, as a consequence of this focus on environmental results, the functions of this instrumentalistic body of law, as well as the assessment of its proper functioning, will be determined by natural scientific factors. These basically state that we depend on nature, which is an interrelated and interdependent system. We have to be careful in managing it, and we need sufficient and good quality information in order to make the appropriate decision. This feature is expressed in the environmental law principles of prevention, and precaution, that will be further developed in the next section. Thirdly, the environmental perspective of sustainable resource management includes an idea of equity, which entails a claim for fundamental rights and responsibilities in relation to the common resources. These rights and responsibilities apply to Mankind collectively, but also to each and every individual as holder of a legitimate environmental interest, or as an actor whose behaviour affects the legitimate interests of others. The intergenerational perspective adds future generations to this reciprocal claim. The sense of common concern for our natural resources is a fundamental basis for the extensive actor responsibilities, and the environmental control regimes, which are in focus in this thesis. As stated in closing in Section 2.3.1.4, the claims for equity and right to environment may shift the perspective of the assessment of administrative intrusion in the activities of the individual. It can also shed some light on the question of legitimated participants in legal processes, as will be discussed in Section 2.3.3.3.

2.3.2 Prevention and Precaution; Topical Principles

2.3.2.1 Prevention

Because of the necessity of sustainability and the problems of foreseeing causal effects of environmental damage, the focus of environmental steering is on avoiding damage. The idea is that prevention is better than cure. This is connected to the above-described natural scientific complexities, including irreversibility.³⁷⁶ Another important reason for this focus is that environmental damage is normally much easier, and above all cheaper, to do something about the sooner measures are taken. It is better to rectify the problem

³⁷⁶ Kiss, A., and Shelton, D., *International Environmental Law* p. 204.

at the source,³⁷⁷ before it spreads and reacts with the environment. But the preferred approach is to take measures even earlier. Therefore, an established and fundamental principle of international and national environmental law is the duty to prevent, reduce and control environmental harm.³⁷⁸ Ideally environmental harm should be avoided as early as possible. Here we can see a kind of temporal scale of duties, from the early preventive activities, trying to foresee problems to be able to avoid them, to more immediate prevention in stopping for example a technical breakdown resulting in a harmful emission, an lastly to minimise and mitigate the harm from such an emission. Early prevention is suggested as most effective, both in terms of results and costs. This entails proactive work including the monitoring, planning and investigation of an activity and its effects, and ensuring sufficient expertise to facilitate appropriate such supervision. Knowledge and information is thus essential to the exercise of prevention. Consequently, we are, with this approach, dealing with risk management. This perspective illustrates the main focus of the environmental law system on administrative steering, which has the main purpose and function of directing the behaviour of the environmental actors, rather than punishing the breaches of law or repairing the damage. These latter approaches may however to some extent be connected to prevention through their potential deterrent effect. A topical and concrete expression, however, of a preventive approach is that of prior assessment of potentially harmful activities – basically a permitting scheme of some sort.³⁷⁹

The basis for preventive measures is information. Hence, environmental law commonly requires environmental impact assessments, obligations to inform the relevant authorities and to turn in reports, etc. The Swedish Environmental Code imposes a general obligation of sufficient knowledge on the actor's part, for understanding and appreciating the risks and effects – that is, the environmental problems of the relevant activity (MB 2:2). The actor also has a responsibility to supervise and control his own activities, and to take action to avoid and deal with these environmental problems (MB 2:3). These general rules, as well as the more specific actor responsibilities for information, supplement the fundamental duties for the steering authorities to investigate, communicate, and generally process cases with due care in order to ensure the decision-making materials needed to take the correct and appropriate action. The distribution of these information responsibilities between the individual actor, and the administrative enforcement authority will be

³⁷⁷ This is often described as an independent principle, certainly in EU-law, see: TFEU Art. 191.2; and Jans, J., and Vedder, H., *European Environmental Law* pp. 40–41.

³⁷⁸ Birnie, P., et.al., *International Law and the Environment* p. 143 (International Law), TFEU Art. 191.2; Jans, J., and Vedder, H., *European Environmental Law* p. 40 (EU); MB 1:1, and 2:3 (Sweden), Wm Art. 1.1.a, (the Netherlands). A preventive approach has been promoted since the early days of environmental law regulation, see for example, and explicitly argued in SOU 1966:65 pp. 39–40, 211, 220, and the subsequent Prop. 1969:28 at p. 210.

³⁷⁹ Kiss, A., and Shelton, D., *International Environmental Law* p. 204.

analysed in Chapters 7–8. The analyses reflect the administrative procedural objective of safeguarding legal certainty, and the shifted perspective brought about by the above described environmental aims, and the concept of common and shared concerns.

2.3.2.2 The Precautionary Principle

Prevention should also be seen in the light of the environmental law doctrine of precaution. Precaution is also essential because of the above-stated aim of staying within sustainability limits, of foreseeing and preventing damage and of the difficulty in obtaining all relevant knowledge and information. Because of the complexities of nature and the non-linear causality factor the relevant knowledge is hardly ever attainable with total certainty. As noted above, preventive environmental steering and the instruments and processes of environmental law generally involve the management of risks. This includes considering causality and weighing probability against the seriousness of the environmental hazard at hand. This is where the precautionary principle comes in.³⁸⁰ This is an essential principle which influences the character of environmental law. It was proclaimed in Art. 15 of the Rio Declaration, as well as many international environmental law documents ever since.³⁸¹ It is also stated as a fundamental principle of EU environmental policy (Art. 191.2 TFEU),³⁸² something which has also been reaffirmed by the European Court of Human Rights, for example in *Tătar v. Romaine*, stating the precautionary principle as a juridical norm with content to be applied within the EU.³⁸³ The precautionary principle is expressed in different so-called “safeguard clauses” in environmental directives. Such clauses regulated risk management procedures, and warrant preventive action also when there is a lack of scientific certainty.³⁸⁴ Thus suggests a development towards recognition of the environmental principles of prevention and precaution in the evaluation of information and evidence in the resolution of individual cases. The focus is on risk assessment, and the standard of evidence to show causality or seriousness of health problems, etc., is lower, especially where one party has easier access to the information.³⁸⁵ This

³⁸⁰ See, for example: Birnie, P., et.al., *International Law and the Environment* p. 154.

³⁸¹ See: Birnie, P., et.al., *International Law and the Environment* pp. 154–155; Kiss, A., and Shelton, D., *International Environmental Law* p. 207, with references.

³⁸² In 2000, the European Commission produced a Communication to state their policy on interpretation and application of the principle, see: Communication from the Commission on the Precautionary Principle, COM (2000) 1. For further analysis of the principle within EU-law, see: Jans, J., and Vedder, H., *European Environmental Law* pp. 37–40.

³⁸³ See: *Tătar c. Roumanie*, Arrêt du 27 janvier 2009, para. 69 (h).

³⁸⁴ Jans, J., and Vedder, H., *European Environmental Law* pp. 38–40.

³⁸⁵ Shelton, D., *Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration* (UNEP draft paper) pp. 18–21; *Taşkın and others v. Turkey*, Judgment of 10 November 2004, para. 112–113 showing an assessment of risk; *Fadeyeva v. Russia*, Judgment of 9 June 2005, para. 79–88, illustrating the weighing of evidence on causality, as also: *Marangopoulous Foundation for Human Rights (MFHR) v. Greece*, Complaint No.

makes it easier to prove environmental harm, and to generate a responsibility to remedy the problem even without absolute proof of the harm and the causes thereof.

In the Swedish Environmental Code the precautionary principle is expressed through its substantive requirements, and through the duties to take not only restorative or reparative measures, but also to prevent situations where there is reason to believe that there is an environment or health risk (generally stated in MB 2:3).³⁸⁶ Noteworthy is that a precautionary approach has been argued as fundamental in Swedish environmental law before the Rio Declaration or the introduction of the Environmental Code.³⁸⁷

The principle has been interpreted in many different ways,³⁸⁸ but a general meaning of the principle is that lack of firm evidence of damaging effects does not free the responsible parties from their environmental responsibilities.³⁸⁹ Moreover, uncertainty shall not be used as a reason for postponing appropriate environmental measures. The precautionary principle supports precautionary measures that go beyond the lowest acceptable environmental standard.³⁹⁰ As a precautionary measure, the environmental safeguards and control will thus buffer some effects that no one could predict.

The preventive approach, avoiding environmental harm, is thus paramount in the environmental scenario. Judicial measures are allowed at an earlier stage, when there is a risk of some understood significance, even though the potential harmful effects are not certain to occur, or even earlier – to have extra precautionary distance to the limits of acceptable environmental harm. This entails a shift in the traditional understanding of burdens of proof and of the investigation of appropriate measures under the regulations of environmental law, including the purpose and general principles of environmental law.³⁹¹ At least that is the theory. Such a challenge to traditional understanding of general principle of law can be complicated to implement and enforce.³⁹² Nevertheless, a common expression of such an approach can be seen in permitting regimes, demanding that the actor show substantial evidence to be relieved from a basic prohibition. This reflects a

30/2005, Decision on the Merits, 6 December 2006, of the European Committee of Social Rights, para. 198–201.

³⁸⁶ See: Prop. 1997/98:45 Part 2 p. 19.

³⁸⁷ Prop. 1969:28 p. 210; and SOU 1966:65 p. 211, referring also to scientific uncertainties. Additionally, the argument is that the regulation is to consider also matters of comfort, welfare, and general standard, and not just focus on demonstrable negative effects. See, also: Michanek, G., and Zetterberg, C., *Den svenska miljörätten* p. 45.

³⁸⁸ Sometimes the term “principle” is avoided, in efforts to deny the doctrine such legal status. It is sometimes referred to as a “precautionary approach”. See: Birnie, P., et.al., *International Law and the Environment* p. 155 (note also p. 161 for a discussion on the legal status).

³⁸⁹ Jans, J., and Vedder, H., *European Administrative Law* pp. 37–37.

³⁹⁰ Rehinder, E., *The Precautionary Principle in an International Perspective* pp. 92 and 94.

³⁹¹ Michanek, G., and Zetterberg, C., *Den svenska miljörätten* pp. 44–45; de Sadeleer, N., *Environmental Principles; From Political Slogans to Legal Rules* p. 203.

³⁹² Compare: Birnie, P., et.al., *International Law and the Environment* pp. 158–159.

concessional idea, where the relevant actions are prohibited with the possibility to be relieved from the prohibition through a concession upon firm proof by the applicant.

2.3.3 Implementing Environmental Law Fundamentals in the Juridical Steering System

2.3.3.1 Goal-Oriented Implementation and Enforcement

Goal-orientation, instrumentalism, and steering perspective characterise environmental law. Environmental legislation is generally formulated as framework law, which focuses on steering through environmental goal implementation rather than detailed regulations. It also affects the tasks and the working methods of the supervisory and controlling administration.³⁹³ Goal-oriented enforcement allows for further involvement of the relevant actors and for optimising efforts and costs, as the result is the only matter that is prescribed by the authority. A basic idea is that there is more freedom for both the actors and for the administrative authorities involved.³⁹⁴ The scheme is to primarily define the desired result, and not the way to get there. The regulation of the actions of the actor is not relevant – only the effect on the environment and on resource management. It could be argued that this flexibility and freedom reflects the respect for the inherent autonomy of the individual that is so fundamental in the Rechtsstaat. Public authority must be legitimate in view of important public interests. In environmental law this legitimate interest is found in the consequences for the environment, and in the quality of resource management the actions reflect. This short section is an introduction to such goal orientation in juridical environmental steering.

Regulating goals can be challenging. Goal-orientation influences the legislative style; the legal regulations are usually quite general in character, related to the environmental goals and quality standards, requiring weighing in the specific case, taking into consideration the physical context, etc. In addition to this, the interpretation of environmental law is dominated by a purposive approach. As described in Section 2.3.1.2, the environmental goals are formulated in the Environmental Code as a kind of interpretative imperative, stating in 1:1 that the Code shall be applied so that these goals are reached. This goal is then operationalised in more concrete formulations, in para. 2, and in the National Environmental Objectives.³⁹⁵

The effect of this goal steering scheme on administrative enforcement is basically twofold. First of all, the enforcers have an essential role and task in operationalising, or translating, the general regulation of goal-oriented

³⁹³ Prop. 1997/98:45 Part 1 p. 170.

³⁹⁴ Prop. 1997/98:45 Part 1 pp. 158–159.

³⁹⁵ Prop. 2000/01:130; and Prop. 2004/05:150.

framework law to individual duties.³⁹⁶ Secondly, in view of the environmental steering system and the purpose of environmental law, the enforcer would not primarily order an addressee to take measures by naming the exact technological equipment, etc. Rather, they would order the addressee to make sure of a certain environmentally relevant result (for example a qualitative limit of emission per day, or the assurances by the addressee of no leakage of certain hazardous substances) leaving it up to him or her to decide on the appropriate measures for adhering to that order. Such an approach in the exercise of authority puts a lot of responsibility and demands on the individual addressee. This is an expression of actor responsibility, but might sometimes be problematic in the perspective of legal certainty. It may especially be difficult for the actor to foresee their legal duties, and the enforcement measures to be expected. Consequently, the enforcers have tasks both to tell the actors what to do, and to make the actors decide what to do themselves. These issues will be analysed in Chapter 8.

This reminds us of the context in which environmental law works. Modern environmental policy is developed into a differentiated system of environmental steering towards the environmental goals.³⁹⁷ Steering through legislation and the exercise of administrative powers is complemented by market instruments and by the demands of, and competition between, different actors (producers, consumers, etc). The idea is that the activity, steering and control are not only in the hands of the State, but also a matter for individual actors.³⁹⁸ However, environmental law is not expected to implement and enforce sustainability by itself. This is important to bear in mind when analysing the effectiveness of administrative enforcement and weighing the different perspectives of legal tradition and function. To succeed in bringing about a change towards a sustainable society, it is generally believed that efforts at many levels and by many actors are needed.³⁹⁹ This then brings us to the issue of actor responsibility.

2.3.3.2 Actor Responsibility

2.3.3.2.1 Extensive Responsibilities in the Context of Common and Shared Environmental Interests

Actor responsibility in environmental law is basically simple. It boils down to the fact that the environmental actor – a person who damages (or risks damaging) legitimate environmental interests must bear responsibility for his activities in order to respect the legitimate interests.⁴⁰⁰ These are environ-

³⁹⁶ See: SOU 1981:46 p. 44.

³⁹⁷ Westerlund, S., *Miljörättsliga grundfrågor 2.0* p. 53.

³⁹⁸ Prop. 1997/98:45 Part 1 pp. 155 and 161–162.

³⁹⁹ See, for example: Agenda 21, and Prop. 1997/98:45 Part 1 p. 160.

⁴⁰⁰ I use the term “environmental actor” for persons acting in a way that has effects of any significance on the relevant environmental interests, mainly resource management in a wide

mental interests of other persons of present or future generations, or of nature itself. The notable feature, however, is the potential extent of these considerations in the context of environmental protection and sustainable resource management. The doctrine of sustainable development has introduced a new perspective by making environmental management a shared responsibility. As indicated in the very beginning of this thesis, sustainable development is not only a concern for the state and the public authorities. Each and every individual actor is to be involved in the management of natural resources.⁴⁰¹ They have actor responsibilities. Actor responsibility plays a central role in this thesis, and will be further discussed in Part III of this thesis. The principal features of the concept will however be presented here, in order to illustrate the environmental law perspective.

An essential feature of the sustainable development doctrine, illustrated in Agenda 21, is the idea of a decentralised world. Although the state is primarily responsible for achieving sustainable development, this cannot be achieved without the participation and the responsibilities of the people – each and every actor individually, and collectively. Agenda 21 suggests a variety of different means for mobilising the public, and seeks to take measures to influence human behaviour in the long run. Information and education is important here. This makes it possible for people at all levels to make informed and preventive choices.⁴⁰² One aspect of this wide mobilisation of the public is the opening up of decision-making procedures, inviting different types of actors (in a wide sense) to participate.⁴⁰³ As noted earlier, there is solid support for wide procedural rights in environmental issues.⁴⁰⁴ Another aspect is that of actor responsibilities requiring active involvement from each and every environmental actor. The basis for this actor responsibility can partly be found in the common concerns of Mankind in the equitable and sustainable management of common resources. With the role of both creature and moulder of his environment, both reactor and actor, there follows an equitable right to nature's resources, but also a consequential responsibility to manage it. This means protecting and improving the environment for pre-

sense. This terminology at the same time reflects the fact that they carry responsibilities for these acts. I consistently use the term “actor” instead of “operator” or other more narrow terms, to reflect the fact that not only industrial operators, or property owners, or such alike, carry environmental responsibilities, but also private persons in carrying out their private or professional business.

⁴⁰¹ Prop. 1997/98:45 Part 1 pp. 159–161, 170, and 512–513; SOU 1996:103 Part 2 pp. 312–13. See, also: Decleris, M., *The law on sustainable development* pp. 30–32, referring to Agenda 21.

⁴⁰² Agenda 21, A/CONF.151/26/REV.1, Annex II, esp. Section 3, and Section 4, Subs. 40. See, also: Decleris, M., *The law on sustainable development* pp. 30–32.

⁴⁰³ Prop. 1997/98:45 Part 1 p. 159.

⁴⁰⁴ See: Section 2.3.1.4, and Section 2.3.3.3.

sent and future generations.⁴⁰⁵ The distinction between victim and abuser, the addressee and the beneficiaries of a right, dissolves. The rights and duties are reciprocal, and the only way to implement the right is to lay corresponding duties on each and every right holder, to avoid the damaging effects of their combined actions.⁴⁰⁶ The environmental actor is therefore obligated to see that the rights and interests of others are appropriately respected. You could, if you will, compare this idea of limited rights to natural resources, as a wider, more holistic, neighbour law principle of non disturbance. An actor can use his or her “share” of nature only to the point that it does not disturb the use by others of their respective shares.⁴⁰⁷

Actor responsibilities supplement and support the responsibilities of the public bodies. This is based on the idea that sustainable management is a common and shared responsibility, which benefits from cooperative and communicative procedures, instead of simply ordering the actor what to do. While public authorities have a leading role in ensuring and furthering the necessary preconditions for such work, sustainable development and resource management should be decentralised and preventive. The responsibility for adherence to environmental law lies primarily on the individual actor. For the actor this includes supervising and controlling the activity, and working proactively to keep updated and diligent. The aim is that individual environmental actors should formulate their own environmental strategies, based on the framework and platform of the environmental legislation.⁴⁰⁸ This again shows the problem with a perception of the enforcement situation as state intrusion in a fundamental freedom of an individual citizen. The environmental law context calls for a more complex perspective.

2.3.3.2.2 *Polluter Pays Principle (PPP)*

Actor responsibility is also connected to the polluter pays principle, the purpose and function of which is to impose the costs of environmental harm on the party that is responsible for the pollution.⁴⁰⁹ This is tied to economic theories of internalising environmental costs, which meet the above stated

⁴⁰⁵ Stockholm Declaration esp. in the Preamble and in Principle 1; Birnie, P., et.al., *International Law and the Environment* pp. 120–121; Cullet, P., *Definition of an Environmental Right in a Human Rights Context* pp. 4–5. See, also: Section 2.3.1.4.

⁴⁰⁵ Stockholm Declaration Principle 1; Kiss, A., and Shelton, D., *International Environmental Law* p. 665; Shelton, D., *Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration* (UNEP draft paper) p. 3.

⁴⁰⁶ Cullet, P., *Definition of an Environmental Right in a Human Rights Context* p. 5.

⁴⁰⁷ Compare: SOU 1966:65 p. 51. This parallel is especially fitting in the discussion of environmental law as limitation of property law.

⁴⁰⁸ Prop. 1997/98:45 Part 1 pp. 160–161 and Part 2 p. 279; Prop. 1987/88:85 p. 254; Jans, J., and Vedder, H., *European Environmental Law* p. 44. Note, moreover, the proclamation in the Finnish Constitution Section 20 that “Each and everyone bears the responsibility for nature and its diversity, as well as for the environment and the cultural heritage.”(my translation).

⁴⁰⁹ Kiss, A., and Shelton, D., *International Environmental Law* pp. 212–213; Michanek, G., and Zetterberg, C., *Den svenska miljörätten* p. 45.

problems which emanate from the notion of common resources as free goods. If there is a price tag on natural resources and polluting activities, they will be carried out more strategically. It is consequently thought to promote rational use of resources.⁴¹⁰ The basic idea is that an operator of a hazardous activity should be responsible for the costs necessitated by the operation thereof.⁴¹¹ The principle called PPP is however generally considered to have been first set out by the OECD as an economic principle and an efficient way of allocating environmental costs.⁴¹² In view of the modern view of common and shared resources and sustainable development, it also seems a fair distribution of costs, avoiding the victims of environmental degradation and resource depletion suffering the burdens of poor management, and also preventing unjust enrichment of the polluters. The polluter pays principle does not only entail liabilities for environmental damage, and resource use. The responsible actor should also bear the cost of pollution control measures.⁴¹³ This means that the costs of monitoring, and the investigation of the effects of the activity, as well as the precautionary measure taken to avoid pollution, etc., are to be borne by the potential polluter. The polluter pays principle is a fundamental principle of EU environmental policy (Art. 191.2 TFEU).⁴¹⁴ It is also recognized, even though formulated very carefully, in the Rio Declaration (Art 16). The principle is fundamental in the Environmental Code system,⁴¹⁵ and it is expressed in many regulations; most notably, perhaps, in MB 2:8 and Chapter 10 stating responsibilities for environmental damage, but also in the rules on fees for administrative control (Chapter 27, and the subordinate regulation), and – as argued here – in the regulation of actor responsibilities for information and other precautionary measures. Administrative enforcement is to a great extent undertaken at the expense of the actor (see 26:17–19 and 22).

2.3.3.2.3 *Historical Roots*

Even though these contemporary concepts of sustainable development and the polluter pays principle have brought a new and comprehensive perspective to actor responsibilities, they are also rooted in legal history. Historically, individual use and management of commonly used resources have commonly been regulated. Common use of water resources, for example, has

⁴¹⁰ Kiss, A., and Shelton, D., *International Environmental Law* pp. 213–214.

⁴¹¹ See, for example: Prop. 1973:141 pp. 31–31.

⁴¹² OECD, Recommendation of the Council on Guiding Principles Concerning International Economic Aspects of Environmental Policies, Council Document no. C(72)128, May 1972; and Kiss, A., and Shelton, D., *International Environmental Law* p. 213.

⁴¹³ Prop. 1997/98:45 Part 1 p. 213; Kiss, A., and Shelton, D., *International Environmental Law* p. 215; Michanek, G., and Zetterberg, C., *Den svenska miljörätten* p. 120.

⁴¹⁴ EU-law has applied a polluter pays policy since the 1970s, see: Jans, J., and Vedder, H., *European Environmental Law* p. 43.

⁴¹⁵ Prop. 1997/98:45 Part 1 pp. 208–210; SOU 1996:103, Part 1 p. 225, and Part 2 pp. 2–22, referring also to the relevant, if not explicit, earlier regulation of the principle.

a long regulatory history.⁴¹⁶ Moreover, polluting industries, or other measures entailing more substantial risks to the health, property or welfare of others, a precautionary perspective has long since brought extensive responsibilities for the actor. The actor that manages a hazardous activity, much do so in a manner that prevents harm to others.⁴¹⁷ Analogy can be drawn with the idea of strict civil liability for typically hazardous activities. Such strict liability has been argued to make sure that appropriate safety precautions are taken so as to avoid damage, and to internalise the potentially very high external costs of damages. Also, the fact that the actor is benefiting from putting others at risk has been argued to motivate strict liability.⁴¹⁸ This can be compared to the contemporary discourse on common resource management, and to the polluter pays principle.⁴¹⁹ Nevertheless, even though there is some regulation of strict liability (Chapter 32 of the Code), environmental law steering is generally focused on administrative supervision and control. This steering system is, however, influenced by its relationship with traditional civil law regulation of real property. The regulation of environmental actors has been developed through a kind of interplay of civil and public law regulation of the exercise of property rights, so as to regulate the negative impacts in the surrounding environment.⁴²⁰ As a result, there have been, since the early days of industrialisation, demands for precautionary measures against those carrying out environmentally hazardous activities, especially in relation to water pollution.⁴²¹ It should be noted, in this context, that the extensive actor responsibilities are sometimes reflected in the construction of strict or absolute, criminal liabilities for environmental damages also.⁴²²

⁴¹⁶ See, for example: 1880 Water Ordinance (“Vattenrättsförordning”) Section 12, and the 1918 Water Act 2:35, especially protection of the water traffic against polluting objects.

⁴¹⁷ Prop. 1969:28 pp. 208 and 218 (note the reference at p. 214 to a codification of valid law and its application in case law). See, further: SOU 1966:65 pp. 211–223 on earlier law. For more actor responsibilities in older legal history, see: 1880 Water Ordinance Section 12, stating a general responsibility to ensure that relevant materials does not get into the water (reaffirmed in the 1918 Water Act), 2:58 of the 1918 Water Act (as amended in 1937), stating a general duty to take the reasonable precautionary measures when there is risk of damage to the ground water supply, the 1942 Water Act regulation in 8:23 on household sewerage, stating a duty to take the reasonable necessary precautions to prevent pollution, and 8:32 on industrial sewage water stating a consessional idea of a principal prohibition which could be relieved if the necessary precautionary measures were regulated.

⁴¹⁸ Hellner, J., and Radetzki, M., *Skadeståndsrätt* pp. 171–174. See, also: SOU 1966:65 pp. 72–75, and 278; Darpö, J., *Vem har ansvaret?* NVV Report 4354 p. 26, with reference to the 1886 Railway Liability Act, the 1902 Electricity Act.

⁴¹⁹ Compare: Michanek, G., and Zetterberg, C., *Den svenska miljörätten* p. 45.

⁴²⁰ See: SOU 1966:65 pp. 28–34 on the earlier developments, and 38–48, on a summary of the suggestion for a comprehensive regulation of imissions. See, further: Section 3.3.1.

⁴²¹ ML Section 5; SOU 1966:65 p. 211, note p. 221 on duties already at the risk of harm. See, also: 1880 Water Ordinance (VRF) Section 12.

⁴²² Such features are discussed in English case law, and will be discussed in Chapter 4. Note also the motives behind the Swedish Environmental Code regulation on strict liability in context of administrative sanction fees, in Prop. 1997/98:45 Part 2 pp. 314–315.

2.3.3.2.4 *Expressions of Actor Responsibility in Administrative Steering*

As a rule, environmental control in the modern legal order has relied primarily on permit regimes, in which activities which are considered environmentally hazardous in some respect, need administrative authorisation to ensure lawful operation. In this procedure, the actors' procedural responsibilities are fundamental, as they seek a benefit and are therefore responsible for providing the necessary decision-making materials. The substantive actor responsibilities are also formulated in permit conditions. Other administrative enforcement is less formalised. The legal means of enforcing actor responsibilities in these contexts will be examined in this thesis.

One matter which affects the range and character of the actor responsibilities, and ability to foresee what they entail, is the preventive approach. Here the actor responsibilities will be triggered earlier, before damage has occurred – even when there is no certainty that it will. The complex scientific realities, and the precautionary approach, entail demands for action even when there is no certainty. These factors also entail that actor responsibilities will to a great extent focus on information duties. Any private or corporate actor has a responsibility to initiate environmental measures, possessing the relevant knowledge and information of his activities and effects of these in the physical and other context. This is prescribed in the Environmental Code 2:2, as well as specific duties to exercise self-control, to make investigations and notify the enforcement authorities, mainly in Chapter 26, and in 2:3, which is expressed as a general principle of due diligence, which includes both information and more direct measures.⁴²³ Swedish environmental law also applies a shifted burden of proof, stating that the actor has to show, in the administrative enforcement situation, that she is managing the installation in accordance with the Code and decisions taken in pursuance of the Code (MB 2:1).⁴²⁴

2.3.3.3 **A Tangled Web of Legal Interests**

A complicating factor in environmental law situations is the existence of many different interests to be considered. Interested parties may be large corporations with business interests, private landowners with economic interests or just an interest of having a good living environment. There are, however, also wider interests for future generation individuals and business, etc., in sustainable resource management. Often we do not know how the loss of a certain resource would affect future development and conditions of life, so we regard it as in the public interest to protect potential future interests too, in line with the principle of precaution. The conflicts of interests are

⁴²³ Prop. 2005/06:182 p. 36; SOU 2004:37 p. 121.

⁴²⁴ Prop. 1997/98:45 Part 2 pp. 12–13.

hence both inter- and intragenerational.⁴²⁵ Furthermore, nature's inherent and independent interest is also argued.⁴²⁶

As has been noted earlier, the philosophy of a common concern in resource management and equitable rights and duties has led to the promotion of decentralised and multi-faceted environmental management. The idea, stated in Principle 10 of the Rio Declaration, is that the best way to handle environmental issues is through public participation. The legitimate interests of all people, today and in future generations, will also lead to procedural rights,⁴²⁷ in a wider sense than most legal contexts.

Nevertheless, even without consideration of management of the world's resources on a more global and abstract level, the range of interests involved is many and different. Environmental disturbance and effects are often not limited to the closest neighbours and they do not respect administrative borders such as those for states, jurisdiction, and so on. Thus, disturbances from activities such as polluting industries or resource depletion may entail effects and relevant interests across time and space. On the other hand, the interests of business and industry entail many legitimate private and public interests. These interests are mainly of economic character, but sometimes also social interests are involved. Environmental law therefore has an inherent character of balancing of a wide scope of interests.⁴²⁸ And the new perspective of global inter- and intragenerational management of common resources has just added exponentially to this regulatory scope.

The examples illustrate the very tangled web of different interests that span over time and space in a way that is quite extraordinary, and which may also be challenging for the legal system. Clearly, the legal order has to consider how to appreciate, evaluate and protect the relevant interests in environmental issues, and where to draw the line. And leaving it up to just the exploiter and the other parties traditionally perceived as concerned, does seem to paint quite a simplistic picture. A noted effect is that not all interests are addressed or even thought of, and that the vast bulk of public interests are generally not prioritised, or are undervalued, especially in a situation of conflict with present day economic interests.

This web of interests may be juxtaposed with the traditional structure of administrative law procedure, which has been focused on procedures between the single interested party and the authority. The authority then takes into account all interests, private as well as public, including environmental

⁴²⁵ Bugge, H.C., *Miljøvern og rettferdighet – en introduksjon* p. 289 (and further in Sections 4–5).

⁴²⁶ *Our Common Future*, and in the opening statement of the preamble of the United Nations Convention on Biological Diversity, Nairobi, 22 June 1992. This is also stated in the Environmental Code 1:1, Prop. 1997/98:45 Part 2 pp. 8–9.

⁴²⁷ Note esp. the Aarhus Convention, affirming a fundamental right to environment, and regulating access to information, public participation and access to justice. See: Section 2.3.1.4.

⁴²⁸ See, for example: SOU 1966:65 pp. 31–34 and 195–202.

interests protected by law, in order to reach the right decision.⁴²⁹ This may be argued to be a simplistic description of administrative law procedure, altered also by the general two party reform in Swedish administrative court procedure.⁴³⁰ Nevertheless, administrative law discourse is very much focused on the protection of the individual against the exercise of public power against her. The exercise of public power is thus perceived as intruding in the individual's fundamental private autonomy with the support of a general public interest. Environmental law is more focused on public control over the legitimate and fair use of common resources between all the different actors (and reactors).⁴³¹ It is more a question of distributing benefits and duties in a situation of destructive competition. The public task of protecting all the involved individual and collective environmental interests may then change the perspective of the rights of the addressee. This echoes also the shifted focus ascribed to the welfare state, and to the human rights discourse.⁴³²

2.3.4 Concluding the Environmental Law Perspective

To conclude, environmental law is instrumentalistic in character; its role is to attain environmental goals – ultimately sustainable development. The perspective is reactor orientation and actor steering. The result is framework law and goal-oriented enforcement. Because of the role and purpose of environmental law, and because of the complexities and inescapable nature of the essentially relevant scientific factors, environmental law theory is founded on the principles of prevention and precaution. This entails a legal system that acts early, and which focuses on directing the actions of the citizen, instead of repairing damage and punishing breaches of relevant law.

Contemporary environmental law involves fundamental claims for fair and equitable management of common resources, and for environmental rights, both procedural and substantive. This also supports fundamental actor responsibility, which is quite wide in view of precaution and prevention in context of the natural scientific realities. The idea of common interests also entails the involvement of a vast number and variation of interests in the relevant procedures, and challenges for the judicial system to weigh these and to appreciate and provide the appropriate legal protection of these inter-

⁴²⁹ Lavin, R., *Tvåpartsmål i förvaltningsprocessen* p. 99. It should be noted that the administrative court procedure is today generally a two party procedure where the original decision-maker serves as a counterparty to the individual. The administrative procedure, however, still often is a one party procedure. It should, however, be stated that also the case of many involved interests is not unique for modern environmental law. Planning law cases also involve many different parties.

⁴³⁰ In the Swedish appeal procedure the original decision-making authority becomes a counterparty to the appellant. These parties will then defend their often opposite interests.

⁴³¹ See: Section 2.3.1.2.1.

⁴³² See: Sections 2.2.1.2, 2.2.1.3, and 2.3.1.4.

ests. The fundamental idea is that environmental law should be decentralised and preventive in character.

In presenting this environmental law perspective, I have noted many legal challenges. In the following I will connect with these issues again and demonstrate how they will be discussed in the thesis.

2.4 Setting the Scene for the Thesis Analysis

2.4.1 Introducing the Legal Problem

In this chapter, I have discussed some of the fundamental and current principles and structures of administrative law and environmental law. The presentation illustrates the different legal perspectives or cultures. In this section I will put these features together and initiate the discussion on what happens in their encounter. The hypothesis is that the environmental law perspective brings challenges to the established legal structure. I will reflect on such challenges in the context of administrative enforcement of environmental law, especially in relation to information duties.

2.4.2 Development of the Rechtsstaat in Context of Environmental Law and Policy

The above-described fundamental aim and purpose of environmental law enriches the perception of the Rechtsstaat. This can be compared to the developments ascribed to the welfare state, where the role of the state, and its authorities, is more active.⁴³³ In the welfare state, there is a wider idea of public interests, and of the public task. Public authorities have the task of ensuring not only the control of legal offences, but also actively furthering public goals. This connects to the instrumentalistic and goal-oriented character of environmental law, where effective steering towards results in the environment is essential. The public authorities have responsibilities to implement public policy, and to protect legitimate interests. Essential such interests are fundamental human rights. Moreover, the State has many further responsibilities under public law, for example in the context of environmental policy. These responsibilities include ensuring environmental protection and sustainable resource management, for the benefit of many individual citizen (both private persons and businesses), future generations, and nature itself. To some extent, these environmental interests have, as shown above, the added quality, or weight, of a fundamental human right. The ex-

⁴³³ Section 2.2.1.2.

pressions of a right to environment for each and every one, implies also that these claims are commonly tied to corresponding duties.⁴³⁴

Juridical steering thus entails protection of legitimate private and public interests. There is a legitimate counterbalance for the protection of the individual and his fundamental autonomy. This connects to the developed Rechtsstaat ideas, and to the concept of substantive legal certainty, as reflected in the welfare state. This entails a wider perspective of legality and foreseeability. Substantive legal certainty requires public responsibility for assuring that substantive standards, etc., stated in law are also realised – in other words, that people can trust the authorities to actively uphold the law. This also reflects democratic ideals, as the laws are laid down by the people's representatives. The qualitative emphasis of claims of environmental rights suggests a further resettlement of the described balance. This may challenge the notion of enforcement decisions as State intrusion into the fundamental freedom of the environmental actor. The distinction between those protected and those they are to be protected from disappears in the context of the collective task of Mankind to manage the common resources fairly and sustainably. In view of substantive legal certainty, the fair and appropriate protection of all the environmental interests involved is essential.

Despite this strong legitimacy of the exercise of authority in the interests of the environment, the appropriate limits for the exercise of state power should be carefully balanced. The importance of upholding Rechtsstaat principles has been stressed in both environmental and administrative law discourse.⁴³⁵ I will investigate environmental law enforcement from the perspective of careful development of Rechtsstaat principles in the environmental law context. Initially, the administrative enforcement system of Sweden, the United Kingdom, and the Netherlands will be presented and compared, in Chapters 3–7. The purpose is to illustrate different ways of regulating with this balanced approach. In many aspects, the systems seem very similar, for example in their similar set of enforcement instruments. In other senses, the systems are fundamentally different, for example in the institutional organisation of the administrative procedure, and the principal regulation of actor responsibilities.

Thus far, the state responsibilities for protecting the environment and environmental rights, and sustainable and equitable resource management have been discussed. These interests are, however, not only the responsibility of the State, but also that of each and every environmental actor. They have actor responsibilities.⁴³⁶ These follow from the international law discourse on equitable resource management, a more limited sense of which can be traced back in legal history. The idea is also supported by the polluter pays princi-

⁴³⁴ Section 2.3.1.

⁴³⁵ See: Sections 2.2.1, and 1.5.2.

⁴³⁶ Section 2.3.3.2.

ple, and generally the idea of responsibilities for hazardous activities. The actor must thus be actively involved in the supervision and control of his own activities, and to see to it that all the relevant environmental rights and interests are appropriately respected. In the enforcement situation, this leads to a cooperative enforcement system, where the enforcement authorities focus on system control and enforce the actors' self-control. The public authority will have a guiding and supporting role, while the actor is the active party. This construction will be further analysed in Part III.

Actor-driven environmental control is considered necessary for ensuring environmental goals in the long run. It is moreover claimed to be efficient in economic terms, since the actor (at least a professional operator) understands the activity best and can choose the functionally and economically best course of action.⁴³⁷ Command-and-control is avoided, at the benefit of a communicative and cooperative process, which is more flexible and respects the actor's autonomy. Supposedly, voluntary initiatives for environmental protection and precaution are thus promoted, which provides incentives for technical research and development. This perspective puts administrative procedure in a new light. Administrative procedure is the responsibility of the authority, and it should be least intrusive of the actor's freedom.⁴³⁸ The environmental law enforcement procedure may however cause considerable relocation of procedural responsibilities. Administrative law procedural regulations serve as safeguards of Rechtsstaat values, and link to the concept of good administration.⁴³⁹ Dispersing, relocating, or mitigating such administrative responsibilities may therefore be criticised for risking legal certainty, etc. This issue will be further discussed in Part III, and the grounds and consequences thereof analysed.

2.4.3 Preventive and Precautionary Exercise of Authority, and the Role of Responsibilities for Information

Environmental law focus on achieving results; aims, qualitative standards, etc., in the environment connects its application to the actual environment. Human dependence on nature makes natural scientific facts essential. It also motivates a fundamental environmental law focus on prevention.⁴⁴⁰ The natural and scientific factors are often complex. This means that environmental management and control must be carried out despite scientific uncertainties. This emphasises the need for preventive action, but also a precautionary approach, where measures are taken without full certainty about the risk and causality.⁴⁴¹ These proactive and precautionary approaches bring about a

⁴³⁷ Prop. 1997/98:45 Part 1 pp. 493 and 512; SOU 1996:103 p. 312.

⁴³⁸ Section 1.5.4, etc.

⁴³⁹ Sections 2.2.1.4, and 2.2.3.

⁴⁴⁰ Sections 2.3.1.3, and 2.3.2.1.

⁴⁴¹ Section 2.3.2.

more extensive range and extent of actor responsibilities. A duty of due diligence sets in earlier, to prevent harm; risk management rather than reparation of damage. It also means that ensuring the adequacy and accuracy of information for decision-making is very important. The basis for proactive measures is information. This task is potentially burdensome, and one for which the actor is principally responsible. This aspect of actor responsibility for information is the focus of the analysis in this thesis, specifically in the context of administrative enforcement procedures.

Environmental law generally imposes extensive information duties upon the actor.⁴⁴² These general rules, as well as the more specific actor responsibilities for information, supplement the fundamental duties for the steering authorities to investigate, communicate, and generally process cases with due care in order to ensure the collection together of decision-making materials needed to take the correct and appropriate action.⁴⁴³ Formally speaking, the specific environmental regulations will overtake the general administrative procedural rules. The fundamental procedural responsibilities of the administrative enforcers are however too fundamental to be simply overruled. They implement fundamental principles of legality, objectivity, and proportionality, and function as safeguards of legal certainty and good administration. The administrative procedure must be able to combine these different aspects, in an appropriate distribution of relevant responsibilities. The distribution of information responsibilities between the individual actor, and the administrative enforcement authority will be analysed in Chapters 7–8. Chapter 7 contains an investigation of the different means available to the authority to enforce the actor’s information duties. Chapter 8 can be described as investigating the succeeding enforcement action, in an analysis of the enforcers’ reliance on actor responsibilities for information in their ordering of precautionary measures. The idea is that the enforcer should, based on the fundamental actor responsibilities, be able to presume that the actor has all the knowledge and information needed to understand their duties, or that they must otherwise investigate further. The enforcer should not take over this actor responsibility. The analyses reflect the administrative procedural duties of safeguarding legal certainty, and the shifted perspective brought on by the above described environmental aims, and the concept of common and shared concerns.

One aspect that is investigated concern the appropriate limits of the relevant actor responsibilities, and the enforcement thereof. This connects to the idea of reasonableness and proportionality, which essentially entails a weighing of the interests of the public and the individual.⁴⁴⁴ This decides *how* power should be exercised in the individual situation, as opposed to merely

⁴⁴² Section 2.3.3.2.4.

⁴⁴³ Section 2.2.3.1.

⁴⁴⁴ Section 2.2.2.3.

stating whether there is legal basis for the exercise of power. Justified exercise of power effectively realises public policy, but its legitimacy is also limited to measures that are perceived as necessary. The environmental context of prevention and precaution, and the essential role of natural scientific limitations, render weighing problematical. Factual uncertainties and acting before any significant harm can be noted may entail problems for the enforcers of environmental law in showing that their measures are legitimate.

However, in environmental a specific feature (or consequence) of actor responsibility for information can be noted in the context of evidence. The onus and standard of proof is influenced by the focus on actor responsibilities. In Swedish environmental law the burden of proof basically rests with the actor in the enforcement situation. This entails a shift in the traditional understanding of burdens of proof and of due care, etc., and makes the addressee carry the risk of insufficient or uncertain evidence. It follows from actor responsibilities, and is well in line with the precautionary principle. At least in theory. Such a challenge to traditional understandings and general principle of law can be complicated to implement and enforce, certainly in the view of proportionality. It generally works in the regulation of permitting procedures, demanding that the actor show enough support to be relieved from a basic prohibition. I will investigate the expression of these principles in the context of administrative enforcement.

In conclusion, the preventive and precautionary approach of environmental law extends the actor's responsibilities. Information duties are essential, and often quite burdensome. The distribution of these responsibilities in the administrative enforcement procedure will be analysed in view of environmental and Rechtsstaat interests. In Chapter 7 I will investigate the possibilities for enforcement of such duties, and analyse their relevant consequences, and reasonable limits in view of the administrative safeguards of legal certainty. The purpose is to formalise a structural inter-relation of the safeguards of both environmental law fundamentals, and Rechtsstaat values. The investigation is carried out in comparison to the Dutch and English systems, where some principal differences will be noted. This makes for an interesting contrast in the analysis.

2.4.4 Goal Steering and Actor Responsibilities

The inescapable feature of environmental law is the focus on the achievement of the goal of sustainable management of natural resources. This entails a fundamental purpose of the relevant law to achieve results in the environment. The scope of this task is wide and applies to many different situations. It is almost impossible to regulate in detail what should be done, and when. The appropriate and lawful environmental behaviour is therefore hard to prescribe for all different situations, especially since this may vary in response to changed natural scientific factors. Environmental regulation needs

to be flexible and dynamic. This reflects itself both in the legislation and in the implementation and enforcement thereof. Environmental law often takes the form of framework law, containing formulation of goals and general rules of consideration. Framework law is generally supplemented and operationalised through lower level legislation and administrative guidance. Even so, there is generally a considerable administrative discretion. This discretion is in the administrative law discourse delimited a purposiveness and legal certainty, but also objectivity, and proportionality, etc.⁴⁴⁵ The purpose of environmental law and a developed perception of legal certainty will however require effective enforcement of environmental law and policy. This is emphasised in the context of European law demands for protection of fundamental rights connected to environmental interests, and the EU law demand for sincere cooperation.⁴⁴⁶

The goal orientation also affects administrative enforcement. The administrative enforcement authority has a rather difficult and complex task within this wide competence. They must make many different and rather complicated legal and natural scientific assessments in the course of their enforcement work. As noted before, some of these tasks will be made in cooperation with the actor in the exercise of their actor responsibilities for information. Moreover, the enforcing authority will prefer ordering the addressee to make sure of a certain environmentally relevant result (for example a qualitative limit of emission/day, or the assurances by the addressee of no leakage of certain hazardous substances) leaving it up to him or her to decide on the appropriate measures for adhering to that order. The enforcement is generally to be focused on making the actor take action themselves, hopefully leading to the actor then making long term changes to their behaviour. Such an approach puts a lot of responsibility and demands on the individual addressee. This might be problematic in the perspective of legal certainty, especially to foreseeability.

Often, however, the legal and scientific assessments required are difficult for the actor to make. This can be a very burdensome, especially for a private actor. Environmental law demands that they take responsibility for ensuring sufficient decision-making information, but the question is how far this can be required in view of legal certainty and proportionality. The problems with foreseeability become clear in this context.

When the enforcement authority has wide discretion under framework law, they will generally have an important administrative task in operationalising, or translating, the general rules to clear and concrete duties for the individual. They will investigate thoroughly an individual case, and decide appropriately what the actor must do to be in adherence with relevant law. This has traditionally been realized through the auspices of a permitting re-

⁴⁴⁵ Section 2.2.2.

⁴⁴⁶ Sections 1.2.4, 2.2.1.5, and 2.3.1.4.

gime, where the applicant for this beneficial decision must supply all the relevant information on which to base the appropriate decision. The permitting regimes of the legal order we are concerned with here are however currently being deregulated, following the Better Regulation movement.⁴⁴⁷ Environmental control is to an increasing extent exercised outside the permit regimes, through individual decisions by administrative enforcement authorities. Enforcement decisions are commonly considered detrimental to the individual, and thus require more active investigation by the enforcer than in the permitting situation. The actor is also informed of all the information gathered in the case, and has the opportunity to defend himself in view of the intrusive and detrimental exercise of administrative authority. In the environmental law context, however, the actor should carry the principal responsibility for sufficient decision-making information, including making investigations and ensuring knowledge, etc. This parallels the traditional concept of the authority's responsibility for due procedural care, and it to some extent takes over the authorities' responsibility. When the enforcer directs authoritative measures against the actor, the actor responsibility for information should be a main consideration to weigh in. The authority should not take over these responsibilities.

These issues are essential in the analysis of the distribution of information duties in environmental law enforcement, especially in Chapter 8 where the issues of goal-steering and precision of orders will be investigated. This investigation is based on the fundamental idea of clear and concrete communication by the public authority to the addressee of his legal duties. In legal practice this idea has caused problems for the administrative enforcers in formulating goal-oriented orders. Moreover, the order must not specify a certain measure to take if there could be other ways to reach the same result. The enforcement authority is left with far reaching duties to investigate the circumstances extensively, which means them taking over any non-cooperative actor's fundamental duties. And even then they may in uncertain factual situations find themselves in the situation where they cannot order anything, because they cannot guarantee that they have found the only acceptable solution. A solution may then be to stop the activity completely. That is clear and concrete, but may often be considered not proportionate. This goes against the idea of sustainable development also, where human activities, and the development thereof may be desirable, but their environmental effect should be optimised in view of sustainable development.⁴⁴⁸

The reader will probably be confused at this point, by the inconsistencies and complexities of this discourse. This is to be expected. That reflects the quite inconsistent current legal discourse. In Chapter 8, the relevant legal practice is described and analysed, with the purpose of formulating a rea-

⁴⁴⁷ Section 1.2.6.

⁴⁴⁸ Section 2.3.1.2.1.

sonably clear idea of the state of the law in the matter. Critical analysis thereof will follow, in view of the interests of procedural care and legal certainty, as well as fair and appropriate enforcement of environmental actor responsibilities. A comparative study of the relevant area of law is useful, both in understanding the incoherence of Swedish law, as well as in the critical analysis thereof. It seems the studied legal orders all rest heavily on the basic idea of clear and concrete administrative communication of duties, but the application of this norm can be quite different. This provides a dynamic feature to the analysis.

2.4.5 Concluding the Introduction

The subject of study in this thesis can be called “environmental administrative law”.⁴⁴⁹ Environmental administrative law is a legal discourse, constructed and reconstructed in the meeting of environmental law and administrative law in the enforcement situation, especially in the environmental challenges to administrative procedure. The result of this study is the text – the investigation and the analysis. The text shows my conversation with the law; with the legal sources, the legal practices and practitioners. This conversation has evolved my understanding of the interrelationship of environmental law and administrative law fundamentals. I will present my understanding of this encounter, and the way there. I believe this will clarify some practical problems in the area, and communicate a more comprehensive understanding of the administrative enforcement system and its purposes. That quality is specifically devoted to the esteemed civil servants that take on this challenging and complex area every day. Nonetheless, the presentation may also be more widely useful in the furthering of knowledge and understanding in this legal area, especially as so few have before this devoted so much effort to it in legal research. The law, its application, and reform, take place in the legal discourse. This thesis is my voice in the legal discourse, and it invites the reader to join in it.

To be able to analyse the described meeting of legal perspectives in the construction of environmental administrative law, the fundamentals of environmental law and administrative law, and of environmental steering and the role of enforcement have been described in Part I. In Part II, the fundamental structures of administrative enforcement of environmental law in all the studied legal orders will be presented. The presentation entails a fundamental structural comparison. Through Part II, the area of administrative enforcement is mapped out, and its structures and concepts, and the current developments thereof, discussed in comparison.

Last, but not least, Part III contains critical analysis of the meeting of administrative law and environmental law perspectives in the specific question

⁴⁴⁹ Compare: Bugge, H.C. *Lærebok i miljøforvaltningrett*.

of information responsibilities. This analysis will shed some light on reasonable limits to enforcement. I can see that there are legitimate environmental law fundamentals which should influence the administrative procedure further in order to better further environmental goals. These aspects will be argued in the analysis, with the purpose of showing the potential development of administrative procedure in the context of environmental law cases. That is environmental administrative law.

The Legal Orders of the Comparative Study and their Administrative Enforcement Systems

3 Sweden

3.1 Introduction

The following chapter will start off the reports of the compared legal orders by presenting the Swedish system. The country reports will introduce the reader to some historical, organisational, and legislative features of the legal orders, and of their respective environmental law enforcement systems. The purpose of this introduction is to provide a basic pre-understanding so as to facilitate subsequent comparison of the enforcement systems. The structure of the country reports is coordinated to facilitate comparison.

In the present chapter on the Swedish system, I will initially introduce the administrative system, and some particular features of Swedish administrative procedure. After that, the fundamental theory and background of environmental law regulation in Sweden are presented, as are the main sources of law and the basic administrative and judicial systems. The presentation of the Swedish enforcement system will be somewhat more detailed. The fundamental principles and purposes of administrative and environmental law have been presented in Chapter 2, and will not be repeated here. The presentation in Chapter 2 was however made with a Swedish perspective. The following presentations of the English and Dutch systems (in Chapters 4 and 5) will therefore include some comments on these fundamental principles, where this is called for. Part II, will be concluded with a preliminary and short comparative statement in Chapter 6. These chapters serve as a stepping stone towards the analyses in Part III.

3.2 Administrative Law

3.2.1 Introduction to Administrative Law and its Sources

Swedish administrative procedure is regulated mainly by the general Administrative Procedure Act (FL⁴⁵⁰) and the Administrative Court Procedure Act

⁴⁵⁰ In Swedish: "Förvaltningslag".

(SFS 1971:291) (FPL⁴⁵¹),⁴⁵² and sectoral legislation such as the Environmental Code. The general administrative procedural regulations are subsidiary to the more specific regulation of different sectors (Administrative Procedural Act Section 3, and Administrative Court Procedural Act Section 2). These general administrative law statutes are however deliberately kept very short, general, and flexible in their application to the many different areas of public law.⁴⁵³ Procedural rules are also found in different sectoral regulations, but are often quite generally formulated there as well. The more specific expression of law in this field will commonly have to be sought in case law and administrative practice.⁴⁵⁴ Administrative law principles, as developed in Chapter 2 of the thesis, therefore become important. These principles are to some extent found in constitutional regulation, namely the Instrument of Government (RF⁴⁵⁵), but they are otherwise developed in practice. At the moment the constitutional and general administrative bodies of law are undergoing reform. The reformed Constitution entered into force on the 1 January 2011. The public investigation on the Administrative Procedure Act is at the time of writing being processed in the Government Offices.⁴⁵⁶

3.2.2 The Administration

The Swedish administration generally consists of a central national level of sector agencies with principal responsibilities for the realisation of administrative tasks. There are government ministries for different sectors as well. The national agencies are separate from the state government, and not headed by the ministers, as will be explained in the following. Next, there are subordinate regional agencies, centrally the County Administrative Boards, which sort under the Government and are also tied to regional governments. The local level of state government hardly exists any more. There are municipalities, which are independent in their governance of local matters. However, municipal bodies, commonly municipal boards assigned to a specific administrative area will exercise public administrative authority. The municipal boards consist of local politicians, but they have administrative tasks which include the application of law, for example monitoring and enforcement of different areas of public law.⁴⁵⁷

⁴⁵¹ In Swedish: "Förvaltningsprocesslag".

⁴⁵² Both originally introduced through the Bill Prop. 1971:30, thus codifying and unifying the main administrative procedural rules, after some years of preparations, see: SOU 1946:69, SOU 1964:27, SOU 1968:27, etc.

⁴⁵³ Prop. 1971:30, for example at pp. 280–281.

⁴⁵⁴ For comments on the use of such sources in this thesis, see: Section 1.5.5.

⁴⁵⁵ In Swedish: "Regeringsformen".

⁴⁵⁶ Prop. 2009/10:80; SOU 2008:125, on the constitutional reform; and SOU 2010:29 on reform of the Administrative Procedure Act (for the investigatory task, see: Dir 2008:36).

⁴⁵⁷ See for example: Sterzel, F. *kommunernas skyldigheter* pp. 154–155.

In the Swedish administrative tradition, the independence (and the corresponding responsibility) of the administrative authorities is fundamental. According to Swedish constitutional regulation the administrative authorities answer to the Government (RF 12:1).⁴⁵⁸ However, the administrative structure is characterised by a principle of separation of the functions of political decision-making on one hand, and implementation and execution of law on the other, marking a sort of separation of powers.⁴⁵⁹ Modern Swedish constitutional order is not build upon the classical idea of separation of powers (resting on the Montesquieu doctrine of division of powers), but on popular sovereignty and the division of public functions. This Swedish model is moreover supported by a kind of vertical separation of public powers through the independent public authorities.⁴⁶⁰

There is an important delimitation of actions of Government in the constitutional prohibition in RF 12:2,⁴⁶¹ against governmental interference in an administrative authority's decision in an individual case. The rule states that no public authority can determine how an administrative authority should decide in a case regarding exercise of authority against an individual or a municipality, or regarding application of the law. The other side of this administrative freedom from governmental steering is that there is no principle of ministerial responsibility. Decisions are taken collectively by the Government (RF 7:3 and 1:6).⁴⁶² The minister does not take the role of director or chief of the administrative authorities, and national administrative authorities are not incorporated in the ministries. The Government guides the administration through budget guidelines and general steering through general instructions, policy and legislation. It can thus control the general structure, goals and responsibilities of the different administrative bodies, but not the implementation and enforcement of law against a person in individual cases. This is coupled with a strong and widespread culture of independence of the administrative authorities. A central administrative body does not, as a rule, steer a regional or local decision-maker in the individual case. The review of administrative decisions in individual cases of exercise of public authority is generally reserved for the appellate body. This entails a system of quite independent administration, both in relation to the Government and between the different administrative bodies. The Ministry of the Environment, headed

⁴⁵⁸ Prop. 2009/10:80 p. 290; Prop. 1973:90 pp. 397–398. See, also: Prop. 1973:90 pp. 392–393; and Sundberg, H., *Allmän förvaltningsrätt* p. 71, on early constitutional law.

⁴⁵⁹ Holmberg, E, et.al., *Grundlagarna* p. 477.

⁴⁶⁰ Bull, T., *Självständighet och pluralism – om vertikal maktindelning i Sverige* p. 108.

⁴⁶¹ RF 11:3 for the courts.

⁴⁶² Prop. 1973:90 p. 183; Prop. 1986/87:99 pp. 14–15 and 25–26; SOU 1972:15 pp. 79–80; Bull, T., *Självständighet och pluralism – om vertikal maktindelning i Sverige* pp. 112–113; Holmberg, E, et.al., *Grundlagarna* pp. 305, and 495–500; Holmberg, E, and Stjernquist, N., *Vår författning* pp. 208–209; Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* pp. 72–73; Sundberg, H., *Förvaltningen och rättssäkerheten* p. 329; Wockelberg, H, *Den svenska förvaltningsmodellen* p. 12, etc.

by the Minister for the Environment, is thus responsible for environmental policy and working for sustainable development.⁴⁶³ It does not steer the administrative authorities directly in their operational enforcement efforts.

3.2.3 Appeal

As has been noted in the context of fundamental procedural principles,⁴⁶⁴ the development of the right to trial has caused fundamental reform of the Swedish administrative procedure. The traditional internal administrative procedure has been replaced by a comprehensive order for court appeal. There is a full administrative court system, consisting of regional Administrative Courts, a few appeal courts called the Administrative Courts of Appeal⁴⁶⁵ and a Supreme Administrative Court⁴⁶⁶. Environmental cases are however often handled in special environmental courts, which will be presented in the following.⁴⁶⁷ The rules on administrative appeal are generally provided in sectoral legislation, especially for decisions that entail exercise of administrative authority against an individual (see: MB 16:12 and 19:1 and 20:2). The right to trial is further safeguarded through FL Sections 22–22a, and Section 3 para. 2, with reference to the ECHR. There is also special regulation of judicial review of governmental decisions in the Act (SFS 2006:304) on Judicial Review of Certain Governmental Decisions.⁴⁶⁸

As a general rule, access to the court in appealable administrative cases is provided for the benefit of concerned parties that the decision goes against (FL Section 22 of and FPL Section 33). This essentially means the parties to the appealed administrative case, or generally the person whose legal (or otherwise legitimate) status is directly affected, and who has an interest which is considered to be protected by the relevant law.⁴⁶⁹ The concrete meaning of such factors varies in different areas of law, and is generally developed in case law and often specifically regulated in sectoral legislation.

In the appeal process, the decision-making authority, whose decision is being appealed, becomes a contradictory party (FPL Section 7a).⁴⁷⁰ As party

⁴⁶³ For more information, go to <http://www.sweden.gov.se/sb/d/2066>.

⁴⁶⁴ Section 2.2.3.3.

⁴⁶⁵ In Swedish: "Kammarrätter".

⁴⁶⁶ In Swedish: "Regeringsrätten" (From 1 January 2011: "Högsta förvaltningsdomstolen").

⁴⁶⁷ Section 3.3.2.6.

⁴⁶⁸ In Swedish: "Lagen om rättsprövning av vissa regeringsbeslut". Before the comprehensive reform of the many different sectoral law rules on appeal, the predecessor of this law provided a general possibility for judicial review in administrative decisions where civil and political rights according to the ECHR were affected.

⁴⁶⁹ Prop. 1971:30 pp. 390–399, see esp. pp. 393 and 399; SOU 2010:29 p. 645; von Essen, U., *Processramen i förvaltningsmål* pp. 212–217; Ragnemalm, H., *Förvaltningsprocessens grunder* pp. 161–172.

⁴⁷⁰ Prop. 1995/96:22; Prop. 1971:30 p. 391. Applicable in environmental procedures through the Environmental Code 20:3, see: MÖD 2003:19. It can be noted that MB 20:3 regulates the court procedure. In the appeals procedure before the higher administrative authority, generally

in the case, they have access to further appeal if their original decision is changed by the first appeal instance. There is otherwise no general rule of procedural access for other state or municipal authorities in administrative enforcement cases. Administrative law as a rule demands statutory basis for a state authority's right to appeal against another state or municipal authority's decision.⁴⁷¹ In many cases a municipal authority may have a right of appeal in cases where they are considered to have a municipal interest.⁴⁷² The scope of such cases is wide and includes all kinds of public interests protected by the municipality; taxation, nature conservation, and administrative decisions on social welfare, etc. Sectoral legislation may provide specific rules on participation and access to court. These rules may also prescribe rights of appeal for administrative authorities within their area of responsibility and interest. Relevant information provided in an opinion to the court should to be considered in the decision-making procedure, even if they are not provided by parties. This is part of the inquisitorial process. The possibilities for procedural participation are hence potentially wide.

3.2.4 The Administration and the Courts

An important feature of the Swedish system of administrative appeal is that the review of the administrative decision is reformatory and one of full appeal.⁴⁷³ The principle is that the appellate body takes over all the original decision-making authority's competences.⁴⁷⁴ This includes the discretionary weighing of interests, and assessment of the best decision within the frame of the law. The administrative courts are argued to have a dual role as both court and administrative authority, as the typical feature of the administrative case motivates more procedural activity, and substantive investigation, in

the County Board, this strictly does not apply. Instead the Administrative Procedure Code applies. Nevertheless, the Administrative Court Procedure Act, for example Section 7a, may be applied by analogy (compare: JO 1990/91 p. 287). In practice, the opinion and the materials submitted by the original decision-maker is generally part of the case proceedings anyway, in view of the investigatory duties of the appeal authority, and they can also appeal the decision, supported by 16:12 and 22:1 of the Environmental Code.

⁴⁷¹ SOU 2010:29 pp. 654–655; Bohlin, A, and Warnling-Nerep, W, *Förvaltningsrättens grunder* p. 264; von Essen, U., *Processramen i förvaltningsmål* p. 212; Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* pp. 195–196. See, also: RÅ 1972 ref. 60; RÅ 1972 ref. 63; RÅ 2003 ref. 86; and SOU 1966:65 p. 248.

⁴⁷² Prop. 1971:30 p. 391; SOU 2010:29 pp. 652–654; Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* pp. 194–195; Bohlin, A, and Warnling-Nerep, W, *Förvaltningsrättens grunder* p. 262. See, for examples: RÅ 1962 ref. 58; RÅ 1964 ref. 23; and RÅ 1996 ref. 39.

⁴⁷³ SOU 2010:29 p. 601.

⁴⁷⁴ Ragnemalm, H., *Förvaltningsprocessrättens grunder* pp. 185–186; Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* p. 210. Note the exception of the special legal review process for certain municipal cases, where the procedure is mainly cassatory, see: Municipal Act (In Swedish: "Kommunallagen") (SFS 1991:900) Chapter 10.

their juridical control over the administration.⁴⁷⁵ This is the special character of the inquisitorial procedure.⁴⁷⁶ The appellate body – in the first instance often an administrative authority⁴⁷⁷ – will decide not only on the legality of the decision, but also decide the case on its merits. They can make a new assessment of the entire case as it is, at the time of their handling of the case.⁴⁷⁸ The courts also have investigatory duties, according to Section 8 of the Administrative Court Procedure Code,⁴⁷⁹ and apart from quashing the original decision and sending it back; they may (and do) also amend the decision or replace it with a new one. This is argued to further the legal protection of the individual.⁴⁸⁰ The procedural freedom of the courts is however limited by the procedural frame set by the parties' claims and grounds (FPL Sections 29–30).⁴⁸¹ It is to some extent also limited by the principle that the case should be tried in two instances, which entails some care in changing the decisions substantively in the higher appellate courts.⁴⁸² In the context of the above-described independence of the administrative authorities this full and reformatory appeal becomes a main instrument of control over exercise of authority in individual cases.⁴⁸³

It is sometimes argued that the classic Montesquieu idea of division of powers does not apply fully in the Swedish legal order. The emphasis is instead on parliamentary democracy.⁴⁸⁴ These constitutional issues will not be developed here. Suffice it to state that the checks and balances of the division of powers may find somewhat different expression in the Swedish administrative law system.

⁴⁷⁵ Sundberg, H., *Förvaltningen och rättssäkerheten* p. 324. See, also: Prop. 1971:30 pp. 244, 282–283, and 290–291, for discussion of appropriate procedural order for the administrative courts, and on the character of the role of the administrative courts.

⁴⁷⁶ Prop. 1971:30 pp. 526–530, on the objectives of the inquisitorial procedure, instead of the adversarial procedure, and the consequences thereof.

⁴⁷⁷ The County Administrative Board in most of the environmental enforcement cases.

⁴⁷⁸ Darpö, J., *JO, de närboende och miljön*. See, for example: RÅ 2007 ref. 75, concerning authorisation to put solar panels on a church building listed for its cultural historical value, where the Supreme Administrative Court made full assessment on the merits of the case, weighing the different interests involved.

⁴⁷⁹ See: Section 2.2.3.1, and 7.2.2.3.

⁴⁸⁰ SOU 2010:29 p. 601.

⁴⁸¹ See: von Essen, U., *Processramen i förvaltningsmål*.

⁴⁸² Darpö, J., *JO, de närboende och miljön* p. 74. See: *Obiter dicta* in MÖD 2001:25. Compare to MÖD 2001:34, where the Environmental Court of Appeal changed the order of precautionary measures to a blank prohibition.

⁴⁸³ See: Bull, T., *Självständighet och pluralism – om vertikal maktindelning i Sverige* pp. 127–128.

⁴⁸⁴ Bull, T., *Självständighet och pluralism – om vertikal maktindelning i Sverige* pp. 107–108; Holmberg, E, and Stjernquist, N., *Vår författning* pp. 15–16 and 47–48; and Sundberg, H., *Förvaltningen och rättssäkerheten* pp. 322–323. See, also: Wockelberg, H, *Den svenska förvaltningsmodellen* for a thorough analysis of the Swedish model of state administration.

3.3 Environmental Law

3.3.1 The Foundations of Environmental Law Regulation

3.3.1.1 Historical Developments

The best way to explain the foundations of Swedish environmental law is to start with a short explanation of the historical development, thus stating the original and fundamental idea of this area of law. Environmental law started from the regulation of use of land and water at the time of agricultural society.⁴⁸⁵ There was a fundamental prohibition of certain problematic pollution and polluter responsibilities for avoiding and repairing damage. An early regulation of pollution is the 1880 regulation of the landowner's right to his waters. It prescribed – in Section 12 – care and reparatory responsibilities, and indicated a prohibition of pollution the water. It further provided for public authorities' competence to regulate breaches of these responsibilities. Following industrialisation and urbanisation, environmental problems became more noticeable, and environmental law regulation as we know it started to form. This regulatory development took place through parallel regulations of health law, neighbour law, and the regulation of water. The developments introduced actor responsibilities and permit systems referred to as concessional orders.⁴⁸⁶

The rapid expansion of industry and the environmental consequences thereof pushed for a even more comprehensive regulation. In the first half of the 20th century, the matter was debated extensively in legal preparations and parliamentary debate; and it was also addressed in the courts. Developments took place in all the relevant areas of public and private law.⁴⁸⁷

⁴⁸⁵ Darpö, J., *Vem har ansvaret?* NVV Report 4354 pp. 10–11, on the 1734 regulation in the Code of Building (Byggningsbalken) 20:6, and the 1852 Regulation on Fisheries (Fiskestadgan), etc.

⁴⁸⁶ The stated developments also brought about regulation of building and planning (1875 års byggnadsstadga) and of human health issues (1874 års hälsovårdsstadga) in the towns. These regulations also included regulations on water pollution. See: Darpö, J., *Vem har ansvaret?* NVV Report 4354 pp. 10–11. There were, as early as 1859, regulatory proposals in the preparations of health law reforms, which essentially suggested a concessional system of authorisation and control. These suggestions were not realised, but they influenced the formulations of the 1874 health regulation, see: SOU 1966:65 p. 93, with references.

⁴⁸⁷ The regulation of water pollution was subject to legislative debate, through reforms of the water law, the health protection regulations. (See: 1919 and 1958 Regulations on Health Protection, the 1942 Water Act, and the preparations of it in NJA II 1942. See: also the suggestions of a 1909 instated committee on the law of ditching (Dikningslagskommittén, see: Bet. 1910), and the connected parliamentary debate (referred to in SOU 1966:65 pp. 94–95). Moreover, there was an extensive private law debate in the reform of (Jordabalken), and suggestions on neighbour law concessional systems (See: LB 1909). The proposal was not realised in legislation, but the courts caught on and developed the concessional idea, and its principles of weighing of interests in case law, (see: SOU 1966:65, esp. pp. 53–55; Darpö, J.,

These developments dominated the legal discourse during the 20th century, with a recurrent call within water law, health law, and neighbour law, for more comprehensive concessional approaches. There was a need for finding a balance between the involved interests, in order to meet the growing environmental concerns. The public interest aspects were emphasised, and the need for a more general regulation of the environmental pollution was advanced.⁴⁸⁸ In 1969 the Environmental Protection Act (ML⁴⁸⁹) introduced a comprehensive regulation of most kinds of pollution from land-based sources, not only industrial pollution or a single kind of recipient.⁴⁹⁰ This new regulation continued the above described discourse, and rested on a system inspired by the existing water law concessional idea.⁴⁹¹ The concessional system was coordinated with the 1942 Water Act regulation, in a comprehensive administrative permitting in a permit regime, with an expert National Licensing Board as the main regulator. The Environmental Protection Act codified much of the already valid substantive demands, balancing of interests, and fundamental demands for actor responsibility for all necessary precautionary measures.⁴⁹² The fundamental demand was that of the actor's duty to take reasonable precautionary measures.⁴⁹³ It further provided a more comprehensive regulatory approach to these demands. The administrative control was mainly focused on the permitting schemes, but there were also further administrative enforcement competences stated in the ML Sections 38–44.

3.3.1.2 A Concessional System – Environmental Permitting, etc

A common trend in the broad discussion about regulation of the growing problems with pollution was the call for stricter control, on one hand, and on the other, the worries about curbing industrial development and all the private and public benefits thereof. The challenge was to find a regulatory solution that provided appropriate legal protection for all the legitimate interests.

Vem har ansvaret? NVV Report 4354 p. 24. Example of this case law include: NJA 1949 p. 651). The matter was further discussed in following the legislative preparations. Control of pollution through private law procedure was, however, deemed insufficient and inappropriate in view of the extent of the problems and the public interests involved. The matter would be brought up in the preparations of the Environmental Protection Act. (See: SOU 1966:65 pp. 190–191; See: SOU 1966:65, and Darpö, J., *Vem har ansvaret?* NVV Report 4354, for comprehensive recount of the historical developments.

⁴⁸⁸ SOU 1966:65 pp. 28, 31–32, 38, 112–114, 187, 190–193, 205.

⁴⁸⁹ In Swedish: "Miljöskyddslagen",

⁴⁹⁰ SOU 1966:65 pp. 187, and 367.

⁴⁹¹ SOU 1966:65 pp. 39, and 45. See, also p. 30 on the considerations of the legislative debate in the reform of the Land Code (Jordabalk); Darpö, J., *Vem har ansvaret?* NVV Report 4354 p. 44.

⁴⁹² Prop. 1969:28 p. 214, referring to SOU 1966:65 pp. 211–223; SOU 1966:65 p. 80 on the directives for the preparation on the reform; Darpö, J., *Vem har ansvaret?* NVV Report 4354 p. 31.

⁴⁹³ Prop. 1969:28 p. 211.

The solution that came to be advanced was a concessional system.⁴⁹⁴ This entailed a process of weighing the relevant interests, and regulating the hazardous activities, while at the same time providing legal security, especially important to the interest of industry. The concession – permit – thus provides the necessary legal protection for the actor.⁴⁹⁵

Terminologically, the word concession is used to describe a permit. The concession is described as authorisation of an otherwise prohibited activity of great public benefit and consequently also to protect the actors from extensively far-reaching demands.⁴⁹⁶ The idea was that a complete ban is essentially impossible to uphold, and contrary to the social economic interests involved.⁴⁹⁷ It was nevertheless clear that the increasingly noticed effects of the pollution were not acceptable. Some flexibility was called for, but it needed to be appropriate and purposive in the context of the environmental law aims and purposes. Such flexibility should be regulated through law and guided by rules on the balancing of risks and benefits.⁴⁹⁸ The actors were not free to pollute, but had responsibilities to the surrounding legitimate interests. The answer was to have a quite wide acceptance of hazardous activities, but conditional to regulated limits and conditions, and extensive responsibilities and liabilities of the actor.

3.3.1.3 Actor Responsibilities

The other side of the described development is the idea of actor responsibilities. General regulation of actor responsibilities was early stated in different legal contexts.⁴⁹⁹ The Environmental Code will later build on this fundamen-

⁴⁹⁴ See for example: LB 1947 p. 129; SOU 1966:65 pp. 31–34 and 54–55; Ljungman, S., *Om skada och olägenhet från grannfastighet* pp. 253–259. See, also SOU 1966:65 p. 67, etc., on concessional systems for airports, railways, roads, etc.

⁴⁹⁵ LB 1909 p. 175; SOU 1966:65 pp. 318–319 (see, also: p. 82, on water law regulation, on which the environmental law reform was based).

⁴⁹⁶ Darpö, J., *Vem har ansvaret?* NVV Report 4354 p. 12; Ljungman, S., *Om skada och olägenhet från grannfastighet* pp. 183–184; Sundberg, H., *Allmän förvaltningsrätt* pp. 151–153. See, also: Prop. 1969:28 p. 42. See, also: NJA II 1942 pp. 95–96 on the consideration in the permitting procedure, of the public benefit of an activity.

⁴⁹⁷ NJA II 1942 p. 90; SOU 1966:65 p. 211.

⁴⁹⁸ The fundamental “rules of consideration” in Chapter 2 of the Environmental Code illustrate such balancing and assessment that is fundamental to the regulatory decisions, such as permitting and enforcement orders. Westerlund has discussed the matter of balancing environmental risks for many years; see the legal and political analysis in Westerlund, S., *Miljöskyddslagstiftning och välfärd*, that has since echoed through his writing on environmental law theory.

⁴⁹⁹ 1880 Water Ordinance Section 12, stating a general responsibility to see that the relevant materials did not get into the water (reaffirmed in the 1918 Water Act), 2:58 of the 1918 Water Act (as amended in 1937), stating a duty to take reasonable precautionary measures to take to protect ground water supply, the 1942 Water Act regulation in 8:23 on household sewage water, stating a duty to take necessary precautions to prevent pollution, if this is considered reasonable, and 8:32 on industrial sewage water stating a concessional idea of a principal prohibition which could be relieved if the necessary precautionary measures were regu-

tal perspective. In the concessional system, these actor responsibilities could be regulated through a permitting procedure, or enforced through administrative enforcement.⁵⁰⁰ However, the actor had the underlying responsibilities for the environmental hazards that came with his or her activity, regardless of any permitting procedure. The environmental activities were thus under regulatory control, and the actors carried extensive responsibilities for the necessary precautionary measures, both preventive and reparatory.⁵⁰¹ These duties were argued to include taking protective measures such as technological process measures to treat the emissions, or to ensure less of it, to isolate the activity so as to stop pollution, or to delimit the extent of the hours of the operation.⁵⁰² The precautionary duties also demand keeping informed and proactive; to take care to gather information and advice and continuously plan and improve the precautionary work. It is a question of risk management, not only avoidance of certain negative effects.⁵⁰³ The actor must thus be actively involved in the prevention of pollution, and assess what precautionary measures to take.⁵⁰⁴ The duties apply both to activities under the permitting obligation and those outside the permit regime.⁵⁰⁵ The norms have been argued to put more extensive duties on those establishing new operations. They nevertheless apply to all actors as a general and well established norm. Reasonable enforcement of these duties may however entail different considerations, and less strict demands than for a new project.⁵⁰⁶

One way to implement the fundamental idea of actor responsibility is the setting up of permit regimes of different kinds.⁵⁰⁷ The permit formalises the essence of the concessional idea of allowing actors to carry out hazardous activities, because they are fundamentally beneficial in society, but under the condition of extensive actor responsibilities for preventing and abating the

lated. See, also: SOU 1966:65 p. 28; on the proposal for the new Land Code (Jordabalk) in LB 1909 p. 175.

⁵⁰⁰ SOU 1966:65 pp. 310–315. See, also for older examples 8:32 of the 1942 Water Act on regulation through a permit, and the legislation on administrative control in water law, in Swedish: “Lagen om tillsyn över vattendrag och andra vattenområden” Section 4.

⁵⁰¹ See: NJA II 1942 pp. 79–80. The regulatory system for the activities outside the permitting regime were however weak, and control was very much left to the actors themselves, see Darpö, J., *Vem har ansvaret?* NVV Report 4354 pp. 19 and 29.

⁵⁰² See: Darpö, J., *Vem har ansvaret?* NVV Report 4354 p. 38, on Section 5 of ML.

⁵⁰³ SOU 1966:65 p. 211.

⁵⁰⁴ SOU 1966:65 pp. 40–41, 310, and also at p. 200. (The general duty is also supported by the dynamic norm of BAT, or best practice, and the weighing of costs and benefits of the relevant precautionary measures, and the environmental factors, as is now regulated in Chapter 2 of the Environmental Code. There is also a call for the development of supporting technical norms and limit values, see for example p. 230.) See, also pp. 83, and 90, on older water law, on which the regulation was to be based.

⁵⁰⁵ Prop. 1969:28 p. 217, SOU 1966:65 pp. 311–315.

⁵⁰⁶ Prop. 1969:28 pp. 210 and 214, holding that these statements of responsibilities in preparing ML did not entail any new responsibilities. See, also: Westerlund, S., *Miljöskyddslagstiftningen och välfärden* pp. 30–31.

⁵⁰⁷ 1942 Water Act 8:32, later on the 1969 ML Section 3, and further.

environmental problems involved. This system thus applies the extensive actor responsibilities, and provides a procedure for determining – or translating – in a thorough procedure what the responsibilities actually entails for that individual actor. It must nevertheless be kept in mind that the basis of actor responsibilities is found in the underlying and fundamental responsibility for the environmental hazards. The concessional system has been added to provide a clear and stable pre-regulation of an activity that will provide legal certainty for the operators, and a stable regulation of industry.⁵⁰⁸

3.3.1.4 The Environmental Code Reform and Beyond

Environmental law as a whole still had a patchwork character. Other sectors of environmental law also developed during mainly the second half of the 20th century; nature conservancy, planning and natural resources, infrastructure, chemical substances, etc. Most sectoral systems were gathered in a comprehensive Environmental Code (MB), which entered into force on 1 January 1999. The different subjects of regulation were now organised under separate chapters of the Code, under a chapeau of a common goal formulation and general and fundamental substantive environmental principles called “rules of consideration”,⁵⁰⁹ and with a more integrated environmental procedure. The intentions were to coordinate and to strengthen the environmental law regulations, including their enforcement,⁵¹⁰ with a unified holistic approach to environmental steering. Environmental courts were established with tasks including acting as permitting authorities and appellate courts for environmental enforcement orders. The Environmental Code thus brings very much of the environmentally relevant legislation under one comprehensive regulatory system. It, however, still consists of many different sectoral regulations and many different authorities. The idea is, however, that the Code comprises a unified regulation which is to take a full and holistic perspective on environmental issues. The Environmental Code is consequently applicable to all activities that have significance to the aims of the Code, even when this overlaps with other areas of legislation and regulation.⁵¹¹

An Environmental Code Committee was established shortly after the Code’s entering into force, with the task of continuing the reform in view of experiences gathered during its first years of implementation.⁵¹² More recent reforms have been triggered by the Better Regulation trend, and most impor-

⁵⁰⁸ SOU 1966:65 pp. 318–319. Prop. 1969:28 p. 277, with reference to the general motives.

⁵⁰⁹ In Swedish: “hänsynsregler”. The rules of consideration are mainly built upon fundamental rules of ML. They were earlier referred to as “rules of authorisation” (“tillåtlighetsregler”).

⁵¹⁰ Prop. 1997/98:45 Part 1 pp. 1–3, 162–164; SOU 1996:103 Part 1 pp. 21–22, 213, 217, 237–238. See: NVV enforcement guidance in Handbook 2001:4 pp. 7, and 39–40.

⁵¹¹ Prop. 1997/98:90 pp. 144 and 147–152.

⁵¹² Dir. 1999:109. The Committee refers from time to time to the fact that the Code was introduced without enough time to make a coherent body of rules out of the earlier laws that were made into the new Code, and that they are set to continue this work; see, for example: SOU 2004:37 p. 119.

tantly by the continuous flow of EU environmental regulation. The core of the Code is however still intact, as is its fundamental basis in old water law. This basis involves balancing the many involved legitimate interests, in a concessional system that expresses and controls the responsibilities of the actor, as well as the rights they can acquire through the permit procedure.

3.3.1.5 Sustainable Development and Actor Responsibilities

An important development is the formulation of the fundamental idea of sustainable development, which has been presented earlier.⁵¹³ This concept developed and become widely acknowledged during the end of the 20th century. One of the main purposes of the Environmental Code reform became to implement this new perspective of environmental policy. The Code is intended to legally operationalise the international declarations and policies on sustainable development, and other environmental principles.⁵¹⁴

The Environmental Code thus rests on the fundamental purpose and goal of sustainable development, as expressed in the opening paragraph of the Code, and further developed and operationalised in the National Environmental Objectives.⁵¹⁵ The system is constructed so that sustainable development, as developed in the Code and in the National Environmental Objectives, shall be considered in all environmental law applications, for example when specifying the substantive permit conditions, or the contents of an enforcement order.⁵¹⁶ The environmental objectives are continuously developed, evaluated and reviewed on the basis of the results. The idea is to have established a truly dynamic and result-oriented goal-steering system.

Actor responsibilities have been further emphasised as the idea of a more general environmental responsibility has evolved. Environmental work is to be driven forward at the grassroots level, not just as a top down “command-and-control” regulation.⁵¹⁷ The previously established focus on prevention rather than reparation is continued and advanced. Proactive and preventive environmental control is further emphasised, now in the context of a collective aim and responsibility, of striving towards environmental goals, and not just avoiding damage or repairing problems. There is thus a duty to cooperate in continuous improvement of resource management. Under Swedish environmental law these duties expressly lie with each and every actor, mainly through the general rules of consideration in MB Chapter 2, and the

⁵¹³ Section 2.3.1.2.

⁵¹⁴ Prop. 1997/98:45 Part 1 pp. 1–2 and 158–159, and Part 2 pp. 5 and 8; SOU 1996:103 Part 1 pp. 22, 182, and 223–227, and Part 2 pp. 7–8.

⁵¹⁵ Prop. 1997/98:145, Bet. 1998/99:MJU6, Rskr 1998/99:183, Prop. 2000/01:130, Prop. 2004/05:150. See, also the Judgment of the Environmental Court of Appeal of 9 November 2006, in case M 9983-04, for an explicit application of these rules and goals.

⁵¹⁶ Prop. 1997/98:45 Part 2 pp. 7–8. Note also the comments on the environmental law discourse, by Fredrik Sterzel in *Ramlagar – nytt och gammalt* at p. 242, in the context of framework law and goal statements in law.

⁵¹⁷ Prop. 1997/98:45 Part 1 pp. 160–161; SOU 1996:103 Part 1 p. 22, and Part 2 pp. 10–11.

environmental principles they are supposed to implement, but also the self-control responsibilities expressed in MB 26:19, and in the Ordinance (SFS 1998:901) on the Actors' Self-control (Self-control Ordinance). These responsibilities are based on the environmental law tradition as stated earlier, but are set in a new context which changes the feature of the responsibilities.

The rules of consideration include, for example, duties to choose the most appropriate location (MB 2:6), to take precautionary as well as reparative and restorative measures (MB 2:3 and 2:8), and duty to have sufficient knowledge about the operation and its effects on health and environment (MB 2:2). In the administrative enforcement situation, the actor has to prove that these general and over-arching principles and rules are followed (MB 2:1). This shifted burden of proof entails a crucial background to actor responsibilities, especially as regards knowledge and investigation, as the lack of information to base the decision on will, at least in principle, not benefit the addressee of an enforcement measure. The general duties under the rules of consideration are limited so as not to entail unreasonable demands (MB 2:7). The assessment of unreasonableness fundamentally rests on a weighing of the costs and benefits of the required measures.

3.3.1.6 Actor Responsibilities for Information

Under Swedish environmental law, every environmental actor must gather the relevant knowledge to control their own activities. This is argued to be a fundamental part of preventive and proactive environmental work, both control and development.⁵¹⁸ The general rule is that the actor should attain the knowledge needed to avoid causing health and environmental problems.⁵¹⁹ The responsibility is dynamic and continuous so as to always require the best environmental safeguards that can reasonably be demanded.⁵²⁰ In certain respects these duties are more extensive for commercial operators, or at least more formalised.

The underlying rules of consideration are the duty of knowledge and of proof in MB 2:1–2, and also the duty of precaution, or duty of care, in 2:3. The duty of precaution is fundamental, with roots in the early environmental rules of old water law.⁵²¹ These duties are the basis of the actor's information responsibility, which has developed into a special procedural order of self-control, and of environmental reports, both a general reporting scheme for larger installations, and also many kinds of sector relevant reports.⁵²² Self-control is also seen as an instrument for proving compliance with the rules of

⁵¹⁸ Prop. 1997/98:45 Part 1 pp. 512–513. See, also statement of the Environmental Court of Appeal in MÖD 2004:64.

⁵¹⁹ Prop. 1997/98:45 Part 2 pp. 13–14; SOU 1996:103 pp. 21–22.

⁵²⁰ SOU 1966:65 p. 310.

⁵²¹ 1941 Water Act 8:42.

⁵²² Prop. 1997/98:45 Part 2 p. 14, referring to MB 26:19 and 22.

consideration in the Code.⁵²³ The enforcers have instruments at their disposal to demand information from the actors, thus enforcing the actor duties of knowledge and investigation. These are stated in MB 26:19–22.⁵²⁴

An essential environmental law feature is the shifted burden of proof in the administrative enforcement situation. This applies both in the permitting procedure and in the more general supervision and control by the administrative enforcement authorities. The evidence rule supplements the duties of precaution and knowledge such that the actor will carry the risk for a poorly investigated environmental risk come the enforcement situation.

Together, these rules make for extensive regulation of actor responsibility for information. Each and every environmentally relevant actor must ensure relevant knowledge, investigation and proof, in their exercise of activities which may entail environmental risks. They must also communicate this information to the administrative enforcers, and thus actively participate in the control of their own activity. The controlling role is thus shared between the enforcement authority and the actor, but the actor is expected to be ultimately responsible for the activity, and thus for ensuring appropriate steering thereof. These rules of actor responsibilities for information and enforcement were well established in the Swedish concession based environmental law system long before the Environmental Code.⁵²⁵ The actor is relieved from a prohibition of the hazardous activity, through a permit conditioned by responsibilities for ensuring appropriate precautionary measures, etc.

Administrative enforcement of environmental law relies much on actor responsibilities for information and self-control. Such duties will be analysed further in Part III. Because of their central place in administrative enforcement they will also be briefly introduced in the context of presenting the enforcement instruments. Before that, however, we will move on to introduce the institutional organisation and allocation of competence and tasks of the environmental law system.

3.3.2 Institutional Organisation, Regulatory Tasks and Procedure

3.3.2.1 The Environmental Authorities⁵²⁶

Earlier the general structure of the Swedish administration and its organisation has been introduced. In the following the relevant institutional organisa-

⁵²³ NVV General Guidance NFS 2001:2 p. 3, and NVV Handbook 2001:4 p. 34.

⁵²⁴ Prop. 1997/98:45, Part 1 p. 171.

⁵²⁵ See, for example: ML Section 43, introduced through Prop. 1973:141, however at pp. 20 and 32 suggested, to an extent, to codify and clarify the information duties already regulated in the duty to take reasonable precautionary measures. See, also, Westerlund, S., *Miljöskyddslagen* pp. 352–354, on self-control.

⁵²⁶ An overview in English, is available at: <http://www.sweden.gov.se/sb/d/5400/a/43490>.

tion of environmental regulation will be presented in further detail. This serves to illustrate the system of environmental authorities – their general competence and tasks. In Section 3.4. the more specific grounds and limits of their enforcement competence will be presented.

There are many different administrative authorities involved in the environmental law and policy area, as well as a special environmental court system. Consequently, there are many different public bodies with administrative enforcement competences. Sometimes these competences overlap, and the same activity can be under the supervision and control of several different authorities.⁵²⁷ This is a reminiscence of the patchwork environmental regulatory system described above. Apart from the Ministry of the Environment, there are national agencies, most importantly the Swedish Environmental Protection Agency (NVV⁵²⁸), with broad and comprehensive responsibilities for environmental policy and administration.⁵²⁹ From 1 July 2011, there is also going to be a specialised Sea and Water Agency, which then takes over some of the NVV functions.⁵³⁰

There are also specialised sector agencies, such as the National Board for Health and Welfare,⁵³¹ and the Swedish Chemicals Agency.⁵³² These agencies have many different responsibilities within the enforcement system, mainly supervision and guidance, but also some operative enforcement.⁵³³ This part of the enforcement system will not be investigated, as the most operative enforcement within the environmental law system is decentralised.

Important administrative authorities within the environmental law system, and significant enforcers, are the County Administrative Boards.⁵³⁴ They are regional authorities under the Government, and thus state authorities. Besides environmental issues, they have responsibilities within planning, health care, infrastructure, and more.⁵³⁵ Administrative tasks within the executive power of the state may be given not only to state authorities, but also to municipalities (RF 1:8, 8:5, and 11:6). Generally, the local administrative tasks are executed by the municipal boards for different political and regulatory areas, for example environment boards. These boards consist of local politicians, and they are generally assisted by a staff of civil servants. They handle

⁵²⁷ See, for example: RÅ 2003 ref. 63, where it was held that the municipal board had enforcement competence in relation to a forestry activity that entailed pollution problems, despite the overlapping competence of the Forestry Agency.

⁵²⁸ In Swedish: “Naturvårdsverket”.

⁵²⁹ Ordinance (SFS 2009:1476) with Instructions for the Environmental Protection Agency (Förordning med instruktion för Naturvårdsverket). NVV has a central role in the realisation of environmental policy.

⁵³⁰ Prop. 2010/11:86. See, also: <http://www.naturvardsverket.se/sv/Start/Naturvard/Havsmiljo>.

⁵³¹ In Swedish: “Socialstyrelsen”.

⁵³² In Swedish: “Kemikalieinspektionen”.

⁵³³ See Ordinances with instructions for these authorities: SFS 2009:947 and 2009:1243.

⁵³⁴ In Swedish: “Länstyrelserna”.

⁵³⁵ See Ordinance (SFS 2007:825) with Instructions for the County Administrative Boards (Förordning med länsstyrelseinstruktion).

enforcement and permitting. The municipal administrative authorities answer primarily to the municipality, which is led by elected political assemblies. Municipal enforcement efforts therefore involve considerable political involvement, even though the cases are to a great extent processed by the civil servants. Enforcement cases in the County Administrative Boards are by and large also handled by civil servants.

In the Swedish system of enforcement of environmental law, permitting and enforcement are systematically and functionally separate. Supervision and enforcement in individual cases of non-compliance with general rules or permitting conditions is normally the responsibility of a lower level authority, creating a much decentralised enforcement system. Criminal enforcement is in turn separated from administrative enforcement. It is the exclusive competence of the public prosecutors. Administrative enforcers have access to sanctions, some of them with some repressive features. The main purpose of administrative enforcement is, however, to direct the environmental actors and activities so as to prevent, and sometimes restore harm. Their competences and enforcement instruments are characterised by this purpose.

As noted above, many different public authorities are involved in the regulation of environmental law. These are authorities on different levels in the administrative structure, central, regional and local. Due to the wide range of the issues involved many different sectors of the public administration, are involved. There can be some questions asked regarding the distribution, and conflict between enforcement competences here. Overlapping competences can be prescribed under the Environmental Code and/or some sectoral legislation, for example in the regulation of roads, and of forestry. The general intent and principle is that the different areas of regulation apply parallel to one another. Consequently, several authorities may be competent in implementation and enforcement in relation to the same actors, to some extent with different perspectives and purposes.⁵³⁶

3.3.2.2 Environmental Courts

Since the introduction of the Environmental Code, Sweden has had a special system of environmental courts. There are, according to MB 20:1, five Environmental Courts, and an Environmental Court of Appeal.⁵³⁷ These environmental courts are linked to the general court system; to five local courts and

⁵³⁶ Prop. 1997/98:90 pp. 147–152. See, for examples: RÅ 2003 ref. 63, where the municipal authorities were held to have enforcement competences in relation to forestry activities which include pollution issues, even though the forestry authorities has overlapping enforcement competences; and MÖD 2006:28, concerning the sector regulation of pollution from marine vessels, as well as the Environmental Code's regulation of environmental quality standards. This also means that both the Swedish Maritime Administration and the relevant environmental authority, in this case the municipal environmental board, have regulatory competence.

⁵³⁷ In Swedish: "Miljödömsstolar" and "Miljööverdomstolen".

Svea Court of Appeal in Stockholm.⁵³⁸ The general courts try mainly criminal law and private law cases, but the environmental courts will also try administrative enforcement law cases like appeals of enforcement orders. They moreover act as permitting authorities. The permitting of larger installations under environmental law is therefore a court case, and decided through the court's judgment. The Environmental Courts are in 2011 to be reconstructed as Land and Environment Courts, which will also decide cases on real property and planning law.⁵³⁹ The Environmental Courts decide on issues that demand some teleological interpretations, and the balancing of interests that require expertise beyond the legal domain. Therefore, apart from lawyers, experts in environmental sciences sit as judges in the environmental courts.

3.3.2.3 Permitting

There are many kinds of permit and authorisation regimes in Swedish Environmental law. Permitting is a primary mode of regulation of polluting establishments and water operations under the Environmental Code system. Permitting of larger industrial installations and water installations is mainly the competence of the Environmental Courts. For some large installations of national interest, especially large infrastructural installations, the Government will make the actual authorisation decision, while the Environmental Court subsequently decides on the permit and its conditions for the thus authorised operation. The Government decision is subject to judicial review by the Supreme Administrative Court. Permit regimes are regulated in Chapters 7,⁵⁴⁰ 9, 11,⁵⁴¹ and 17 of the Code, and in the Ordinance (SFS 1998:899) on Environmentally Hazardous Activities and the Protection of Public Health. Furthermore, under the rules on the so called environmentally hazardous activities (mainly polluting installations), an operator can apply voluntarily for an environmental permit even when such a permit is not required (MB 9:6 para. 3, and 11.9 para.2). Such voluntary permit application serves to bring about an administrative decision which then provides legal certainty

⁵³⁸ In Swedish: "Tingsrätter" and "Svea Hovrätt".

⁵³⁹ From 2 May 2011, there are "Land and Environment Courts" ("Mark- och miljödombstolar"), which comprise the tasks of the Property Courts, the Environmental Courts, and also the planning law cases earlier tried by the Administrative Courts. See: SFS 2010:921, and further in: Prop. 2009/10:215. This also means that the procedure is not to be regulated by the Administrative Court Procedure Act, but instead by the Procedure Code, and – for cases appealed to the Court – the Act (SFS 1996:242) on Administrative Court Cases (Lagen om domstolsärenden). Appealed administrative enforcement cases will therefore still be handled in an administrative procedure, but under somewhat different regulations than other administrative court procedures. These changes took place after the printing of this thesis, which will instead refer to the previous terminology and legislation on procedure.

⁵⁴⁰ Permit in relation to Nature 2000 effects are prescribed in Chapter 7. These rules will not be investigated further.

⁵⁴¹ Chapter 11 regulates water operations and installations, which are subject to a separate and different regulatory system. Water law is outside the scope of this study and will not be elaborated further.

and protection of their legitimate expectations. An actor can, according to MB 9:6 para. 2, also be ordered by the competent administrative enforcer to apply for a permit, when the environmental risks in question are significant.

Permitting of activities with less environmental impact, and of activities that might affect Natura 2000 interests, are as a rule permitted by the County Administrative Board (MB 7:28–29b). There is an independent body within the Council that tries permitting cases; the Regional Licensing Board.⁵⁴² Permitting is thus kept separate from other tasks of the County Administrative Board. Some very small installations and activities, such as private sewage installations, are permitted by the municipal environment boards.

Furthermore, there are many activities and installations with no duty to obtain any permit, but instead a duty to notify the relevant municipal board. This process is something in between permitting and administrative enforcement. The notification means that an administrative authority, often a municipal board, will have the opportunity to make a comprehensive assessment of the activity, and the possibility to take enforcement measures, directly ordering precautionary steps, or prohibiting the activity and/or ordering the responsible actor to apply for a permit. Though it is not a full permitting procedure, the notification is to be followed by information on the activity, and the authority assessing the notification can use their enforcement competences in MB Chapter 26 to ask for more information and thus extend the process.

3.3.2.4 Administrative Enforcement

Supervision and enforcement of activities under permit conditions and general rules of environmental law are generally the competence of the County Administrative Boards and the municipal environment boards. The administrative enforcement authorities are prescribed in Chapter 2 of the Ordinance (SFS 2011:13) on Administrative Enforcement of Environmental Law (Administrative Enforcement Ordinance). The main organisational idea is that the permitted activities are supervised and enforced by the County Administrative Boards, while the environment boards enforce the non-permitted activities, and the smaller activities that they have themselves permitted. In reality, much of the enforcement of permitted activities is according to MB 6:3 para. 4, and Sections 10–12 of the Ordinance, delegated to the environment boards.⁵⁴³ The result is a decentralised system for enforcing environ-

⁵⁴² “Miljöprövningsdelegationen”.

⁵⁴³ The County Boards are to some extent mandated, or obligated even, to take back the enforcement competence delegated to the municipalities. In practice this would require severe maladministration, and such return of delegation of powers is generally never done (see Environmental Code 26:4, the Administrative Enforcement Ordinance 1:21–22; and Prop. 2002/03:54).

mental law, with the municipal environmental boards as principal operative enforcement authorities.⁵⁴⁴

The decentralised enforcement is supported by enforcement guidance by the County Administrative Boards and national authorities, mainly the Environmental Protection Agency, and other specialised authorities (Administrative Enforcement Ordinance 3:1, and further). According to MB 26:3 and the Ordinance of Administrative Enforcement, the role of the County Administrative Boards as regional enforcement authorities, is to provide guidance and support to the local enforcers within their region. Additionally, they try the local enforcement cases on appeal. The Environmental Protection Agency has the central role as national enforcement authority. Its main area of responsibility is to gather and circulate information within the enforcement organisation, to evaluate the enforcement work, and to further the effective enforcement, through guidance and recommendations, research, information, and statistics. They are also provided with regulatory powers in lower level legislation.⁵⁴⁵

An important part of the enforcement guidance is done through General Guidance and Handbooks.⁵⁴⁶ The guidance does not constitute formally legally binding rules or instructions (remember the independence of administrative authorities) but it generally enjoy significant authority in practice. It serves as a source of administrative practice. Guidance informs the operative enforcers of the central administration's interpretation of legislation, mainly through recommending how the operative authorities may or should act when applying the relevant regulations.⁵⁴⁷ There is also a special Enforcement and Regulation Council ("Tillsyns- och föreskriftsrådet") tied to the National Environment Agency, functioning as a forum for the enforcers for cooperation, guidance and exchange of information and experience.⁵⁴⁸

As have just been described, the Swedish system for environmental law regulation separates the permitting function and the supervision and enforcement function as means of regulating actors under environmental law.⁵⁴⁹ Enforcement instruments connected to the permit; such as revocation and review of the permit conditions, are consequently under the competence of

⁵⁴⁴ Prop. 1997/98:45, Part 1 pp. 498 and pp. 573–575, and Part. 2 p. 268; SOU 1996:103 Part 1 pp. 555–556, and 562–563, and Part 2 pp. 297–298. In 1988 (Prop. 1987/88:85) the municipal authorities could ask for delegation of the administrative enforcement competence, and in 1988 (Prop. 1987/88:85) the municipalities were given the administrative enforcement task relating to non-permitted activities, as well as the possibility to be delegated such tasks relating also to permitted activities.

⁵⁴⁵ Prop. 1997/98:45, Part 1 pp. 576–578.

⁵⁴⁶ Examples include: NVV Handbook 2001:4, and General Guidances NFS 2001:2 and NFS 2001:3.

⁵⁴⁷ NVV Handbook 2001:4.

⁵⁴⁸ Ordinance (SFS 2007:1052) with administrative instruction for NVV (Förordning med instruktion för Naturvårdsverket), Sections 20–22; Prop. 1997/98:45, Part 1 pp. 579–580; Ds 1998:22 pp. 96–104. See: <http://www.tofr.info/> for the council's official webpage.

⁵⁴⁹ Prop. 1997/98:45 Part 1 p. 471.

the permitting body. The administrative enforcement authorities apply for such measures, but the permitting authorities have exclusive competence to decide whether and how such measures are to be made.⁵⁵⁰ Therefore, the general picture is that no single enforcement body has access to the full scale of administrative enforcement instruments. Additionally, for some coercive enforcement measures the enforcers need to go through other authorities, for example for the awarding of a conditional fine.⁵⁵¹

3.3.2.5 Procedural Reform – Shifting Regulatory Focus

It is important also to note some expressions of the Better Regulation agenda within the Swedish legal order. A crucial step in the Swedish agenda has been reform of the permit regime. In order to lessen the administrative burdens and simplifying for business, fewer activities have to apply for environmental permit, or they only have to notify the municipal environmental board.⁵⁵² The procedure has also been to some extent simplified. Additionally, more permitting is to be handled by County Administrative Boards instead of the Environmental Courts.⁵⁵³ Starting from May 2011, planning law, real property law, and environmental law cases will be dealt with in one court system – the Land and Environment Courts – in order to facilitate coordinated regulation.⁵⁵⁴

Essentially, the reform of the permitting system has entailed further decentralisation of the enforcement competence and responsibilities, and changes focus of public environmental law control. The scope of the area regulated by local enforcement authorities' supervision and enforcement in individual cases is increased as the permitting obligations are diminished and shifted from the Environmental Courts to regional permitting authorities.

⁵⁵⁰ Traditionally however, the regulation of conditions for supervision and control of a permitted activity – a “control program” has been delegated to the enforcement authority. These may be argued to give the enforcers some tasks in the permit process. Notably, the Environmental Court of Appeal has more recently reformulated their case law stating that in accordance with EU law and legal certainty, the permit conditions have to regulate also supervision and control matters, even though details of how to carry out these matters can still be left to the enforcement authority to prescribe in a control program, see MÖD 2009:2 and 2009:9.

⁵⁵¹ A conditional fine is a monetary fine. See further in Section 3.5.5.2.

⁵⁵² A significant deregulation of the Swedish permitting obligation was made in 2008 (SFS 2008:690), when the Ordinance (1998:899) was amended so as to take away many permitting obligations, generally replacing them with notification duties. See, also: Darpö, J., *Rätt tillstånd för miljön* p. 56, stating some numbers illustrating the result of the deregulation.

⁵⁵³ These reforms have been developed in steps, see mainly: SOU 2001:124 and Prop. 2004/05:129 lessening the scope of obligatory permitting, and simplifying permit changes, for example regarding the requirements of impact assessment, etc; and the efforts by the recently finished Environmental Process Review, for example leading to lowering demands for licensing for wind-energy turbines, see Prop. 2008/09:146, and also review of the institutional organisation, leading up to the up-coming changes in the court system (see below). See, also Darpö, J., et.al., *Miljöprövningen i vågskålen – landskampen mellan Finland och Sverige*, on the permitting procedure and the better regulation reform.

⁵⁵⁴ The Act (SFS 2010:921) on Land and Environment Courts; Prop. 2009/10:215. See, also public information at: http://www.domstol.se/templates/DV_InfoPage____18195.aspx.

Such reforms will necessitate review of the enforcers' enforcement procedure. These aspects will be discussed in Part III.

3.3.2.6 Appeal

As described earlier, Sweden has an administrative court system where appeals from administrative law decisions against the citizens are generally tried.⁵⁵⁵ The environmental law case will however as a rule be appealed to Environmental Court, often preceded by appeal to a higher administrative authority – generally an Administrative County Board. Apart from procedural regulation in the Environmental Code, the procedure in the administrative appeal authority is regulated by the Administrative Procedure Act and in the Courts by the Administrative Court Procedure Act.⁵⁵⁶ In the Land and Environment Courts the procedure will instead be regulated by the regulations of the general court system in their administrative decision-making.⁵⁵⁷

The basic route for appeals within environmental law can be described as: Municipal Environment Board → County Administrative Board → Environmental Court → Environmental Court of Appeal → Supreme Court. Different bodies are involved in the varying types of decisions under the Environmental Code, depending mainly on where the case has been initiated. Some cases, for example the permitting of larger installations, are handled in the Environmental Court in first instance and then appealed to the Environmental Court of Appeal, and further to the Supreme Court. For enforcement decision, as well as permitting of smaller installations, the process starts at the administrative authority level (MB 19:1, 20:2, and 23:1).⁵⁵⁸ Cases tried in the Environmental Court on appeal, for example administrative enforcement cases, may not be appealed to the Supreme Court (MB 23:8). This means that the case law of the Environmental Court of Appeal is often final, and in practice therefore takes the role of precedence. It should be noted also, that awarding of a conditional fine is handled by the Environmental Courts in first instance, and may thus be appealed all the way to the Supreme Court (MB 20:2). According to MB 23:1 para. 2, and The Procedural Code 54:9, appeal to the Environmental Court of Appeal, and further to the Supreme Court, requires leave of appeal.

⁵⁵⁵ The Code (SFS 1971:289) on General Administrative Courts (Lagen om allmänna förvaltningsdomstolar) establishes the administrative courts. A general rule of administrative appeal is provided in FL Sections 22–22a, as well as Section 3 (see, on right to trial: Section 2.2.3.3).

⁵⁵⁶ To some extent the FPL rules may be applied by analogy also in the appeal before the administrative authority. See for example: JO 1990/91 p. 287.

⁵⁵⁷ See: Section 3.3.2.2, and footnote 539.

⁵⁵⁸ Though appeal of administrative decisions are made to a court of law, or sometimes a higher administrative authority first, the appeal application is always sent to the original decision-making authority. This gives them opportunity, and in clear cases a duty, to review their decision, before the transfer of the case to the appellate body (FL Sections 23–25, and 27).

3.3.2.7 Procedural Access

As discussed earlier, Environmental process involves extensive possibilities – and rights – to public participation and procedural access.⁵⁵⁹ This first of all involves rules on consultation. The extensive regulation – on different levels of law – of the environmental impact assessment procedure is a recognized example. It involves rules on consultation, notification, and publication, etc. There is also a comparatively wide concept of access to appeal in environmental cases. Furthermore, international law, and more specifically EU law regulates the access to justice and participation in environmental cases.⁵⁶⁰

The general rules on access to appeal have just been described. MB 16:12 reiterates the general rule regarding standing for concerned parties. In environmental cases with many interests involved, there is a wide range of persons directly affected by the decision, and having interests protected by the relevant body of law.⁵⁶¹ This also includes public authorities defending public interests of varying kinds. The matter of access to justice in the environmental process is developed in case law.⁵⁶²

Wide procedural access is especially found in the permit procedure. Apart from the range of directly concerned parties under the general rule, NGOs may appeal a permit decision (MB 16:13),⁵⁶³ as well as different administrative authorities within their area of responsibility and interest (MB 16:12, and 22:6).⁵⁶⁴ Additionally, the different procedural steps of the permitting procedure – environmental impact assessment, publication and possibilities for stating opinions to the permitting authorities – provide room for participation. Fewer parties are normally involved in the enforcement case procedure. The general public normally does not know about the case, if they have

⁵⁵⁹ See: Sections 2.3.1.4 and 2.3.3.3. Compare also to the discussion in SOU 1966:65, pp. 298–299, and 307–310, arguing a wide concept public concerned, already in the preparation of the 1969 Environmental Protection Act.

⁵⁶⁰ Examples include: Directive 2003/4/EC on public access to environmental information; the Aarhus Convention (UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, UN Doc. ECE/CEP/43 (1998), 38 ILM 1999). Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11/EC, and Directive 2003/35/EC. See also: Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.

⁵⁶¹ Prop. 1997/98:45 Part 2 p. 262; SOU 2010:29 p. 645.

⁵⁶² See, for examples: NJA 2004 p. 590; MÖD 2002:83. See, also: Darpö, J., *Rätten till en god miljö, and Vem får överklaga i miljösmål?*

⁵⁶³ Prop. 2004/05:65 pp. 116–119; Prop. 1997/98:45 Part 1 pp. 486–490, and Part 2 pp. 212–213. Note also the changes on 1 September 2010, where the criteria for a NGO with right to appeal were made less strict, see: Prop. 2009/10:184, esp. pp. 63–69. The changes were made in response to the preliminary ruling of the ECJ in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun*, where the Swedish rule was held not to comply with the Directive 85/337/EEG on EIA, and the implementation of certain rules in the Aarhus Convention. See, also: Darpö, J., *Behövlig bakläxa i EU-domstolen*.

⁵⁶⁴ MÖD 2003:87. Note that these authorities generally have a duty to be active in relevant cases according to 22:6. Compare: SOU 1966:65 p. 310.

not initiated it themselves. The authority will communicate with observably concerned parties, typically neighbours of the relevant activity (FL Sections 16–17). These parties will have a right of appeal. This is the case also when the authorities have decided not to act on their complaint.⁵⁶⁵

An administrative body's passivity as such is generally not appealable. The enforcer's initiative is seen as an exclusive decision of the authority, and the complainant does not become a party to the case. Nevertheless, within the area of environmental law there is some case law and administrative practice that can be seen as a kind of measure against the enforcer's passivity.⁵⁶⁶ In response to a complaint an enforcement authority must initiate a case, and reach an administrative decision, which is communicated to the parties. The decision to act or not in response to the complaint is seen as an authoritative action against the complainant, and he or she has, as an interested party, a right of appeal.⁵⁶⁷ This links with the administrative authorities' enforcement duties, which will be further elaborated in Section 3.4.4.

The original administrative enforcement authority will become a contradictory party in the appeal against their enforcement decision (FPL Section 7a).⁵⁶⁸ Apart from this, however, the general rule is that other authorities do not have procedural access in administrative cases; unless there is special statutory basis for a state authority's right to appeal another authority's decision.⁵⁶⁹ There is such specific regulation in environmental permitting cases (MB 16:12 para. 1, subpara. 4, and 22:6)⁵⁷⁰, but not for administrative enforcement cases.⁵⁷¹

NGOs do not have independent standing in enforcement cases, except for the specific enforcement under Chapter 10 on activities causing environ-

⁵⁶⁵ See: Section 3.4.4.3.

⁵⁶⁶ MÖD 2000:43 and 2000:44, referring to: RÅ 1995 ref. 55 and 1996 not. 190. See, also: MÖD 2003:19 on appeal against the enforcement authority's decision not to act on a notification of a new installation not under licensing obligation; and JO 2002/2003 p. 357.

⁵⁶⁷ RÅ 1995 ref. 55 and MÖD 2000:43 and 44, stating that it would not have been the intention that the Environmental Code system were to change the relevant administrative case law.

⁵⁶⁸ Prop. 1995/96:22; SOU 2010:29 ref. 655. FPL is applicable in environmental procedures through MB 20:3, see: MÖD 2003:19. MB 20:3 applies to the court procedure. In the appeals procedure before an administrative authority, FL applies. Nevertheless, FPL may be applied through analogy. In practice, the opinion and the materials submitted by the original decision-maker are part of the case proceedings anyway, in view of the investigatory duties of the appeal authority.

⁵⁶⁹ SOU 2010:29 pp. 654–655; Bohlin, A, and Warnling-Nerep, W, *Förvaltningsrättens grunder* p. 264; Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* p. 194 See, also: RÅ 1972 ref. 60, and RÅ 1972 ref. 63, RÅ 2003 ref. 86. See, also: SOU 1966:65 p. 248.

⁵⁷⁰ Many authorities, as well as organisations and members of the public are also involved in the environmental impact assessment, see: Chapter 6 of the Environmental Code.

⁵⁷¹ See: MÖD 2000:54, on an administrative decision on whether or not changes to a permitted activity were such as to require a new permit. NVV wanted to appeal the decision. Notwithstanding the connection to licensing, the decision was held to concern administrative enforcement, and NVV had no access to appeal.

mental damage.⁵⁷² However, the Aarhus Convention regulation on access to justice for a wider scope of the public, in particular to NGOs, covers also administrative decision-making such as the choice not to take enforcement measures. The Swedish regulation probably conflicts with this regulation.⁵⁷³

In conclusion, procedural access is as a whole wide in environmental law matters, but perhaps mainly in the permitting context. The administrative enforcement process is not as accessible, formally because less interests are allowed status as parties, and practically, as there is generally no communication with the wider public. A noteworthy consequence of the deregulation of permitting obligations is therefore deregulation of procedural access.

3.4 Administrative Enforcement of Environmental Law

3.4.1 Introduction; General Remarks on Enforcement

Earlier, the general institutional organisation of environmental authorities and their competences have been described. The presentation will now move on to consider the enforcement system, its grounds and limits, in view of the current enforcement policy. In other words, we move from discussing who can enforce to when they can enforce.⁵⁷⁴ In order to reflect the policy context of enforcement, the administrative practice reflected in the guidance from NVV will serve as an important source of information.

Public control over environmental law rests mainly with the above-discussed permitting and administrative enforcement authorities.⁵⁷⁵ In the preparations of the Environmental Code reform, it was held that administrative enforcement was not just to be coordinated through the Code, it would also be stricter, or more intense, in order to ensure the Code's aims. Effective and forceful administrative enforcement was emphasised, as well as legal certainty and consistency in application of the law.⁵⁷⁶

In the past, administrative enforcement can be said to have taken a back-seat to the permitting schemes of the concessional system. There were some administrative enforcement competences stated for regulation of environ-

⁵⁷² See for example: MÖD 2007:17, where an installation was argued to be operated without the lawfully needed permits. The NGO was held not to have standing. The wider access to justice, including NGO:s, has been discussed in some borderline cases between licensing and enforcement. For a critical analysis of the procedural rights of NGOs, see: Darpö, J., *JO, de närboende och miljön*.

⁵⁷³ Aarhus Convention Art. 9(3); Michanek, G., and Zetterberg, C, *Den svenska miljörätten* p. 376.

⁵⁷⁴ It should however be noted that these aspects will often overlap, due to the enforcement competences being tied to the purpose and aims of the Code.

⁵⁷⁵ SOU 2004:37 p. 56.

⁵⁷⁶ Prop. 1997/98:45 Part 2 p. 491.

mentally hazardous activities in the 1969 Environmental Protection Act (ML) Sections 38–44, comprising competence to serve orders of positive and negative obligations, and to couple these with conditional fines.⁵⁷⁷ They were nevertheless primarily to advise and direct the actor before resorting to enforcement measures,⁵⁷⁸ which were only to be used for more qualified situations when urgent action was needed and there was an obvious need for the measures. Nevertheless, the enforcement competence was linked to the observation of environmental risk, so as to make preventive enforcement possible.⁵⁷⁹ The competences were to great extent based on the earlier water enforcement regulation,⁵⁸⁰ and can be described as secondary to permitting. Administrative enforcement was directed at non-permitted activities, and could be met with a permit application from the actor. They could however not order the actor to apply for a permit, but had to apply to the Environmental Protection Agency to stop the activity, so that they had to apply for a permit. The regulated competences of the administrative enforcers were gradually extended, or at least codified; in 1973 a competence for the enforcers to ask the responsible actor for investigations was introduced. The regulation was held not to entail any new or extended responsibilities for the actor in view of older regulation of responsibilities for reasonable and necessary precautionary measures. The regulation was nevertheless welcomed as a clarifying regulation of the actor responsibilities, at least for the non-permitted activities.⁵⁸¹ In 1987, the enforcement authorities' competence to take necessary measures themselves at the expense of the actor was made more accessible, when the prerequisite of obvious necessity for the competence to enforce through authoritative orders was lost.⁵⁸² The following year, the role of administrative enforcement was further emphasised, and to support effective enforcement, the actors' responsibilities for self-control were developed and more formalised. Rules on environmental reports and control programmes were introduced, and it was argued that administrative enforcement should focus on system control.⁵⁸³ This view has been kept and emphasised through the Environmental Code reform, and is thus given the wide scope of application of the Code. A crucial aspect in the context of this thesis is that the system is structured around the actor's own responsibilities for supervision and control.⁵⁸⁴ Administrative enforcement of environmental law in context of such actor responsibilities are the subject of this study.

⁵⁷⁷ SOU 1966:65 p. 368.

⁵⁷⁸ See SOU 1966:65 pp. 231, 235 and 368.

⁵⁷⁹ SOU 1966:65 p. 368.

⁵⁸⁰ SOU 1966:65 pp. 44–45, 233–234 and 365.

⁵⁸¹ Prop. 1973:141 pp. 20 and forward.

⁵⁸² Prop. 1986/87:135 pp. 14–17, 21–24 and 34–35.

⁵⁸³ Prop. 1987/88:85 pp. 251–263, 303 and 306.

⁵⁸⁴ Prop. 1997/98:45 Part 1 pp. 160–161, and Part 2 p. 279; SOU 1996:103 Part 2 p. 312. See, also: Prop. 1987/88:85 pp. 251–258; and Westerlund, S., *Miljöskyddslagen* pp. 352–353, on earlier regulation based on the same idea.

As indicated earlier, only the Police Authorities and the State Prosecuting Offices have criminal enforcement competences. Criminal enforcement has an important repressive function, supporting the environmental steering system. Nevertheless, the general idea is that criminal enforcement has limited possibilities to solve environmental problems. Instead, this requires more flexibility.⁵⁸⁵ Criminal enforcement is argued to be the most intrusive measure for the steering system and should be saved for the most serious offences. The sanction system is therefore structured such as to have the administrative system carry the large part of the enforcement, with the help of administrative sanctions and other coercive instruments, and criminalising only the most serious offences with what should be harsh penal sanctions. In reality the strong impact of criminal enforcement has been difficult to obtain, and legislative and organisational reforms are being made to try to remedy these problems. Until then, the administrative system has an even more central role in the environmental enforcement system than intended.⁵⁸⁶

Private law enforcement of environmental law is found in tort law. In the Environmental Code this is regulated mainly in Chapter 32. The individual may sue for damages or apply for a court injunction to stop a disturbing activity, or for reparatory measures to be taken. Even though damages have been sometimes quite effectively used to restore the damaged interests of the affected public, this is not argued to serve as a central method of steering the behaviour of actors in attainment of sustainable development and protection of the environment. Tort law procedure has only been used by the public authorities on rare occasions, at least in the function of protecting environmental interests.⁵⁸⁷ The legal function is mainly to cover economic loss, and thus to a main part different from the steering functions studied in this work.

3.4.2 Administrative Enforcement Aims and Competence

Having thus illustrated the general role and function of administrative enforcement in context, I will go on to describe further the grounds and limits of the administrative enforcement powers of the Swedish authorities. These powers are generally wide, and they communicate tasks and consequential duties for the administrative enforcers. The powers are related to their aim and purpose, and a lot of discretion is left to the administrative authorities. Administrative enforcement should ensure the purpose of the Environmental

⁵⁸⁵ SOU 2002:50 p. 229.

⁵⁸⁶ A few years back, the sanction system of the Environmental Code was thus reformed. See: Prop. 2005/06:182 pp. 1, and 43–44, and SOU 2004:37 pp. 20, 53–58, 82–83, for the fundamental features of the reform and the discussion leading up to it.

⁵⁸⁷ See, for example: NJA 1995 p. 249, where the state through a County Administrative Board sued for damages for the illegal killing of two wolverines.

Code system, principally sustainable development.⁵⁸⁸ This is stated in the opening paragraph of the Code's regulation of administrative enforcement in Chapter 26.⁵⁸⁹ The aims and purposes of the Code are tied not only to pollution control, but also resource management, protection of biodiversity and nature conservation (see, for example: MB 1:1 para. 2, 2:3 a, 2:5, and the National Environmental Objectives.).

Swedish environmental law rests firmly on the belief that effective administrative enforcement is necessary to reach the environmental goals.⁵⁹⁰ The preparatory works explicitly point out that administrative enforcement according to the Code shall apply the rules of the Code so as to best further these aims.⁵⁹¹ This has also been confirmed in case law.⁵⁹² It is also emphasised in the administrative guidance, and reflected in enforcement efforts. The aim and focus of the authority's mandatory planning the enforcement efforts, is to implement this goal oriented approach.⁵⁹³ In conclusion, the enforcement competences are wide and tied to the realisation of the environmental aims.

Enforcement also reflects the fundamental principles and characteristics of environmental law, specifically prevention and precaution. The Environmental Code being focused on risk management and applicable whenever the environmental interests are at risk, any such situation is subjected to enforcement.⁵⁹⁴ This means that not only directly harmful behaviour may be acted upon. Enforcement measures may be taken to remedy environmental risks, as well as poor environmental routines – also linked to resource management and life cycle approach.⁵⁹⁵ The precautionary principle is applicable in deciding on the competence of the enforcement authority. Already small risks and the fear of risks among people in the relevant area, can be enough to give the authority competence to supervise and enforce and for the actor to have investigatory and precautionary responsibilities.⁵⁹⁶ The competent

⁵⁸⁸ Prop. 1997/98:45, Part 2 pp. 5–9; SOU 1996:103 pp. 12–14. See, also: NVV Handbook 2001:4, in the foreword at pp. 7, and 31. Note. Also: SOU 1966:65 pp. 366–367, on similar regulation of the enforcement competence under ML, and the subsequent Environmental Enforcement Act (Miljötillsynslagen).

⁵⁸⁹ Prop. 1997/98:45, Part 2 p. 270.

⁵⁹⁰ Prop. 1997/98:45, Part 2 p. 266.

⁵⁹¹ Prop. 1997/98:45, Part 2 p. 6.

⁵⁹² See: MÖD 2006:53.

⁵⁹³ NVV Handbook 2001:4 p. 7, and at pp. 16–17 and 22.

⁵⁹⁴ The Environmental Code 2:1 para. 2 explicitly states that individual acts of negligible significance in the individual case, is not regulated by the rules of consideration. This should follow already from the applicability of the Code on situations and acts that are relevant in reaching the goal of sustainability, but it is clarified, in response to the opinion of the Council on Legislation (“lagrådet”) on the safeguards of the private life of the private individual, etc. Note also: SOU 1966:65 p. 368 regulating enforcement in response to risks, and thus facilitating preventive and precautionary action.

⁵⁹⁵ Prop. 1997/98:45 Part 2 p. 273.

⁵⁹⁶ See: MÖD 2005:55, concerning radiation from mobile phone stations. Nevertheless, the existence of an enforcement competence does not take away the need for substantial legal

authorities shall for this purpose control compliance with the Environmental Code, as well as subordinated legislation, judgments and decisions in pursuance of the Code (MB 26:1 and 26:9). This includes permit conditions and other decisions from courts and administrative authorities. The Government can also prescribe a competence to enforce EU-regulations (MB 26:5).

The range of potential addressees of administrative enforcement is wide.⁵⁹⁷ Not only commercial activities are regulated by environmental law, or may be addressees of enforcement decisions. Apart from specific regulation of typically private activities (for example private sewerage, and wells, etc., in Chapter 9 of the Code and subordinate legislation), each person, physical or legal person, is bound by the general rules of consideration, if not explicitly stated otherwise. Also private persons in their non-commercial activities may be addressees of enforcement measures, if they have an environmental impact that is not negligible and thus exempted (MB 1:2).⁵⁹⁸

An important limitation of the enforcement competences is regulated by the permit. The Environmental Code prescribes a strong legal status of the environmental permit (MB 24:1). It has a legally binding force against everyone, including the enforcement authorities, which can also be noted in MB 26:9. The authorities may enforce, for example, a thus regulated limit value,⁵⁹⁹ but they cannot regulate further the issues already regulated in the permit, with the exception of urgent measures to avoid health problems or serious environmental damage. This illustrates the relationship between the permit and the formulation of the permit conditions and the administrative supervision and enforcement regarding these activities.⁶⁰⁰ It is the basis both for knowing what is regulated for the operation, and for the limits of their enforcement competence. The permit conditions can specify the self-control that the operator has to make, thus making self-control enforceable through the criminal system. In recent years, case law has moved towards a practice of specific permit conditions stating emission limits values and requirements

grounds for an enforcement order. See, also: MÖD 2007:28 about potential risks from flying golfballs for passersby outside a golf course, where it was held that the authority responsible for environmentally hazardous activities had supervision and enforcement competences. However, even though the authority has the power to supervise and enforce in a certain situation, there may not be sufficient support for an order, for example when the disturbance involved is deemed to be such that they should be accepted by the involved neighbours (see Judgment of the Environmental Court of Appeal on 26 January 2007, in case M 1744-06), or where the risks involved are considered small, in the context of an active precautionary efforts on part of the actor (17 October 2005, in case M 3534-04) the risks were deemed small and the actor was taking precautionary measures. An enforcement order on precautionary measures may in these cases be deemed unnecessary. The decisions were quashed on appeal.

⁵⁹⁷ The Environmental Court of Appeal comments on the wider formulation of the responsible actor in MÖD 2006:2. There is quite interesting and difficult case law on the matter of the identity of the addressee, and who may be responsible and liable for different problems, alone or collectively. This debate will, however, not be further developed in this thesis.

⁵⁹⁸ Prop. 1997/98:45 Part 2 p. 272, SOU 1996:103 Part 2 p. 304; Ds 1998:22 pp. 32–33.

⁵⁹⁹ Prop. 1997/98:45 Part 2 p. 272, SOU 1996:103 Part 2 p. 304.

⁶⁰⁰ SOU 2004:37 p. 244.

of monitoring and control these.⁶⁰¹ This specification is based on considerations of legal certainty, but also EU law regulations – mainly in the IPPC directive.⁶⁰² Such specification will, at the same time limit the possibilities for administrative enforcers to reformulate such demands. It should, however, be emphasised that many aspects of environmental regulation are not regulated in permits, but only through the general operative enforcement.⁶⁰³

The basis of administrative enforcement is consequently quite widely formulated. The grounds and limits for enforcement measures are drawn from the purpose of the Environmental Code, and the management of risks of any significance related to the environmental goals. The enforcers may decide on the measures needed to achieve compliance with this system of regulation.⁶⁰⁴ The enforcement policy is based on actor responsibility, and the range of potential addressees is widely regulated. Enforcement is undertaken using the different instruments provided in the Environmental Code. Central are the administrative enforcement instruments – most importantly administrative orders backed up by coercive instruments – mainly conditional fines. These instruments will be described further in the Section 3.5.

The application of the Code and the enforcement competences are thus wide, both regarding the potential addressees and the subject of the regulation. To some extent the permit system steers the focus and limits of the administrative enforcement scope. This has to do with the legal status of the permit, and the separation of functions and powers between the permit authorities and the administrative enforcers. Actor responsibilities are also more specifically regulated in relation to permitted activities, as will be noted in the analysis of actor responsibilities for information, in Section 3.4.3, and in Chapter 7.

3.4.3 Actor Responsibilities at the Core of Environmental Steering

Swedish environmental law system is to a great extent based on the responsibility of each actor to see to it that the rules of the Environmental Code are

⁶⁰¹ MÖD 2009:2; MÖD 2009:9, and Judgment of the Environmental Court of Appeal on 6 February 2009 in case M 5069-07.

⁶⁰² Today recast in Directive 2010/75/EU on industrial emissions (integrated pollution and prevention control) (IED).

⁶⁰³ Such aspects can then, as a rule, not be put into license conditions, see Judgment of the Environmental Court of Appeal on 13 June 2006 in case M 6377-05, where some of the permit conditions were deemed not to regulate aspects relevant for the permit, and were instead regulated through an administrative order.

⁶⁰⁴ Consequently, if there is no need there is no legal basis for the enforcement, see: MÖD 2005:71, where the Court deemed the measures of the addressee as accepted, and that there therefore was no need for enforcement any more. The order was therefore quashed on the grounds that the purpose of it was void. On the other hand in MÖD 2006:28, the fact that the addressees had initiated work, and made agreements on the proceeding of the measures ordered, did not make the orders unnecessary.

followed, and to further sustainable development. The environmental control system rests on the actors' own responsibilities for supervision and control.⁶⁰⁵ To some extent, however, the actors' own efforts must be supervised and controlled by the public, mainly the local and regional enforcement authorities. Consequently, Administrative enforcement involves regulating (supervising and controlling) the actors' own such efforts, as well as regulating the actors' activities directly. It is argued that the Environmental Code has in this sense meant a system change, or a shift of paradigms.⁶⁰⁶ The wide scope of the Code means that the extent of the demands for self-control is potentially very large and applies to many different kinds of actors.

The described administrative enforcement approach is often tied to so called system control, which means that the enforcement authorities checks the activity's organisation, expertise, routines, techniques, and order in relation to environmental issues. System control comprises control over the actors' self-control and their potential for controlling the environmental issues responsibly.⁶⁰⁷ But the environmental system reliance on actor responsibilities for active involvement in the control of their activities carries further. This is reflected in the general principles and rules of consideration, as well as in administrative enforcement of environmental law.

This approach of enforcing actor responsibilities for control can be compared to the concept and discourse of enforced self-regulation.⁶⁰⁸ Self-regulation is a wide concept, which can include the described Swedish enforcement approach.⁶⁰⁹ I have nevertheless chosen not to use the term, as it is often connected to a very different situation than the one studied here. Enforced self-regulation is often associated with a different and perhaps wider sense of actor involvement, where normative tasks – as well as responsibilities – are delegated to private actors, with a more limited control function of the public.⁶¹⁰ Often the private actors will draw up the regulations of the relevant activity themselves. This regulatory function may include both set-

⁶⁰⁵ Prop. 1997/98:45 Part 1 pp. 160–161, and Part 2 p. 279; SOU 1996:103 Part 2 p. 312. See, also: Prop. 1987/88:85 pp. 251–258; and Westerlund, S., *Miljöskyddslagen* pp. 352–353, on earlier regulation based on the same idea.

⁶⁰⁶ NVV Handbook 2001:4 Chapter 2, specifically at p. 31. Note however, that already in Prop. 1987/88:85 was this direction set, even though for a more limited legal scope of ML.

⁶⁰⁷ NVV Handbook 2001:4 p. 47.

⁶⁰⁸ Braithwaite, J, *Enforced Self Regulation: A New Strategy for Corporate Crime Control*.

⁶⁰⁹ Fairman, R, and Yapp, C, *Enforced Self-Regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement* p. 493; Ogus, A, *Self Regulation* pp. 588–589. See, also: BRÅ Report 2001:17 *Miljödriven utveckling – på gott och ont?* pp. 9–10.

⁶¹⁰ Ogus, A, *Self Regulation* p. 590, stating as a common understanding of self regulation as deliberate delegation of the state's law-making powers to organisations more or less made up by the regulated actors. See, also: BRÅ-reports 2004:3, *Brottsutvecklingen i Sverige 2001–2003* p. 257, referring to the enforcement of the rules set by the actors, and 2001:17 *Miljödriven utveckling – på gott och ont?* pp. 9–10, referring to the possibility for the actor to decide the extent of the environmental efforts.

ting standards and the way to live up to them, and they will control the standards themselves. The public administrative control will often be limited to more general and systematic steering. Sometimes there are private enforcement systems.⁶¹¹ Recently the idea of self-regulation has been tied to the discourse of so called “new public governance”.⁶¹²

The scope of this thesis is to investigate, in comparison to other legal orders, the grounds and limitations of the environmental law steering approach established in Swedish law. Fundamentally, the thus established administrative enforcement of actor control responsibilities will not substitute the public competence and responsibility, but instead supplement it and create a cooperative control process. The common perception of self-regulation systems can be compared to a system of environmental auditing.⁶¹³ They are different and separate from the administrative enforcement order, even though sometimes mutually beneficial.⁶¹⁴ As noted earlier, such systems are not investigated further in this thesis.⁶¹⁵

3.4.4 Enforcement Tasks and Duties

3.4.4.1 Duties Based in Administrative Tasks

Swedish environmental law regulates not only the stated competence for the enforcement authorities, but also a corresponding duty to enforce. This is stated in the preparatory works, and based in statutory regulation of the administrative enforcement tasks, mainly MB 26:1–2.⁶¹⁶ Duties to enforce are

⁶¹¹ Ogus, A, *Self Regulation* p. 589.

⁶¹² See for example: Rubin, E, *The Regulatizing Process and the Pounderies of New Public Governance*.

⁶¹³ BRÅ Report 2001:17 *Miljödriven utveckling – på gott och ont?* p. 9.

⁶¹⁴ The EMAS and ISO 14000-systems for environmental auditing, etc., are sometimes argued as part of self-control, or as beneficial to it. Auditing schemes overlap with the legally regulated self-control demands, and may facilitate the enforcement procedure. But they can not to be seen as interchangeable. See: NVV General Guidance NFS 2001:3 on Section 7; NVV Handbook 2001:4 at pp. 50–53; and Ds 1998:22 pp. 68–72. The Environmental Court of Appeal discussed the relationship in MÖD 2003:40. Both the parties held that the existence of such a voluntary system means more organised documentation, etc., but not automatically less need for administrative supervision and control. In the end the Court held that the company had not proven that the administrative enforcement needs were lower.

⁶¹⁵ Section 1.4.

⁶¹⁶ Environmental Code 26:1 stating that they “shall” carry out enforcement tasks; Prop. 1997/98:45, Part 1 p. 494, and Part 2 p. 266; and SOU 1996:103 Part 1 p. 542, and Part 2 p. 296. The duty seems to refer to the supervisory and enforcing work of the authorities (*myn-dighetsutövningen*). Aside from this obligatory activity, the enforcers also have responsibilities to use soft steering to further voluntary environmental measures, and guide the public into compliance with the code, and to work actively towards the environmental goals. But here it seems the different authorities have more discretion (see Prop. 1997/98:45 Part 1 pp. 494 and 496). It can be noted that enforcement tasks were perceived as a duty to enforce even before the Environmental Code (see for example: Nilsson, A., *Att byta ut skadliga kemikalier* pp. 220–221). Compare however: JO Decision on 1995-11-20 (dnr 3886-1994), where the Par-

also drawn from European law.⁶¹⁷ The duties include supervision and steering of the actors' self-control,⁶¹⁸ as well as a duty to report suspicion of a criminal offence, and to decide on environmental sanction fees where applicable. In relation to permitted activities, the enforcement authorities should first of all supervise the operations and their environmental impacts, and compliance with the permit conditions. Enforcement tasks and duties moreover include continuous supervision of the permit conditions, to assess if these are adequate, and the consequent duty for the administrative enforcement authority to act, should they find it necessary to revise or change the permit conditions.⁶¹⁹ The IPPC directive Art. 13⁶²⁰ states an obligation to ensure review of permit conditions in stated situations. This regulation should be realised through administrative enforcement efforts. In reality however, very few Swedish permits are reviewed. This has led to some debate, and also criticism from the EU Commission.⁶²¹

The administrative enforcement authorities accordingly have duties to supervise and enforce the areas in which they are given competence. They have a duty to monitor the realisation of the environmental goals, and to initiate supervision and enforcement measures where this is needed to ensure compliance with the Environmental Code system, and with European law. Such initiatives can be taken in response to complaint from the public, or through regulated obligatory notifications from operators starting up new environmental activities (MB 9:6 and Ordinance on Environmentally Hazardous Activities and the Protection of Public Health Sections 21–28, and the appendix).⁶²² They will of course also carry out their administrative en-

liamentary Ombudsman only had minor points of criticism in response to a complaint of a municipal board not doing anything about many years of complaints of noise nuisance (caused by one of the board members' business) without taking any kind of action or investigation (discussed together with other cases on passivity in: Nilsson, A., *Något om JO:s syn på miljöskydd och rättssäkerhet* pp. 67–70.

⁶¹⁷ See Section 1.2.4. on demands for effective enforcement.

⁶¹⁸ NVV General Guidance NSF 2001:3, on 26:19.

⁶¹⁹ Prop. 2001/02:65 pp. 64–65. These relevant rules were changed in order to clarify that the general enforcement duty included a duty to actively supervise and initiate review of permit conditions. This was done in response to criticism from the Commission. Further reference to the duty to enforce through review can be seen in the preparations of the legislation on limited licensing procedure for small changes, where the following supervision and review becomes increasingly important to ensure effective permit regulation; in Prop. 2004/05:129 p. 67–68.

⁶²⁰ Now in Directive 2010/75/EU (IED) Art. 21.

⁶²¹ The Swedish regulation of review of old permits has resulted in criticism from the EU-Commission, leading to further amplification in the Environmental Code. Prop. 2001/02:65 pp. 63–65, and p. 85. However, very few review initiatives are still being taken, and the Commission have been proceeding taking steps against Sweden, see: Commission Case 2009/2291, and reasoned opinion of 18 March 2010 (IP/10/314). See press release at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/314&type=HTML>, and information at the government's web page: <http://www.sweden.gov.se/sb/d/12250/a/136772>. See, also discussion in Darpö, J, *Rätt tillstånd för miljön* pp. 152–154.

⁶²² MB 9:6 and FMH 21–28, and the appendix.

enforcement tasks on their own initiative, and take enforcement action *ex officio*, if this is necessary to ensure compliance with the Code system.

A criminal case,⁶²³ which received wide publicity, features members of a municipal environment board that were convicted for misuse of office (Penal Code 20:1) for failing this duty, by deciding not to report suspected criminal offences, and not deciding on environmental sanction fees. Such duties are administrative tasks of the authority. They are stated in the enforcement guidance, and the consequences thereof discussed.⁶²⁴ In another topical case concerning food safety control a municipality had stated explicitly in a published decision that they would not carry out any food safety control. The municipal bodies were criticised by the Parliamentary Ombudsman, and prosecution of the relevant decision-makers was discussed.⁶²⁵

There are also some general responsibilities for the enforcement authorities, for example according to the Administrative Enforcement Ordinance 1:9, to conduct their enforcement tasks effectively and to develop the competence of its staff. They are obliged to continuously evaluate where measures are needed, what resources they have, and to plan and review their work (Administrative Enforcement Ordinance 1:6, 1:8, and 1:19). The planning should depart from the perspective that the national environmental quality aims shall be met within one generation, as well as fulfilling set environmental quality standards and plans.⁶²⁶

3.4.4.2 “Soft” Steering Tasks

The enforcement authorities also have supporting tasks according to the general task and competence stated in 26:1, supporting the environmental actors with information and advice, both generally and in individual cases.⁶²⁷ This has been referred to as “soft steering”. The administrative authorities’ general service duties (FL Section 4-5) can also be noted in this context. There are also responsibilities concerning cooperation, information and guidance inside the enforcement organisation.

Enforcement is carried out in a context of the double roles and tasks of the enforcers, both supporting and controlling the environmental actors; an enforcement order is often preceded by a line of pre-enforcement measures; information, advisory meetings, etc. The perception of the double roles and tasks of the enforcers is well established with the enforcers; both sides are

⁶²³ Judgment from the Court of Appeal (Hovrätten) of 7 April 2003 in case B 3204-02. This case, notwithstanding its status as a non-precedential case, is generally referred to as example of the enforcement duties of the administration, even in the case of laymen decision-makers such as local politicians; for example, see reference in SOU 2004:100 p. 258.

⁶²⁴ NVV Handbook 2001:4 pp. 32, and 40.

⁶²⁵ JO 1988/89 p. 378, with reference to a preceeding decision. The decision-makers could nevertheless not be prosecuted due to the formulation of the preconditions for liability.

⁶²⁶ See: NVV General Guidance NFS 2001:3. The planning documents should be an public document as decided by the authority.

⁶²⁷ SOU 1996:103 Part 1 p. 542, and Part 2 p. 295.

seen as important.⁶²⁸ The purpose of enforcement is to bring about adherence to the relevant law and attainment of policy and legal goals. A precondition for that is that the actors know and understand these rules and aims. Even though it is the responsibility of the actors to comply to environmental law; to investigate, monitor and take measures; it is also one of the tasks of the enforcement authorities (stated in MB 26:1) to help create preconditions for the adherence of environmental law, and to furthering positive development.⁶²⁹ Therefore the spreading of information of the rules and the environmental effects of different activities are important tasks that fall well in line with the main purpose of environmental law supervision and control.

The combination of supporting and enforcing efforts, together with the focus on the actors' own abilities and responsibilities are stated by NVV as essential principles of the enforcement. This can be argued to summarise the enforcement policy of the Swedish environmental authorities. NVV also state in guidance that the enforcement authority should be clear and consistent, enforce environmental offences, and be clear and unambiguous in their role as supervising and controlling authority.⁶³⁰

3.4.4.3 Administrative Procedural Duties in Response to Complaints

In this context of enforcement tasks and duties, it should be noted that there are some environmental law case law and administrative practice that reflect recourse against the enforcer's passivity. In response to a complaint, an enforcement authority must initiate a case, and thus also conclude it with an administrative decision, which is communicated to the relevant parties. The decision to act or not to act in response to the complaint is deemed as authoritative action against the complainant, and as an interested party, he or she can subsequently appeal.⁶³¹

The general administrative procedural rule is that a complaint does not in itself initiate a case, but that this is up to the authority. Nevertheless, the

⁶²⁸ Bengtsson, M., *Genomförande av tillsyn enligt miljöbalken*, NVV Report 5369 pp. 28–31; and Cederstrand, S., et.al., *Miljötillsyn i praktiken* NVV Report 5583 pp. 40–46. The investigations point to different "styles" in the enforcement, emphasising "soft" or "strict" enforcement. Nevertheless, both sides are essentially viewed as important tasks.

⁶²⁹ See, also: Ds 1998:22 p. 33.

⁶³⁰ NVV Handbook 2001:4, in the foreword at pp. 7–8.

⁶³¹ MÖD 2000:43 and 2000:44, drawn from older case law: RÅ 1995 ref. 55 and 1996 not 190. Also MÖD 2003:19 on appeal of the enforcement authority's decision not to act on a notification of a new installation. MÖD 2004:31. See for statements by the Parliamentary Ombudsman in: JO 2002/2003 p. 357, and JO 2008/09 p. 384, and Decisions on: 2 July 2003 (dnr 1017-2002), 28 October 2003 (dnr 3450-2001), 28 June 2005 (dnr 555-2004), 12 December 2007 (dnr 4978-2006), and 11 August 2008 (dnr 2639-2007). See, also: Darpö, J., *JO, de närboende och miljön* pp. 72–75. Note, also: NVV Handbook 2001:4, stating at p. 127 that in consideration of legal certainty, a formal decision on whether or not to act may be appropriate, if there are different contradicting interests involved. Main reasons are the need for possibility to appeal, and the rule that the decision cannot be changed on subsequent review if this goes against one of the involved contradicting interests.

substantive content of such a complaint can trigger the authorities' administrative duties, such as duties to enforce environmental law and to provide protection of the legitimate interests of concerned parties.⁶³² This can often be relevantly argued in the environmental case. Such legitimate interests may typically involve property rights, protection of health and safety, etc. I would argue that the field of environmental law may open up the matter even further in view of the environmental rights and responsibilities that the common concern of resource management brings. This would mean a wide access to a trigger of enforcement. Under current legal practice, the duties to initiate a case will at least arise in the enforcement of environmental law concerning disturbances between neighbours.⁶³³

The reasons in relevant case law hold that there is a legitimating interest on part of the applicant, and that there is no difference in principle between the case where the enforcer has given a decision and where it has not.⁶³⁴ Moreover, statements by the Parliamentary Ombudsman in environmental enforcement cases reveal an administrative law practice of duties for the authority to act formally and quite specifically in response of the complaints from the concerned public. The topic of these administrative cases is generally the question of whether or not the enforcer should take authoritative measures against the potential offender. The Ombudsman decisions state that when a person turns to the enforcement authority, asking for reparative measures to abate the disturbance that the complainant is experiencing, a case arises with the authority.⁶³⁵

The Ombudsman decisions also reiterate the duty for the administrative authority to lead the case forward and to finish it with a formal decision. The authorities must be active in the handling of the case, pushing it forward so as to not let the response to the complaints take too long, and not to put these responsibilities on someone else.⁶³⁶ The decision and the different communicative steps of the administrative procedure provide information about the

⁶³² See: SOU 2010:29 pp. 646–647; Strömberg, H., and Lundell, B., *Allmän förvaltningsrätt* p. 94; and Bohlin, A., and Warnling-Nerrep, W., *Förvaltningsrättens grunder* pp. 86–87.

⁶³³ And notably also in animal protection cases, as illustrated by the JO-cases described.

⁶³⁴ Explicitly stated in: MÖD 2000:44, Section 6 of the reasons of the Court.

⁶³⁵ In the Decision of 28 February 2002 (dnr 2484 –2487-2001), the Ombudsman refers to neighbours affected by the disturbance, but in the Decision of 11 August 2008 (dnr 2639-2007), the reference is to a complainant that considers themselves affected, which suggests a wider scope.

⁶³⁶ JO decision of 11 August 2008 (dnr 2639-2007) in which the environmental board had come to the decision that the best way to manage the relevant bird problem was for the nature and recreation management offices of the municipality to take certain measures, and awaited their actions. They consequently forwarded the continuing complaints there. The environmental board in their processing of the complaints thus turned over not only the responsibilities for the actual physical management of the problem, but also the legal responsibilities as an administrative authority. See, also JO decision of 28 June 2005 (dnr 555-2004), and JO 2008/09 p. 384, in which the local enforcement authorities were criticised for not being sufficiently active in the handling of the case, despite the reoccurring complaints and pressing factual circumstances.

enforcement decision. This facilitates the individual's possibilities to defend their legal position and protected interests, for example through appeal.

There is no legal instrument for forcing the administrative authority to make a decision if they refuse to do so by themselves. The administrative practice is nevertheless normally followed, and considered authoritative.⁶³⁷ Should the enforcers refuse to make a decision (perhaps in order to avoid appeal) they could be criticised by the Ombudsman,⁶³⁸ and perhaps the decision-makers could be prosecuted for misuse of office according to Section 29:1 of the Penal Code (SFS 1962:900), and/or liable for damages according to mainly Section 3:2 of the Tort Liability Act (SFS 1972:207).

3.4.4.4 Concluding Remarks

In summary; within the wide scope of environmental law, the administrative enforcers have many tasks and duties to support, inform, supervise and enforce. They will be seen as having a duty to initiate an enforcement case, whether they intend to take enforcement measures or not, to process the case properly, and to conclude it with an appealable decision. They also have duties to support and help the individual in their contacts with the authority.

3.5 Administrative Enforcement Instruments

3.5.1 Introduction

Enforcement instruments for the many different administrative authorities that are involved in the enforcement of environmental law are generally regulated in the Code. Chapter 26 draws up the basic "toolbox". The following chapters subsequently regulate enforcement fees – the fees the supervised actors pay for the work of the enforcement authorities (Chapter 27), access for inspection (Chapter 28), environmental sanction fees (30), etc. The criminal law sanctions are regulated in Chapter 29.

It is important to remember, first of all that the enforcement is carried out in the context of the actors' self-control duties; and secondly that the administrative enforcers also have supporting and informative tasks and duties. These features construe an enforcement approach – or policy – that is aimed at making the actors drive the environmental efforts forward; to give the actors the powers, the means, and the initiative, but without losing the administrative control. The control should nevertheless ideally be more passive, or laid back. They should just "keep the ball rolling", confirm, and support the good work, and merely help out – or if necessary "put their foot

⁶³⁷ See for example: Darpö, J., *JO, de närboende och miljön* p. 72.

⁶³⁸ See for example: JO 1989/90 p. 317.

down” – when the actors fail in their duties. A preference of “soft” enforcement strategies, communication, negotiation, advice and information, is sometimes argued. The enforcers nevertheless have a discretionary choice as to the appropriate means for performing their tasks as enforcement authorities. They are formally free to go directly to authoritative steering through orders and sanctions, if they deem this necessary.⁶³⁹

Enforcement guidance states an enforcement policy with focus on efforts to strengthen the actor’s own potential to live up to their responsibilities and regulatory demands, so that the actors can independently further sustainable development through preventive environmental work. Administrative enforcement work should focus on supervising the activities compliance with the law and the actors’ self-control. Supervision should mainly be carried out through inspections, including unannounced inspections.⁶⁴⁰

For the purpose of inspections and other enforcement work, the authorities, and persons acting on their behalf, have a general right (MB Chapter 28) of access to real property, buildings, installations, and vehicles, to carry out their investigations and other enforcement work. The intention and point of departure is that access is to be given voluntarily through agreement by the owner, but should such access be denied the enforcers have the power to force such access, with the help of the police if needed (MB 28:8). The right of access is according to MB 28:6 to be carried out with the least damage and intrusion as possible, and the property owner can sue for damages. The preparatory works emphasise careful judgment in carrying out these wide and potentially very intrusive powers.⁶⁴¹

Nevertheless, Swedish environmental law regulation principally relies on the actor’s own efforts to supervise and control their activities and consequential environmental effects. The general regulation of actor duties in this context will therefore be presented next, in order to put the subsequent description of administrative enforcement instruments in its relevant context.

3.5.2 Basic Actor Duties Related to Administrative Control

3.5.2.1 Self-control

The environmental actor’s duties to supervise and control themselves have long been a basic principle of environmental control. It became more explicitly stated in the environmental statutes in the end of the 1980’s. Enforce-

⁶³⁹ Prop. 1997/98:45 Part 2 pp. 273–274; SOU 1996:103 Part 2 p. 305. Note that soft steering measures were earlier demanded as an obligatory first step in administrative enforcement. This was deemed an unnecessary obstacle to effective abatement of relevant environmental problems, and therefore left to the discretion of the authority instead. The enforcers will nevertheless still have to consider the proportionality of their measures.

⁶⁴⁰ NVV General Guidance NFS 2001:3 p. 5, on MB 26:1.

⁶⁴¹ Prop. 1997/98:45, Part 2 p. 293.

ment was then argued to be focused on system control complemented by traditional supervision and enforcement based on inspection.⁶⁴² Apart from the above generally prescribed duties of knowledge and precautionary measures, the Environmental Code states an explicit and general duty of self-control (MB 26:19). The provision holds that every environmental actor shall continuously plan, supervise and control the activity, in order to prevent their potential environmental and health disturbances. The procedure is dynamic, thus adapting the control requirements to the changed circumstances; changes in the environment, the production levels, the technological development, etc.⁶⁴³ These duties are further regulated in the Self-control Ordinance, and NVV General Guidance (NFS 2001:2) on the Actor's Self-control, listing very comprehensive rules and recommendations of the contents and exercise of self-control.⁶⁴⁴

Self-control is not limited to making sure that the regulations of the Code and permit conditions are followed. The actors must actively keep themselves informed about the environmental effects of their activities, and plan their activities in pursuance of the goals of the Environmental Code – not just to avoid conflict with the goals but also to actively realise them.⁶⁴⁵ NVV Guidance states a demand of operator control over the activity, and of being able to steer it, thus ensuring legal compliance and avoiding negative effects on humans or the environment.⁶⁴⁶

For commercial activities under mandatory permitting and notification duty, self-control duties are more formalised and prescribed in more detail in the Self-control Ordinance.⁶⁴⁷ Self-control however concerns all kinds of activities, also private undertakings, leisure activities, and non permanent installations, such as transports. These responsibilities will normally be quite different for private individuals and larger industries. The demands are adjusted to the relevant situation so as not to entail unreasonable consequences. However, such assessment is dependent of the environmental risks involved, not of the identity or characteristics of the responsible operator.⁶⁴⁸

It should also be noted that disregard of the duties of self-control and environmental reporting is to some extent sanctioned by environmental sanc-

⁶⁴² Prop. 1987/88:85 pp. 251–258, 303 and 307; Westerlund, S., *Miljöskyddslagen* pp. 352–353.

⁶⁴³ Prop. 1997/98:45 pp. 279–280; SOU 1996:103 Part 2 pp. 312–313.

⁶⁴⁴ Note, also: NVV General Guidance NFS 2000:15 on methods for measuring and taking samples ("om genomförande av mätningar och provtagning i vissa verksamheter").

⁶⁴⁵ Prop. 1997/98:45 Part 2 pp. 279–280.

⁶⁴⁶ NVV General Guidance NFS 2001:2.

⁶⁴⁷ The Ordinance covers installations under mandatory licensing under the MB Chapters 9 or 11–14. The rules only cover professional operations or permitted activities taken within such an operation. But remember that the ordinance does not delimit or specify what self-control is. That would entail a delimitation of the responsibilities, esp. concerning who is liable to carry out such control. The purpose of the lower level legislation is to ensure quality and coordination of monitoring methods, etc., see Prop. 1997/98:45 Part 2 p. 280.

⁶⁴⁸ Prop. 1997/98:45 Part 2 p. 279; SOU 1996:103 Part 2 p. 313.

tion fees (see MB 30:1, Administrative Sanction Fees Ordinance Section 1, and the Appendix Sections 2.2.1–2.4.1).

3.5.2.2 Duties to Inform the Enforcement Authorities

Operators of installations with a permit obligation under 9:6 of the Code – “environmentally hazardous activities” – are obligated to turn in an annual environmental report to the administrative enforcement authority (MB 26:20, and NVV Regulations (NSF 2006:9) on Environmental Reports,⁶⁴⁹ Section 1).⁶⁵⁰ To some extent, requirements of environmental reporting are based on EU law, but there is also a general reporting duty. These duties are often regulated more specifically through the permitting procedure. A basic purpose of the report is to provide a full presentation of the actor’s efforts to comply with permits, and the control thereof. This serves to make enforcement more effective, to improve self-control, and to further transparency.⁶⁵¹

The environmental report shall according to MB 26:20 contain a presentation of the measures taken to live up to the permit conditions, and the results of these measures. The contents of the report are specified in NVV Regulations on Environmental Reports, Sections 2–5, and are quite extensive. Apart from fundamental information about the activity, the actor, and permits and other decisions directed at them, the report shall contain information about the results of measurements and other investigations, and also the relevant preventive, improving or restorative measures of significance made during the last year. Sometimes also an emission declaration has to be made. NVV Guidance states that the enforcement authority should respond to an environmental report within 3 months.⁶⁵²

Additionally, according to the Self-control Ordinance Section 7, the actor of a commercial activity has to immediately report operational disturbances to the enforcement authority. Following MB 29:5, the failure to do so constitutes a criminal offence. NVV Guidance points out that already at the suspicion of negative effects of a operational disturbance or incident, such notification should be made, before any investigation into the risks are made.⁶⁵³ This follows from the preventive and precautionary approach of the Environmental Code.

The generally formulated duties of the actor have thus been presented. It is also important to bear in mind, the principal shifted burden of proof in the administrative enforcement situation, both in the permitting procedure, and in the more general supervision and control by the administrative enforcement authorities. This principle supplements the duties for precaution and knowledge in that the actor will carry the risk for a poorly investigated envi-

⁶⁴⁹ In Swedish: ”Naturvårdsverkets föreskrifter om miljörapporter”.

⁶⁵⁰ Prop. 1997/98:45 Part 2 pp. 280–281; Prop. 1987/88:85 pp. 257 and 306–307.

⁶⁵¹ Prop. 1987/88:85 p. 257.

⁶⁵² NVV General Guidance NFS 2001:3, on MB 26:20.

⁶⁵³ NVV General Guidance NFS 2001:2, on the Self-control Ordinance.

ronmental risk, come the enforcement situation. Having thus set the scene of the basic actor responsibilities in the administrative enforcement context, we move on to the instruments for administrative enforcement.

3.5.3 Enforcement Orders

The main administrative enforcement instrument is the administrative order. This is a decision stating authoritatively the duties of the addressee, and urging compliance.⁶⁵⁴ The relevant competence to issue such an enforcement order is stated in MB 26:9. There are no explicit statutory requirements on the form of the order.⁶⁵⁵ These requirements are drawn from general rules and principles on administrative procedure, practicability, and sometimes case law. The only explicit requirement is one of proportionality stated in MB 26:9 para. 2; the enforcer may not use enforcement measures more intrusive than necessary. If the order is coupled with a conditional fine (MB 26:14), some formal requirements are set out in the general Act (SFS 1985:206) on Conditional Fines⁶⁵⁶.

The enforcement order may confer both negative and positive duties onto the addressee – duties to do something or to refrain from doing something. The enforcement authority has the competence in 26:9 to issue a prohibition in an individual case, if required for the adherence of the Environmental Code system. They might for example prohibit the operation of an entire factory. It may also state that the addressee is prohibited to keep in operation a certain piece of machinery, for example an elevator in an apartment building in use, until specified environmental or health standards are met, for example keeping the noise levels in the surrounding apartments in compliance with a specific noise standard.

Enforcement orders may alternatively require actors to take certain measures. The general enforcement competence rule does not explicitly state what measures may be ordered, only that the enforcement measures have to be proportionate and required to ensure adherence to the Environmental Code system.⁶⁵⁷ The preparatory works provide several examples of protective and precautionary measures that can be required of the actor in administrative

⁶⁵⁴ Sundberg, H., *Allmän förvaltningsrätt* p. 676.

⁶⁵⁵ However, the enforcement guidance of NVV states that the orders must be carefully specified as to the person to which the decision is addressed, the measures that are demanded, and the time-frame, within which the measures are to be taken (Handbook 2001:4 p. 95), and also recommends a checklist for the process of making an order, stating among other things the considerations, and implicitly, the contents of the decision; the name of the addressee, the measures, carefully specified, the motivation of the decision with reference to legislation, time frame, a decision phrase, and appeal information.

⁶⁵⁶ In Swedish: "Lagen om viten".

⁶⁵⁷ There are also some specific types of orders regulated in the Environmental Code 26:10–11. However, the general basis for an enforcement order is the general regulation in 26:9 and more specified orders of investigation and reporting.

enforcement or in permit conditions – delimitations of the activity, or minimisation of emission through treatment installations, storage and packaging of chemicals, installations that serve as safety barriers hindering potential leaks, etc. Administrative enforcement orders can also demand adherence of limit values for emissions, etc. These listed measures that can be required are however explicitly described as examples. The assessment of necessary and appropriate measures has to be made in the individual case, in consideration of the different relevant circumstances.⁶⁵⁸ It seems the enforcement authority may prescribe any kind of purposive measures. These measures may be reparative and restorative works, as well as preventive precautionary measures. This follows from the substantive norms stated both in the Code and in environmental law principles. These norms are generally also subjected to a substantive principle of reasonableness in 2:7 of the Environmental Code, and also the more general administrative principle of proportionality.⁶⁵⁹

The presented administrative enforcement instruments regulated under MB Chapter 26 and 30 may all be executed under a pending appeal (MB 26:26 and 30:5). This is an essential prerequisite for effective enforcement.⁶⁶⁰ Administrative decisions may thus be executed immediately after the latest date for compliance prescribed in the order. Environmental sanction fees⁶⁶¹ are executable when the period for payment is out, but for enforcement orders the enforcement authority has to decide on such immediate executability. Should, however, the addressee appeal the order, the court may on application decide on an interim stay of execution – a sort of temporary injunction⁶⁶² (FPL Section 28, through the MB 20:3).⁶⁶³ This could be relevant in the case of a problematic financial situation for the actor, where the execution could lead to foreclosure, a circumstance that has been pointed out in the ECHR case law on immediate execution and presumption of innocence.⁶⁶⁴

⁶⁵⁸ Prop. 1997/98:45 Part 1 p. 494, and Part 2 pp. 13–19.

⁶⁵⁹ See: Section 2.2.2.3. on proportionality and reasonableness.

⁶⁶⁰ Prop. 1997/98:45 Part. 2 p. 317. Prop. 2005/06:182 p. 54; and also (in the context of conditional fines) Prop. 1984/85:96 p. 42. Note the proposal of SOU 2010:29 (see pp. 545–546) to strengthen the main rule of executability of unchallengeable decisions.

⁶⁶¹ See: Section 3.5.6.

⁶⁶² In Swedish: “inhibition”.

⁶⁶³ Prop. 1997/98:45 Part 2 p. 317; SOU 2004:37 pp. 101–105. For an examples in practice, see: Judgment of the Environmental Court of Appeal on 12 March 2009 in case M 117-09; Judgment of 14 January 2005, in case M 5977-04 and the included lower instances; Judgment of the Stockholm Environmental Court on 18 June 2004, in case M 599-03; and the Decision (dnr 505-6970-02) by the County Council of Uppsala County on the 7 Nov 2003.

⁶⁶⁴ Prop. 2005/06:182 pp. 53–54, SOU 2004:37 pp. 103–104, referring to the preparatory works to the Administrative Procedure Code, Prop. 1971:30 pp. 422–423, etc.

3.5.4 Enforcing the Duties of Knowledge and Information

3.5.4.1 Orders to Produce Information and Investigation

There are special enforcement instruments connected to the actors' responsibilities for information in the enforcement system in Chapter 26 of the Code.⁶⁶⁵ There is a general competence under MB 26:21–21a, to order an actor (any actor to which the Code applies) to supply the enforcers with the information and documents needed for their supervision and control. This instrument only covers the attainment of information and documentation that does not require closer investigation on part of the actor.⁶⁶⁶

The enforcement authorities may also, under MB 26:22, order investigations. Such an order comprises a subsequent duty to present the results of such investigations to the enforcer. Consequently, the enforcer may order the relevant actor both to make investigations needed for the supervision and enforcement of that activity, and to submit the information thus attained. The purpose is to provide the enforcer with the facts needed for their evaluation of the relevant activity, including the assessment of whether or not the activity entails health or environment risks.⁶⁶⁷

Thus, the competence to order investigation is narrower than the order for submitting existing information, in the respect that only information relevant for the enforcement against that activity is covered. When asking for existing information and documentation, the purpose can be wider. They may also order the submitting of other information that the enforcer needs in their overall strategic and coordinating environmental supervision and control. The NVV Guidance recommends that asking for information and documentation is weighed, motivated and specified in each case – not just demanding all available information. The enforcers may require continuing information when there is specific need for such monitoring. The extent and frequency of such reporting should be tailored to the individual circumstances.⁶⁶⁸

3.5.4.2 Enforcing Self-control Measures – System Control

The enforcement authorities' duties cover also the supervision and control of the compliance with legal demands on the self-control. When an actor's self-control is found insufficient or inappropriate, the enforcement authority can and should, according to MB 26:19 para. 3 take enforcement measures, thus conducting system control. NVV Guidance emphasises these system control measures, and describe them as help to self help. The enforcers order the actor to suggest improvements to his self-control. This serves to make them

⁶⁶⁵ They can be understood as specified types of orders, as generally prescribed in MB 26:9.

⁶⁶⁶ Prop. 1997/98:45 Part 2 p. 282; SOU 1996:103 Part 2 p. 315.

⁶⁶⁷ Prop. 1997/98:45 Part 2 p. 283; Prop. 1973:141 pp. 1 and 30; SOU 1996:103 Part 2 pp. 316–317.

⁶⁶⁸ NVV General Guidance NFS 2001:3, on MB 26:21.

take the responsibility for the improvements themselves.⁶⁶⁹ The idea is of course that they should in the end carry out the control independently. The actor is obligated to suggest a control programme, or remedial measures, should the enforcement authority so demand. The setting up of control programs has generally been regulated in the permit of an installation. However, through this general regulation, such a programme may also be required for other environmental activities, should the enforcement authority find them needed.⁶⁷⁰ Such a proposal should be followed by a response from the enforcement authority, and subsequently the authority should make a separate order based on the self-control regulations, to follow the accepted proposal. The process and the decisions are seen as aiming at the actor's own ability to fulfil the duty of knowledge in MB 2:2.⁶⁷¹

The described instruments may be combined in different enforcement cases. The enforcer may, for example, order the actor to produce information or investigation for the purpose of the enforcement authority's system control with the support of MB 26:21–22. Based on the information thus provided by the actor, the enforcer may then take measures under MB 26:19 in order to have the actor improve their self-control.

3.5.4.3 Historical Context, and Developments

All in all, information responsibilities of the actors' and the administrative authorities' competences to enforce them are quite extensive in their reach and variation. These norms have long since been established in Swedish environmental law, as an inherent part of the actor's precautionary responsibilities. The self-control and providing the actor with information necessary for administrative control has been regulated since the Environmental Protection Act, with roots in old water law. When the enforcement competence to order investigations was added to the Environmental Protection Act, there were voices stating that to some extent this merely meant a codification of the valid state of the law.⁶⁷² The statutory changes codified and clarified the issue, and made the rules generally applicable to all environmentally hazardous operations. Normally, these matters were regulated in the permit conditions, but now the relevant responsibilities were matched by clear enforcement competences also for non-permitted activities.⁶⁷³

Despite this long history, the changes in the normative context have widened the application of these actor responsibilities and enforcement compe-

⁶⁶⁹ NVV Handbook 2001:4 pp. 55–58.

⁶⁷⁰ Prop. 1997/98:45 Part 2 p. 280. See, also: Prop. 1973:141 pp. 18–19, and 34 in the context of changes in ML.

⁶⁷¹ NVV General Guidance; NFS 2001:3, and Handbook 2001:4 p. 34.

⁶⁷² Prop. 1973:141 p. 20.

⁶⁷³ Prop. 1973:141 pp. 31–37, on the change of Section 43 of the 1969 Environmental Protection Act. See, also: NJA II 1942 p. 188, citing the preparatory works of the 1942 Water Act, which hold the actors' investigations as part of the enforced precautionary responsibilities.

tences. First of all, the enforcement authorities' competence for authoritative enforcement measures have since been enhanced and decentralised.⁶⁷⁴ Additionally, and most importantly, the Environmental Code has made the norms generally applicable in all areas under the wide aims of the Code. And recently, also, the permitting regime is being deregulated, leaving more and more regulation under general administrative enforcement control only. The long since established rules on information responsibilities and the enforcement thereof have thus become more widely applicable, and more topical. Perhaps the complexities of environmental problems have also become clearer. The implications of this development will be discussed in Part III.

3.5.5 Enforcing Enforcement Orders

3.5.5.1 Introduction

An administrative order may be enhanced through coupling it with some kind of threat of coercion or sanction.⁶⁷⁵ Under this heading I will describe some coercive powers, or instruments, used to enforce enforcement measures. This means forcing the actor to do as the authority has ordered, through sanctions or other kinds of coercion. This reflects the authoritative character of juridical steering, where ultimately, the enforcer may force the actor to do something. At the point where these powers are used is not a soft steering situation focusing on voluntariness and negotiation. This is where the public authorities force the actor to adhere to the environmental regulations. The basic idea is that the enforcers should dispose of effective coercive instruments in order to be able to enforce decisions of public necessity.⁶⁷⁶

3.5.5.2 Conditional fine

The main instrument of applying pressure on the actor to comply with the order is the threat of a penalty of an administrative fine in case of non-compliance. I will use the term conditional fine.⁶⁷⁷ The competence to couple the order with a conditional fine is provided in the MB 26:14. Further and general regulations on conditional fines are drawn up in the Act (SFS 1985:206) on Conditional Fines.⁶⁷⁸ This administrative sanction is separated from criminal sanctions, and seen as having more of a function or directing

⁶⁷⁴ In the beginning of the Environmental Protection Act's history, the enforcers would generally only be able to conduct "soft" steering through information and advice. Only in more serious cases could an authoritative order be issued, then the authority would most often have to seek a decision from a higher authority. See: Prop. 1973:141; Prop. 1969:28 pp. 10, and 224–226. See, also: Darpö, J., *Vem har ansvaret?* NVV Report 4354 pp. 41–42.

⁶⁷⁵ Sundberg, H., *Allmän förvaltningsrätt* pp. 676–677.

⁶⁷⁶ Prop. 1997/98:45 Part 1 pp. 491, and 495; Prop. 1984/85:96 Förslag till lag om viten m.m. p. 21, SOU 1982:21 Ett effektivare vite.

⁶⁷⁷ "Vite". See Sundberg, H., *Allmän förvaltningsrätt* p. 677 for definition.

⁶⁷⁸ In Swedish: "Lagen om viten".

the conduct of the actors', as the threat of a conditional fine forces the individual addressee to concrete measures and the wanted change in behaviour.⁶⁷⁹ The conditional fine can be directly prescribed in response to unlawful acts, and the order gives the actor a time frame within which to comply. This speeds up the enforcement work. It is therefore seen as much more effective than criminal enforcement.⁶⁸⁰

A conditional fine is attached to an enforcement order, thus putting financial pressure on the actor to do as ordered. The general rules on conditional fines in the Conditional Fines Act Section 2 regulate the formulation of the order. The order is to be directed at one or several named addressees,⁶⁸¹ who have also to be served the order.⁶⁸² Several actors may be collectively addressed by a conditional fine order, but then fine sums have to be prescribed for each of the actors (Conditional Fines Act Section 3). An important delimitation of the use of conditional fines, motivated by considerations of legal certainty, is that the addressee has to have legal and factual possibilities to comply with the order (Conditional Fines Act Section 2 para. 2). Otherwise a fine cannot be ordered and will not be awarded by the courts.⁶⁸³

The monetary sum of a conditional fine is flexible, to facilitate effective coercive force. The sum is to be set in consideration of financial circumstances of the addressee, and at an amount which can be expected to make them comply with the order (Conditional Fines Act Section 3).⁶⁸⁴ The idea is that the sum of the fine should be of such amount that it will break through the addressee's potential resistance towards compliance in the individual case. This includes eliminating the financial gains of non compliance. Notably, these calculations may often be applied in a somewhat standardised manner.⁶⁸⁵ The necessity of the ordered measures and the weight of the pub-

⁶⁷⁹ Von Essen, *Processramen i förvaltningsmål* pp. 27–28; Sundberg, H., *Allmän förvaltningsrätt* pp. 677–678. Compare however: Lavin, R., *Förvaltningsprocessen inför 2000-talet* pp. 453–454, and 458 arguing that conditional fines are so similar to penal fines that they should be handled more like criminal cases.

⁶⁸⁰ Prop. 1997/98:45 Part 2 p. 275; SOU 2002:50 p. 212, SOU 1996:103 Part 2 p. 308.

⁶⁸¹ See, also RÅ 1995 ref. 40, where the order addressed "the owner" of a specific real property. This was deemed to unclear.

⁶⁸² Judgments of appellate courts on the enforcement order also have to be served to the addressee by the enforcement authority, if the conditional fine is to be awarded, see: MÖD 2003:87. See, also: RÅ 1996 ref. 21 where the addressee was not served the Supreme Administrative Court's rejection of the application of leave of appeal concerning the order. The addressee only found out about it when served with the enforcer's application to the Court to award the conditional fine. The conditional fine was not awarded.

⁶⁸³ This is based on codified case law, see Prop. 1984/85:96 pp. 20 and 24–25. See, also: MÖD 2004:24, and MÖD 2007:7.

⁶⁸⁴ Sundberg, H., *Allmän förvaltningsrätt* pp. 680–681, connecting this to the purpose of coercing compliance with legal duties (directing the addressee's behaviour).

⁶⁸⁵ Prop. 1984/85:96 pp. 27, 33 and 49. See for examples: MÖD 2003:61. These purposive criteria (conduct directing, and profit neutralising) for setting the conditional fine sum are also emphasised in the enforcement guidance (Handbook 2001:4 p. 98).

lic interests that the measures are used to protect, can also be taken into account when setting the steering sum of the fine.⁶⁸⁶

A time frame has to be stated if positive measures are ordered. This time frame is to be set in consideration of the character of the interests and problem that caused the order, the character of the required positive measures, and the factual possibilities of the addressee to take the measures.⁶⁸⁷ The fine amount is to be paid after a stated period for compliance is expired. If deemed appropriate the order can prescribe a continuing conditional fine (Conditional Fines Act Sections 3–4). This means that a fine is to be paid for each time the order is breached or for each time period of a decided length, under which the order is not complied with. The fine can be ordered to be paid for each time the actor takes a prohibited action, for each time the actor refrains from doing something, or for each set time period during which he has not taken the relevant measures. The formulation depends on the type of measures and the circumstances of the case.⁶⁸⁸

A continuing conditional fine is to be used only if it is appropriate, for example when continued non-compliance can be expected.⁶⁸⁹ It was introduced to counteract systematic use of appeal to stall the procedure, and prevent the enforcers from further action,⁶⁹⁰ in accordance with Section 2 para. 2 of the Conditional Fines Act. The continuing conditional fine has a more lasting effect, as the financial pressure remains after the duties conveyed in the order has been fulfilled.⁶⁹¹ A continuing conditional fine may, according to MB 26:15, also be conferred to a new addressee, in cases tied to real estate, thus linking the duty to the land and to the land owner.⁶⁹²

The enforcer decides on the conditional fine order, but to award this fine, the enforcement authority has to make an application to the environmental courts (MB 20:2 para. 1 subpara. 8). The court then decides if the relevant order was formulated correctly, if there are legal grounds for the order of conditional fine, if the addressee is in fact in breach of the order, if it is feasible for the addressee to follow the order, and if there is some legitimate excuse.⁶⁹³ The courts will, according to Section 9 of the Conditional Fines

⁶⁸⁶ Prop. 1984/85:96 pp. 27 and 49; and MÖD 2004:46.

⁶⁸⁷ Prop. 1984/85:96 p. 48.

⁶⁸⁸ Prop. 1984/85:96 p. 50. See, also: NVV Handbok 2001:4 p. 99 with reference to RÅ 1989 ref. 48, stating that a continuing fine can be tied to each breach of an ordered limit value, but in the relevant case, it was more appropriate to prescribe time periods during which compliance was required, or a fine could be awarded.

⁶⁸⁹ Prop. 1984/85:96 pp. 30 and 51.

⁶⁹⁰ Prop. 1984/85:96 pp. 21 and 28–31.

⁶⁹¹ Prop. 1984/85:96 p. 29.

⁶⁹² Prop. 1984/85:96 p. 35. This applies also to other property legally linked to real estate, such as permanent installations on the land, and for others with similar legal titles. This is noted in the real estate registers.

⁶⁹³ Prop. 1984/85:96 p. 37. They should however not review the ordering authority's assessment of the motives to issue the conditional fine order in the first place. See: Sundberg, H., *Allmän förvaltningsrätt* p. 684. Sundberg, H., *Allmän förvaltningsrätt* pp. 676–677.

Act, also consider if the purpose of the fine has become invalid.⁶⁹⁴ They may also adjust the size of the fine amount. Such adjustment is intended as an exception for particular extraordinary circumstances. General exercise of such adjustment could, according to the preparatory works, risk the effectiveness of the threat of the coercion through conditional fines. In practice, however, adjustment seems quite regularly made, and based on arguments tied to the functionality and fairness of the fine in general and not just the sum.⁶⁹⁵ If the order is found legal, the conditional fine is imposed, and can subsequently be executed when it has entered into force.

Appeal of the decision of conditional fine has led to extended administrative procedure, which has also been misused. This has hindered effective use of the instrument, and contradicts the purpose of a fast instrument of pressure.⁶⁹⁶ Nevertheless, it is the main instrument for coercing compliance.

3.5.5.3 Administrative Coercion – Default Action by the Authority

If an order is not adhered to, be it either an order conveying positive or negative duties, the bailiff's office shall on the enforcement authority's application, according to MB 26:17 execute enforcement decisions. This covers all kinds of decisions. In the situation of environmental crime, the administra-

⁶⁹⁴ Prop. 1984/85:96 pp. 37 and 55. This entails consideration of the function of the conditional fine instrument, especially the general prevention of the repressive character, in the circumstances of the individual case. The fact that the ordered measures have later on been taken does not automatically entail that the conditional fine decision is invalid. These considerations by the court can also result in adjustment of the fine sum (see for example: Judgment of the Environmental Court of Växjö in 18 March 2009 in case M 3479-08). See, also Sundberg, H., *Allmän förvaltningsrätt* pp. 682–683, for a discussion on earlier case law.

⁶⁹⁵ Prop. 1984/85:96 pp. 37 and 55–56. See for example: MÖD 2003:39, where the Court based their adjustment of the sum on the grounds that the conditional fine had been decided in a standardised manner and without regard to the individuals economic situation or other circumstances; MÖD 2008:12, where the fact that the actor had had problems with getting the measures done in time, and that they had been done shortly after the expired time frame was reason for adjustment (even though it could be suspected that the actor had not been very active until the application for awarding the conditional fine); and MÖD 2008:18, where the total sum of several periods of a continuing conditional fine was adjusted because the enforcer had waited so long to apply for awardment (the Court argued that the addressee may get the impression that the order is not so serious). See, also: MÖD 2004:46, and Judgment of the Environmental Court of Växjö on 18 March 2009 in case M 3479-08. Note moreover: RÅ 2002 ref. 62, an animal welfare case where the purpose of the fine was deemed to have become invalid. The assessment seems stricter than the Environmental Court of Appeal practice. It is reasoned, with support of the preparatory works, that such relevant exception requires a thorough assessment of the function of the conditional fine order and other circumstances in the specific case, and that special consideration also had to be made of the general deterring effect. It was held in the relevant case that the addressee had not sold the operation to escape liability, and that there is very little chance that they will continue the activity in any overseasable time. The need for coercion was thus not relevant.

⁶⁹⁶ Prop. 1997/98:45 Part 2 p. 275.

tive enforcement authorities may apply for rectifying measures by the bailiff, even without a prior administrative enforcement order.⁶⁹⁷

Alternatively the enforcement authority can themselves decide to undertake the measures on behalf of the addressee (MB 26:18). This is called to rectification on the expense of the wrongdoer (the relevant responsible actor).⁶⁹⁸ The enforcement authority does the work themselves, or commissions a contractor, and then recovers the costs from the responsible addressee. This makes it possible for the enforcement authority to take action without having to go through the bailiffs' authority, which suggests a faster, simpler, and perhaps more effective means of rectifying a problem, but at the risk of having to be left with the bill, should the responsible actor be unwilling or unable to pay. These measures can be taken where an immediate action is required to abate environmental or health risks, but also for small issues easily handled by the authorities.⁶⁹⁹ The enforcing authority should first give the responsible actor the opportunity to take the measures himself,⁷⁰⁰ and they must consult NVV, according to the Ordinance on Environmentally Hazardous Activities and the Protection of Public Health Section 29.

This enforcement instrument can entail the enforcement authority physically shutting down prohibited installations or parts thereof, tearing out buildings, etc. This measure is mainly to be used as a secondary enforcement instrument, in cases where there is no chance of getting the actor himself to take the measures. However, the enforcement authority may decide on such rectification without prior enforcement order, primarily in cases where the risk of serious damage necessitates immediately action, but also if there are other extraordinary reasons. The special motivation of the regulation states several situations when this is possible, for example when there are several actors liable for restoring contaminated lands. The enforcers may carry out the clean up on the expense of one of the actors' and then leave the division of costs for later. This is practical and should entail faster results.⁷⁰¹

The enforcers' rectification on behalf of the responsible actor is very seldom used, suggestably due to the financial risks involved. It is easier to involve the bailiff's office at once, to be able to handle the question of financial liability simultaneously, and the enforcement guidance recommends that the enforcers do that in cases of uncertainty in the will or abilities of the actor to stand the costs.⁷⁰²

⁶⁹⁷ Prop. 1997/98:45 Part 2 pp. 277–278; SOU 1996:103 Part 2 pp. 310–311. Note also special regulation of such measures: Lagen (1990:746) om betalningsföreläggande och handräckning. The bailiffs' authority then tries the application subject to special regulations, and the decision is appealable to the environmental courts.

⁶⁹⁸ On the instrument in general terms, see: Sundberg, H., *Allmän förvaltningsrätt* p. 686.

⁶⁹⁹ Prop. 1997/98:45 Part 2 pp. 278–279; SOU 1006:103 pp. 311–312.

⁷⁰⁰ Prop. 1997/98:45 Part 2 p. 273.

⁷⁰¹ Prop. 1997/98:45 Part 2 p. 278.

⁷⁰² Prop. 1997/98:45 Part 2 pp. 278–279; NVV Handbook 2001:4 p. 106.

3.5.5.4 Special Measures of Enforcing the Duties to Investigate

There are also some enforcement powers that may be used for enforcing non-adherence of information duties. Before the introduction of the Environmental Code, non-adherence to an order to supply the enforcer with information was directly enforceable through criminal prosecution.⁷⁰³ Today's wider responsibilities for information and knowledge are mostly only enforceable through administrative law coercion and sanctions. Apart from the possibilities to couple an order for information, etc., with a conditional fine, the authority may look to alternative ways to produce the information.

As to the environmental actor's duty of knowledge, investigation and providing the enforcing authorities with the information necessary for supervision and control, the enforcer may decide the relevant investigation to be conducted by someone else, if this is more appropriate. This is regulated in MB 26:22. The decision is appealable under the MB 19:1. The originally liable actor still has to cover the expenses for such investigation, at a rate decided by the enforcer. The idea is that the enforcer may commission investigation by someone with technical and scientific expertise to do the investigation if this is deemed necessary, but still on the expense of the liable actor. Being a rather intrusive decision, the decision has to be made in a formal written decision, and the authority should ask for the actor's opinion prior to the decision. The enforcement authority also has to ensure that the costs of such an investigation are not unreasonable.⁷⁰⁴ Notably, an enforcement order of investigation may also, according to MB 26:22 para. 3 of the Code be coupled with a prohibition to transfer the relevant property until the investigation is completed, in order to stop the actor escaping their liabilities.⁷⁰⁵

3.5.6 Administrative Sanction Fees

The environmental enforcer has, since the introduction of the Environmental Code in 1999, the power and duty to decide on environmental sanction fees, in response to breaches of the Code, or of relevant EU regulations. This is regulated in MB Chapter 30, specifically 30:1 and 3, and in the Environmental Sanction Fees Ordinance. The administrative sanction fee is intended as an administrative enforcement instrument,⁷⁰⁶ and was introduced in the interest of a more effective sanction system, and argued as crucial for environmental protection.⁷⁰⁷ The idea is a system built on simple, clear and standardised handling of offences that are easily established. The sanctions were therefore given a repressive sanctioning purpose, generally steering people

⁷⁰³ Prop. 1997/98:45 Part 2 p. 282; Prop. 1973:141 pp. 3–4 and 37.

⁷⁰⁴ Prop. 1997/98:45 Part 2 p. 283; Prop. 1973:141 pp. 3, 18–19 and 33–34. See, also: NVV General Guidance NFS 2001:3, on MB 26:22.

⁷⁰⁵ Prop. 1997/98:45 Part 2 p. 283.

⁷⁰⁶ Prop. 1997/98:45 Part 2 p. 316; SOU 2004:37 p. 56.

⁷⁰⁷ Prop. 1997/98:45 Part 1 pp. 533–534.

towards a better and more careful behaviour in environmental matters. At the same time it makes for an easy and quick response to breaches of law, and therefore an effective steering instrument.⁷⁰⁸ An advantage with administrative sanction fees is the fact that they can be directed both at legal and physical persons, while only physical persons may be prosecuted. This is a way to punish companies in breach of environmental law.⁷⁰⁹

Liability is strict when it comes to administrative sanction fees. The administrative authority does not have to investigate intent or negligence. This is motivated by the argument that the actor is liable to carry out their activities so as not to breach the sanctioned rules, and by the purpose of the environmental sanction fee to further the care and caution in managing environmental activities.⁷¹⁰ Moreover, this simplified procedure means that the decision can appropriately be made by an administrative authority. An investigation of guilt or due care should as a rule be made by a court of law.⁷¹¹ The final decision may be appealed to the Environmental Court, and thus held to ensure the fundamental right to a fair trial, as described in the ECHR Art. 6.⁷¹² The sanction fees are thus modelled to be an effective repressive sanction, but still ensuring legal certainty.⁷¹³ The environmental sanction fee is not intended to serve as a tool to eliminate economic gain, as this would mean a more involved procedure and therefore less effective and also not the direct aim of the sanction.⁷¹⁴ The aim is instead to further general environmental law compliance and care, similarly as for criminal sanctions. It is hence not decisive whether environmental damage has occurred or not.⁷¹⁵

The offences for which administrative sanction fees are prescribed are thoroughly specified in the Administrative Sanction Fees Ordinance Section 1, and in the Appendix. The fees have a considerable range, starting from relatively small sums. The sums are doubled in response to continuing or

⁷⁰⁸ Prop. 1997/98:45 Part 1 pp. 534–535; SOU 2004:37 p. 80; Prop. 2005/06:182 pp. 34–35 and 43.

⁷⁰⁹ Prop. 2005/06:182 pp. 48–49; SOU 2004:37 Section 3.5.

⁷¹⁰ Environmental Code 30:2, Prop. 1997/98:45 Part 2 p. 315; Prop. 2005/06:182 pp. 46–47.

⁷¹¹ Prop. 1997/98:45 Part 1 pp. 543–544, SOU 2004:37 pp. 84–87.

⁷¹² SOU 2004:37 p. 68, where a comparison to the administrative tax law sanctions, as tried by the European Court in *Janosevic v. Sweden*, Judgment of 23 July 2002.

⁷¹³ Prop. 1997/98:45 Part 1 p. 539, and describing the considerations of legal certainty at pp. 543–546.

⁷¹⁴ Prop. 1997/98:45 Part 1 p. 538. In fact earlier sanction fees were used as a tool to eliminate economic gain, and the experiences were that the process was complicated and time consuming. Even though the elimination of economic gain was deemed important, it was hard to effectively process such measures (Prop. 1997/98:45 Part 1 p. 535; SOU 1996:103 Part 1 p. 598, Part 2 p. 353, as reiterated in SOU 2002:50 and SOU 2004:37 pp. 80–81). Thus, repressive sanctions were deemed more useful as effectively enforcing environmental law and steering environmental actors. The sanction fees bear the character of an economic/financial steering instrument, see: SOU 2004:37 p. 83, and further down in Section 7.7.4.2.

⁷¹⁵ Prop. 1997/98:45 Part 1 p. 535, Part 2 p. 314; SOU 2002:50 p. 236; SOU 1996:103 Part 2 p. 353.

repeated breaches (Administrative Sanction Fees Ordinance Sections 2–3).⁷¹⁶ This steers the individual offender's behaviour more effectively, compared to the criminal sanction which has more of a general preventive function. This is especially so if the enforcement authority, in its obligatory communication with the offender prior to the sanction decision, informs of this progressive sanction fee sum. The addressee is thus given the opportunity to submit their opinion (FPL Section 17, and MB 30:3). This provides further pressure on the individual actor to take the required measures.⁷¹⁷ But still the decision-making procedure is free from evaluations of circumstances on part of the offender, the activity or the endangered environment. It is still simple and standardised.

Strict liability, coupled with the enforcers' duty to decide on the fees, means that the sanction fee shall as a rule follow the specified breaches. Exception is made for breaches of already decided enforcement orders coupled with a conditional fine (Administrative Sanction Fees Ordinance Section 4). This is an obligatory exception. The enforcers may also refrain from ordering a sanction fee when a fee would be unreasonable due to the addressees' illness, unavoidable and unforeseeable circumstances, or the fact that the breach has been sanctioned through criminal enforcement. However, ignorance of the legal requirements, not having time, or having commissioned the relevant measures to be taken by someone else, are not legitimate excuses. The measures taken by the actors in order to avoid breach of law are considered (MB 30:2).⁷¹⁸ However, the stated considerations provide exceptions, and the main rule is strict application of the sanction fees.⁷¹⁹

The environmental sanction fees were reviewed a few years after their introduction. The general response from the enforcers and the environmental operators was positive. Environmental sanction fees are considered an effective form of enforcement, even though certain features were criticised, such as the sums and the regulated offences, and that the implementation of the rules differed between different enforcement authorities.⁷²⁰ The review took place in context of a review of the entire sanction system, with the ambition of clarifying, simplifying and focusing the system.⁷²¹ The idea was that criminalisation and criminal enforcement efforts were better saved for more serious offences while other offences were more appropriately sanctioned through environmental sanction fees and through conditional fines. Double

⁷¹⁶ The lowest amount of fee was lowered from 5000 to 1000 SEK, in order to ease the burdens on smaller companies, see Prop. 2002/03:54 pp. 23 and 25.

⁷¹⁷ SOU 2002:50 p. 250.

⁷¹⁸ Prop. 2005/06:182, largely referring to SOU 2004:37 Section 3.6, not esp. pp. 97–101, widening the scope of the statutory text as motivated in Prop. 1997/98:45 Part 2 p. 315 stating the example of the actor being delivered the wrong chemicals, without information of this mistake and no way of knowing or controlling the mistake.

⁷¹⁹ Prop. 2005/06:182 p. 51.

⁷²⁰ SOU 2004:37 p. 59.

⁷²¹ SFS 2003:518; SOU 2002:50; SFS 2006:1014; SOU 2004:37; Prop. 2005/06:182.

jeopardy was to be eliminated and the environmental sanction fees system was expanded and diversified, but still characterised by standard procedure.

3.5.7 Administrative Enforcement Tied to the Permit

3.5.7.1 Revocation and Review of the Permit Conditions

As described above, permitting and other administrative enforcement tasks and competences are in the Swedish system separated. Enforcement instruments effectuated through the environmental permit are thus under the exclusive competence of the permitting authority. This can be drawn from Chapter 24 of the Environmental Code, and the limitation by permits on the enforcement competence, in MB 26:9 para. 3. The enforcement authorities that supervise and control the permits can only act for review or revocation of a permit through applying for such action by the permitting authorities.⁷²² In urgent cases however, the enforcement authority may order a stop of the activity and apply for enforcement measures concerning the permit, according to MB 26:9 para. 4.

The permitting authority may, according to MB 24:3 revoke the permit in certain specified situation. These situations are generally quite serious and rare; fraudulent behaviour by the applicant in the permitting process, disregarding of the permit and its conditions, very serious environmental situations, or if the permit activity is no longer active. A potentially very wide ground for revocation is Sweden's duties as member of the EU.

The permitting authority can also review the permit, according to MB 24:5. The permit as a whole may only be reviewed as to the extent of the activity, expressed for example in production volumes. The permit conditions may also be reviewed on specified grounds; first of all in cases of the applicant's fraudulent behaviour, or breach of the permit and its conditions, but also if so required by the developments in the state of the affected environment, or in the relevant technology of industrial process or control. Notably, the thus decided new demands may not be so extensive as to make the operation of the activity considerably more difficult, or impossible. It should be noted also in this context, that the actor – the holder of the thus reviewed Chapter 9 permit is responsible for the investigations in the process.⁷²³

The role of the administrative enforcement authorities is to supervise compliance with the permits and the conditions, and to apply to the permitting authority for review. Such responsibilities are explicitly regulated enforcement duties of the competent authorities and are necessary for the main-

⁷²² See, for example: MÖD 2007:23, where the Court quashed the enforcement order on grounds that the enforcement competence was limited by the permit. They however added that the enforcement authority could seek revocation of the permit. The court cannot ex officio try the license, but are dependant on an application from competent parties.

⁷²³ See: footnotes 619 and 621.

tenance and updating of effective environmental permits. However, such initiative is seldom taken. The competence to initiate review is stated in MB 24:7. This possibility is limited to the competent enforcement authority, such as the Environmental Protection Agency, and the Legal, Financial, and Administrative Services Agency⁷²⁴. The enforcement authority is generally the County Administrative Board, but as the enforcement is to a great extent delegated to the local environmental boards, they consequently receive the same responsibilities for initiating review. The public may not apply for review with the permitting authority, nor initiate review of the permit.⁷²⁵ They may notify the relevant authorities of circumstances which should lead to such review, but the decision of whether or not to act on this information is entirely up to the authority in question, and there is no possibility for appeal of a negative decision.

In summary, the environmental permit has a strong legal status, against everyone, both authorities and members of the public, and the limited review of these permits are legally mainly regarded as the exclusively competence and concern of the permitting authority and the permit holder. The limited scope of the review order has, as indicated earlier, been criticised by the EU Commission, and we may await future movement in this area.⁷²⁶

3.5.7.2 Order to Apply for a Permit

Apart from responsibilities for the supervision and taking initiatives to initiate review and revocation of a permit, the administrative enforcement authorities may, according to MB 26:9 para. 2, order an environmental actor to apply for a permit, even if they are originally under no such statutory duty. Such permitting duty may be ordered in situations with activities entailing risks of considerable pollution, or other considerable environmental nuisance. Thus, the more comprehensive investigations and regulation of the activity is used to implement and enforce the Code and its goals and purposes. The situation may arise when an activity should under EU law be subject to permitting. The enforcers should in such situations order the actor to apply for a permit. This can be suggested to follow from their enforcement duties, both under the Environmental Code, and under EU law.

This competence is very seldom used. The enforcement authority may instead choose to just stopping the activity through an order of prohibition.⁷²⁷ This would mean that the actor would have to seek some kind of authorisation, like a voluntary permit. The measure thus has the same effect but does not have to fulfil the statutory prerequisite of acting against risks of considerable pollution or nuisance. It may therefore be more easily applicable.

⁷²⁴ In Swedish: "Kammarkollegiet".

⁷²⁵ See, for examples: MÖD 2003:74; and MÖD 2000:49.

⁷²⁶ Section 3.4.4.1, and footnote 621.

⁷²⁷ See, for example: MÖD 2002:69.

This concludes the description of the administrative enforcement measures, and as can be noted, the measures tied to the permit are only relevant to the administrative enforcement authorities in a very limited manner. Next, the relationship to criminal enforcement will be presented. The administrative enforcement authorities do not have such enforcement competences, but in many ways, the administrative enforcement activities connect to it.

3.5.8 Relationship to the Criminal Enforcement System

3.5.8.1 Criminal Enforcement – Police, Prosecutors, and Administrative Enforcers

Prosecution for criminal offences is the exclusive competence of the Swedish Prosecution Authority, and the Public Prosecuting Offices. The criminal procedure is tried in the general court system, not in environmental courts. The responsibilities of the administrative enforcement authorities are principally limited to reporting the factual circumstances amounting to a suspected criminal offence to the police or the prosecutor's office.⁷²⁸ Such reporting is prescribed in MB 26:2, as an obligatory duty of the enforcers. This is due to the importance of criminal enforcement.⁷²⁹ This rule was introduced through the Environmental Code. Reporting of environmental offences has since grown hugely and has affected enforcement of environmental crime.⁷³⁰

A more general duty is the County Administrative Boards guidance responsibilities according to the Administrative Enforcement Ordinance 3:16.⁷³¹ There is also a general duty to cooperate for effective and relevant enforcement. In this context the preparatory works emphasise strongly that the administrative enforcement authorities and police and prosecutors should coordinate their resources and cooperate to ensure the most effective possi-

⁷²⁸ Prop. 1997/98:45 Part 2 p. 267.

⁷²⁹ Prop. 1997/98:45 Part 1 p. 495, and Part 2 p. 267. The mandatory reporting is held as necessary to ensure that suspected crimes are reported. It is argued to further public trust, as the decision to enforce environmental crime will then rest on the prosecutors and not the local authorities, which may find themselves under pressure from operators in their decision of whether or not to report a suspicion of criminal offences (Prop. 2002/03:54 p. 22).

⁷³⁰ Prop. 2002/03:54 p. 22; SOU 2004:37 pp. 54, 58 and 409. Earlier environmental legislation, ML Section 28 in fine, regulated a limited such duty, and the Parliament Ombudsman also stated a general duty to report suspected crime to the prosecutors (JO 1988/89 p. 382), but the rule was authoritatively and generally introduced with MB 26:2. The motivation behind this is the strongly emphasized weight of informing the criminal enforcement system of the observations made by the operative administrative enforcement authorities (Prop. 1997/98:45 Part 1 p. 495). The reporting was thus made obligatory. The background may be found in the fact that environmental crime, like illegal drugs crime, depends on intelligence and investigation, and that the slim resources thus have to be combined to effectively enforce. *Brottsutvecklingen i Sverige 2001–2003*, BRÅ-rapport 2004:3, see especially graph 2 at p. 251. The increase of reported offences supports the argued need for codifying this duty.

⁷³¹ Note also FL Section 6, stating that an administrative authority shall within its field of responsibility, provide assistance to another authority.

ble enforcement of offences against the environment (MB 26:6). Unannounced inspections are explicitly stated as the administrative enforcers' task in this context.⁷³² The Environment Agency Guidance emphasise the principal importance of cooperation between police, prosecutors and administrative enforcers.⁷³³ The fact is that the administrative enforcement authorities do a main part of the policing work, detecting and reporting suspected environmental crime. However, the administrative enforcers have a different function and culture than detecting and proving crime. Their main goal is preventive and reparatory action, mainly through communicative soft steering with the actors. Most environmental offences are nevertheless discovered through pre-announced inspections and the study of the actor's reports to the enforcers.⁷³⁴ They will then come to the attention of the prosecuting offices through subsequent report from the enforcement authority, following their duty under MB 26:2.

3.5.8.2 No Direct Criminalisation of Non-compliance with Administrative Enforcement Orders

Non-compliance of administrative enforcement orders are as a rule not sanctioned directly. Such disregard of duties conveyed in enforcement decisions, for example ordering measures to be taken to bring an operation into compliance with relevant permit conditions, is not regulated as criminal offence, even though the action can in itself be criminalised.⁷³⁵

There is some criminalisation of offences against the administrative enforcement system. First of all, it is considered illegal and an offence under MB 29:4 to operate an activity without the prescribed permit or advance notification to the enforcers.⁷³⁶ It is also an offence to give incorrect information in documents that the actors are under a duty to turn in to the enforcer (MB 29:5); for example in a permit application, notification, or reporting duty; and which have significance in their enforcement work. The offence also covers the situation where the duty to turn in the information was conveyed in an enforcement order in a specific case, as well as duties conveyed in general rules.⁷³⁷ To some extent the breach of a notification duty is also covered, for example notification of an operational disturbance.⁷³⁸

⁷³² Prop. 1997/98:45 Part 2 p. 270, NVV General Guidance NFS 2001:3 p. 5, on 26:1.

⁷³³ NVV Handbook 2001:4 pp. 7 and 107–108.

⁷³⁴ SOU 2004:37 p. 318; Skagerö, A, and Korsell, L, *Är vi bra på miljöbrott?* Webbrapport 2006:5 pp. 22 and 26–27.

⁷³⁵ Prop. 2005/06:182 pp. 93–97.

⁷³⁶ Prop. 2005/06:182 pp. 86–87; SOU 2004:37 pp. 222–223, and 226–227. The criminalisation of operation without obligatory prior notification has been debated, but is still criminalised. This aspect is deemed to become even more important subsequently to the ongoing deregulation of licensing duties.

⁷³⁷ Prop. 2005/06:182 pp. 95, and 150.

⁷³⁸ In Swedish: "försvarande av miljökontroll". See: SOU 2004:37 Section 5.7. The rule does not cover duties of information conveyed through orders, such as in 26:21 (SOU 2004:37 p.

This could become important in the context of ongoing deregulation of the permitting duties, turning permitting duties into notification duties. The regulation of these activities is made through general rules and enforcement orders. Breach of these enforcement orders is not criminalised. The preparatory works predict that the shift in regulatory focus from regulation in individual cases, to general rules, will necessitate a change in the criminal system following this focus.⁷³⁹

3.5.8.3 Criminal Enforcement and Environmental Sanction Fees

The structural idea today is that more serious environmental offences are criminalised and generally given a high penal value, thus ideally resulting in harsh penalties. Subsequently, the administrative sanction fees are used for less serious offences. The administrative sanctioning system is to be quick, simple, clear and standardised.⁷⁴⁰ This has been decisive in the structuring of the sanction system. In most cases offences sanctioned by administrative sanction fees have been decriminalised. In the remaining cases the prosecutor will try if prosecution should be made, and then consider if prosecution could entail that the offence is sanctioned twice. The administrative authority can also in their decision, consider former criminal conviction and punishment and thus find a sanction fee inappropriate (MB 29:11 and 30:2).⁷⁴¹ The general idea is to avoid double jeopardy.⁷⁴² Even though sanction fees are formally not criminal sanctions, they have common features and are often paralleled by the addressee,⁷⁴³ and by the general public. The sanctions have the same function and require similar demands of legal certainty in the precision of sanctioned actions, right to a fair trial, etc.⁷⁴⁴

Notably, the sanction fee system having proved so effective (while the criminal system has had problems reaching the goal of higher punitive value and harsher sanctions for the more serious environmental crimes), critical arguments have been raised of the fact that sanction fees are often higher than criminal penalties for more serious crime.⁷⁴⁵ This comes in conflict with the intended structure of the system, and indeed with a concept of fairness, but this should be solved within the criminal enforcement order.

128). Nor is verbal information covered. The criminalisation of breaches of information duties were revised and clarified a few years ago, see SOU 2004:37 and Prop. 2005/06:182.

⁷³⁹ SOU 2004:37 pp. 112–113.

⁷⁴⁰ Prop. 2005/06:182 pp. 1, and 43–44, SOU 2004:37 pp. 20, 53–58, 82–83.

⁷⁴¹ SOU 2004:37 pp. 79 and 93.

⁷⁴² Prop. 2005/06:182 p. 42; Prop. 2002/03:54 pp. 20–21; SOU 2002:50 pp. 245–246; SOU 2004:37 p. 20, and Section 3.2.

⁷⁴³ As argued also in SOU 2002:50 p. 223.

⁷⁴⁴ SOU 2004:37 pp. 59, 62–65, 106.

⁷⁴⁵ Skagerö, A., and Korsell, L., *Är vi bra på miljöbrott* BRÅ Webbrapport 2006:5 p. 23. This may be changed after the changes of sanction fee levels, leading to fewer very heavy sanction fees.

3.6 Concluding Remarks

This introduction to the Swedish legal order has presented the general organisation of the administrative authorities and the relevant courts, and the constitutional relationship between them. A central feature of the Swedish administrative culture is the independence of the individual authorities and decision-makers in the individual administrative cases, with the following duties and responsibilities. There is a general administrative court structure, but special environmental courts will often handle environmental law cases. The process is one of full appeal.

Swedish environmental law enforcement is mainly carried out through administrative law measures, mainly permitting and administrative enforcement. These functions are separated. Permitting is mainly handled by the regional County Administrative Boards, except for the largest installations which are tried by Environmental Courts. Administrative enforcement is often carried out by municipal environmental boards and the County Administrative Boards.

Rules on administrative enforcement are found in MB Chapter 26. These prescribe enforcement tasks and the corresponding enforcement duties, which are tied to the wide aims and purposes of the Environmental Code. The main enforcement instrument is the enforcement order. It can be coupled with a conditional fine, which is the main coercive instrument. The administrative enforcers will also decide on administrative conditional fines for specifically prescribed offences, and they may take physical measures to see to it that the actors' duties are realised, as a rule at the expense of the actor. The administrative enforcers do not have access to criminal prosecution, but a duty to report suspected environmental crime.

Administrative enforcement of environmental law in Sweden relies much on the actor's fundamental responsibilities. The idea is that enforcement should ideally be a help to self help, where the actors are encouraged to drive the environmental work forward themselves. This is necessary for the realisation of sustainable development. Environmental protection, sustainable use of resources, etc., needs active involvement of every actor. The Swedish system thus prescribes extensive actor responsibilities for knowledge, planning, control, monitoring, taking protective measures, etc. The actors have to conduct self-control, to document and notify the enforcers of their efforts, and report how they are fulfilling their duties under the relevant permits, etc. The enforcers in turn have instruments to demand suggestions for improvements of the self-control, ask for a control programme, or for information and investigation to support the enforcement by the administrative authority.

Having thus described the Swedish system to some detail, the English and Dutch systems will be described next in Chapters 4 and 5. Chapter 6 will then conclude Part II with some comparative remarks.

4 United Kingdom (England and Wales)⁷⁴⁶

4.1 Introduction

4.1.1 Introduction to the English Legal Order

In this chapter one of the two legal orders and environmental law enforcement systems to which the Swedish is compared will be introduced. This first comparative subject is the English system. It is a “common law” system, and as such perceived as inherently different from the civil law tradition of continental Europe and the Nordic countries. Before describing the administrative and environmental law systems, and the administrative enforcement competences and instruments, some general remarks will be made on the common law tradition; its method and sources etc.

The common law system originated in a centralisation of justice and unification of English law in a “common law”.⁷⁴⁷ Important legal principles have mainly been developed by the judges of the courts in a piece by piece manner in their decisions in cases, under a rule of precedent, which binds the court to earlier decisions in a higher court.⁷⁴⁸ This judge-made common law is where the Constitution and the fundamental legal principles are found.

⁷⁴⁶ The United Kingdom (UK) consists of Great Britain (England, Scotland and Wales) and Northern Ireland. Within the UK there are three distinct legal systems, of which I have in this study focused on the system of England and Wales. In the following I will therefore refer to the UK, and the English legal order, or English law, etc., with this focus in mind. Quite often, the rules are common to the legal systems, for example when it comes to constitutional rules. I have nevertheless only focused on the perspective of English law, and will therefore not distinguish such common features from those that are specifically regulated for the different legal systems.

⁷⁴⁷ Zweigert, K., and Kötz, H., *Introduction to Comparative Law* pp. 182–184; David, R., and Brierley, J., *Major Legal Systems in the World Today* pp. 312–313, and Darbyshire, P., *Eddey & Darbyshire on the English Legal System* pp. 134–136.

⁷⁴⁸ Darbyshire, P., *Eddey & Darbyshire on the English Legal System* p. 8. Note that “common law” can have different meanings in different contexts, referring to the Anglo-Saxon legal systems in general, a branch or an area of English law as opposed to “Equity” (historically an area of a the judicial system and with different procedures). I will however refer to common law as the law developed by the judges of the superior courts in the UK.

Today, English law contains a lot of statutory law; nevertheless, the common law background still influences the legal culture.

In the common law system judges and barristers, rather than scholars or legislators, have been the authoritative legal force. Development of law has thus been based on precedent and analogy, and a pragmatic, or even empirical, legal technique.⁷⁴⁹ The continental legal systems have in comparison been referred to as “scholars’ law”; developed by professors at the universities, as the continental law has been more academic and theoretical in character, as opposed to the forensic and pragmatic character of English law.⁷⁵⁰

The English legal system therefore has a different character from continental law. The civil law tradition is systematic and theoretical and through rational method deducts the law and the solutions to the legal problems from legal principles and rules in an organised system, to the relevant legal situation, as in a specific case before the courts. The common law approach is more pragmatic and casuistic focusing on the actual situation and its circumstances. The solutions to legal problems are induced from the dealings with similar situations before, rather than deduced from a system of principles, perhaps even emanating from one overall or superior principle.⁷⁵¹ The English jurist will avoid such deduction. The idea is that the existence of rights or principles is futile to assert if in practice there are no means of putting them into effect.⁷⁵² This could suggest that the English legal system might be more open to change in response to a new situation.

The different legal approach has effected the categorisation and development of legal concepts in English law. There is no identity with the continental systems as to legal concepts and their organisation in the legal system. English legal terms should not be translated, for risk of their meaning being distorted.⁷⁵³ I will therefore in the following describe and reflect on some of the relevant legal principles.

4.1.2 Sources of Law

The sources of law in the United Kingdom are: statute law and other delegated legislation⁷⁵⁴, common law (precedents), EU law, the European Convention on Human Rights, other international treaties, the residual royal pre-

⁷⁴⁹ Zweigert, K., and Kötz, H., *Introduction to Comparative Law* pp. 182–191; David, R., and Brierley, J., *Major Legal Systems in the World Today* pp. 337–338 and 353–354.

⁷⁵⁰ Zweigert, K., and Kötz, H., *Introduction to Comparative Law* p. 258.

⁷⁵¹ Zweigert, K., and Kötz, H., *Introduction to Comparative Law* pp. 181, 186–187 and 258–259; and Darbyshire, P., *Edey & Darbyshire on the English Legal System* p. 14.

⁷⁵² David, R., and Brierley, J., *Major Legal Systems in the World Today* p. 355.

⁷⁵³ David, R., and Brierley, J., *Major Legal Systems in the World Today* pp. 334–335.

⁷⁵⁴ Delegated legislation (e.g. orders in council, statutory instruments and byelaws) is legislation enacted by subordinate authorities with competence to legislate, delegated from Parliament, (see: Darbyshire, P., *Edey & Darbyshire on the English Legal System* pp. 23–24).

rogative, books of authority, and custom. To this might be added reason.⁷⁵⁵ A major source is precedents – the case law of the royal courts. As indicated above, English law is typically seen as a judge-made law – case law with the authority of precedent. The rule of precedent entails that the decisions rendered by a higher court are binding on the lower courts. The rule applies to the decision of all the superior courts: the High Court of Justice and the Court of Appeal and the Supreme Court (formerly the House of Lords). The decisions of the Court of Appeal are also binding on that Court itself,⁷⁵⁶ except in criminal matters. Otherwise, the earlier decisions of a court are not formally binding on its own decisions, although they are very persuasive.⁷⁵⁷

Statutory law has traditionally had a secondary function and authority, limited to correcting or complementing case law where needed. It follows that one cannot be entirely sure to find in statute the statements of leading legal principles, but only regulation of specific and particular problems often identified by the courts in their judging. It is sometimes argued that provisions of statutes are only fully assimilated by the law when the courts have used the provisions on a factual situation.⁷⁵⁸ However, this is only the traditional view of the sources of law. Since the beginning of the nineteenth century English law has experienced codification and reform through statutory law.⁷⁵⁹ Policy efforts aimed at rapid and comprehensive social change have meant that statutory law has become increasingly important, and it can be argued as now the main source of environmental law. This can be tied to the development of welfare state ideas, and the EU-membership introducing many legal provisions to be implemented into national law. These developments have entailed massive legislative activity in England.⁷⁶⁰

Another important source to be considered is statutory guidance, which involves statements by the Government, generally the Secretary of State for the responsible governmental department, of their view on how the statutes should be interpreted and applied. Administrative authorities are often required to have regard to such guidance. A clear disregard for statutory guidance may be perceived as illegal.⁷⁶¹ In the context of this thesis, I will also refer to policy documents of different kinds as an indicator of administrative practice, if not directly as a source of law.

The latest developments in the English legal system have largely been due to the membership in the European Union, and the influence of the European

⁷⁵⁵ Darbyshire, P., *Eddey & Darbyshire on the English Legal System* p. 19; David, R., and Brierley, J., *Major Legal Systems in the World Today* Chapter III.

⁷⁵⁶ *Young v. Bristol Aeroplane Company, Limited* [1944] K.B. 718.

⁷⁵⁷ David, R., and Brierley, J., *Major Legal Systems in the World Today* pp. 377–378.

⁷⁵⁸ David, R., and Brierley, J., *Major Legal Systems in the World Today* pp. 361, 373, and 383–386.

⁷⁵⁹ David, R., and Brierley, J., *Major Legal Systems in the World Today* p. 330; and Zweigert, K., and Kötz, H., *Introduction to Comparative Law* p. 197.

⁷⁶⁰ David, R., and Brierley, J., *Major Legal Systems in the World Today* pp. 384–384.

⁷⁶¹ See: Section 4.2.5.3.

Convention on Human Rights, which has introduced demands for concepts of rights and legal principles. Such constitutional concepts and legal principles are not unfamiliar to English law, but because of the above-described difference in legal approach, the influences from continental law do pose challenges, or at least new perspectives, for the English legal system.

4.1.3 Concluding Remarks on the Introduction

As described, there are essential differences between the common law and civil law systems in the roles of the sources of law. The differences should however not be exaggerated. A more relevant difference lies in the legal tradition, or culture, and in the ways of thinking and communicating of the actors within this tradition. Because of these different approaches and expressions, the legal system is built up differently than the continental system. Topically, the fundamental principles described in this thesis, such as Rechtsstaat, and legal certainty are not expressed here, at least not in the same meaning. Legal principles are approached from a different angle and may therefore be understood and applied quite differently. The nature of English law can even be perceived as non-principled – as more pragmatic than systematic. Legal decisions are thus dictated by different considerations.⁷⁶² This tension between the legal traditions makes it interesting to investigate how the Rechtsstaat ideas and principles are used in the relevant enforcement situations. Hopefully, a peek at similar situations in a “fremden Spiegel” might provide a new perspective or interpretational horizon with regard to the studied issues.

4.2 Administrative Law

4.2.1 Public Law in the Common Law System

On the face of it, English public law may seem very different and peculiar to the continental lawyer. Many will argue that there is no administrative law in the UK, as there is also no constitutional law. Indeed the traditional civil law dichotomy of private law and public law is not as relevant in the common law system.⁷⁶³ Historically there may not have been any clear concept of administrative law as a special branch of law. There is no special administrative court system, and neither is there a constitutional court, or for that matter any written constitution. But, there is of course both constitutional law

⁷⁶² Jones, B., and Parpworth, N., *Environmental Liabilities* p. 9.

⁷⁶³ David, R., and Brierley, J., *Major Legal Systems in the World Today* pp. 317 and 321; and Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* p. 221.

and administrative law in the UK, as areas of public law. This area has developed in a different way and manifests some significant terminological and procedural differences in comparison to most other European legal orders. Today administrative law is very well established as a legal branch, albeit influenced by the described common law tradition, and there is an administrative law branch within the High Court – the Administrative Court.

In the following, some features of the English public law system will be described, in order to provide a basic understanding and thus facilitate comparative analysis. An essential idea of public law in the UK is that there is no separate body of law for the government bodies, or the control thereof. Common law prescribes that the ordinary law of the land applies also to the administration; ministers as well as local authorities; and control of the administration under the law is done by the ordinary courts. The main instrument for this control is judicial review. This is said to connote democracy and equality and to follow from the common law concept of rule of law.⁷⁶⁴

4.2.1.1 Some Constitutional Basics of Common Law

Fundamental features of the British Constitution are the rule of law and Parliamentary sovereignty. While the rule of law lies at the heart of British constitutional law, there is no written constitution to describe and delimit the powers of the state. This links to the idea of “sovereignty of Parliament” (or “legislative supremacy”), which basically means that Parliament is free to legislate at their discretion. It is in principle beyond legal control. Protection of rights and liberties of the citizen is therefore to be realised through ordinary statutes and judicial decisions, instead of in a constitution. There are no constitutional guarantees, and such guarantees can in principle not be created.⁷⁶⁵ The situation is different for the administration. The Government; comprising ministers, central and local authorities in different sectors; are subject to the law.⁷⁶⁶ The constitutionality of their actions is subject to judicial review – the courts’ supervision of the legality of administration.

English constitutional law is mainly found in case law. It is, as any written constitution, composed of rules guaranteeing fundamental rights and freedoms and curbing arbitrary exercise of power by the state.⁷⁶⁷ The difference is that these rules do not apply to Parliament, which has a supreme power and unlimited competence to pass legislation. The court cannot deem a statutory provision “unconstitutional” and thus overrule it.

⁷⁶⁴ Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* p. 221; and Wade, W., and Forsyth, C., *Administrative Law* p. 10.

⁷⁶⁵ Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 223–224, noting however statements of the House of Lords in *Jackson v. Attorney-General* [2006] 1 A.C. 262 that Parliamentary sovereignty is judge-made, and not absolute.. See, also: Wade, W., and Forsyth, C., *Administrative Law* pp. 4, 12 and 26–32.

⁷⁶⁶ Wade, W., and Forsyth, C., *Administrative Law* p. 32.

⁷⁶⁷ David, R., and Brierley, J., *Major Legal Systems in the World Today* p. 383.

Constitutional law analysis is based on the fundamental concept of rule of law, and the interpretation of the legislative intent of parliamentary acts, presumed to always be based on the rule of law and the principles derived thereof. However, the supremacy of national legislation is changing due to European law developments.

4.2.1.2 European Law

The supremacy of national legislation is today limited by EU law and the provisions of the European Convention on Human Rights (ECHR). The Human Rights Act 1998 basically incorporates the ECHR into UK law as of October 2000.⁷⁶⁸ Apart from the convention rights thus being part of English law, the courts have to take into account the judgments, decisions, declarations and opinions of the European Court of Human Rights and other institutions (Human Rights Act 1998 Section 2). These sources are not formally binding but must be considered.⁷⁶⁹ According to Section 6 of the Human Rights Act a public authority, such as an administrative enforcement authority has to ensure that their actions are compatible with the rights of the ECHR, unless specifically required by legislation to act a certain way. A victim of public authority's action which is incompatible with the ECHR may initiate proceedings claims and judicial review proceedings based on the ECHR, or rely on the ECHR in other relevant legal proceedings.⁷⁷⁰

The Human Rights Act does not have any particular constitutional status. The courts cannot invalidate an "incompatible" piece of legislation. They may note the incompatibility so that it can be amended through legislative measures (Human Rights Act 1998 Sections 4–5, and 10–11). Despite this formally limited legal status the Act has had substantial influence in UK law and policy, on the approach of the courts, and initiating legislative reform.⁷⁷¹

EU law is given legal effect in the United Kingdom through legislation (European Communities Act 1972 Section 2) and subsequent support in case law. The courts have accepted and applied the principle of direct effect of EU law, and to some extent the principle of "indirect effect", requiring legal interpretation loyal to EU law even when there is no direct effect. English

⁷⁶⁸ There are some differences; the exact statement of Art. 13 of the Convention is not incorporated. Darbyshire, P., *Edey & Darbyshire on the English Legal System* p. 81.

⁷⁶⁹ Darbyshire, P., *Edey & Darbyshire on the English Legal System* p. 81.

⁷⁷⁰ Hughes, D., et al., *Environmental Law* p. 99.

⁷⁷¹ Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 225–226. See, also: the Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, esp. at p. 18. Changes to the doctrine of supremacy was considered, but rejected, in the preparations of the Human Rights Act. In practice, the reform has brought some influences to the UK constitutional law. See, moreover: Feldman, D., *The Human Rights Act 1998 and constitutional principles* p. 165, arguing reform through the courts, rather than revolutionary changes, and mainly of the principles of rule of law.

law has also accepted the principle of the supremacy of directly effective EU law over domestic law, crucially in the *Factortame* case.⁷⁷²

Both the European Court of Human Rights and the ECJ demonstrate quite purposive approaches to legislative interpretation, and this becoming important and influential for English courts not previously as used to the approach. A move from earlier precedents towards legal interpretation more in line with the European courts has also been detected in English courts.⁷⁷³ Furthermore, the formulation and application of fundamental principles of administrative law are continuously influenced by European law on fundamental human rights and good administration.⁷⁷⁴

4.2.1.3 Good Regulation

As indicated above, the concept of good administration has become applicable to UK administrative law through the influence of European law. This means that administrative law principles, stating procedural duties of the authorities and rights of the concerned individuals, have developed and will probably continue to do so. Another concept that should be distinguished and presented is the idea of “good regulation” which has developed as a central principle of policy of constitutional and administrative influence.

The principle stems from the Better Regulation policy, which has been referred earlier.⁷⁷⁵ This policy is very topical in current developments of public administration, and of administrative law and policy. Considerable efforts are put into setting up government bodies – today the Better Regulation Executive, as part of the Department for Business, Innovation and Skills (BIS) – and commissioning numerous investigations and reviews. The review efforts have focused on lightening the administrative burdens of compliant business, thus facilitating business in a world of tough competition and at the same time lessening the costs and furthering the effectiveness of regulation.⁷⁷⁶ The 2006 Legislative and Regulatory Reform Act also makes it possible to make Better Regulation changes to primary legislation through ministerial orders, meaning a simpler legislative procedure. Regulatory activities are to be carried out in ways that are transparent, accountable, proportionate, consistent, and targeted (meaning: only introduced where action is needed). These are referred to as the five principles of good regulation. These principles seem to touch upon those of proportionality (meaning both least intrusive and necessary for its purpose), foreseeability, and other expressions of

⁷⁷² *R. v. Secretary of State for Transport, ex p. Factortame Ltd* [1990] 2 A.C. 85. See, also: Darbyshire, P., *Eddey & Darbyshire on the English Legal System* pp. 19–20 and 73–75.

⁷⁷³ Darbyshire, P., *Eddey & Darbyshire on the English Legal System* p. 82; Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* p. 226 and 227.

⁷⁷⁴ Darbyshire, P., *Eddey & Darbyshire on the English Legal System* pp. 70–71.

⁷⁷⁵ Section 1.2.6.

⁷⁷⁶ See: <http://www.bis.gov.uk/policies/better-regulation>.

the Rechtsstaat theories and principles on the legitimate exercise of public power, some of which have been presented in Section 2.2.

4.2.2 The Administration

The UK administration is commonly described in terms of government and civil service (permanent non-political offices and employments under the Crown). Fundamentally, the UK is a monarchy, and the Crown (the Queen) has governmental powers, but they are generally exercised by ministers in central government in the name of the Crown.⁷⁷⁷ Central government is essentially represented by the Prime Minister, Central Government Departments of State, and the Cabinet (the most senior ministers). The departments of state are headed by a minister called the “Secretary of State”, assisted by junior ministers. Legislation will often prescribe decision-making powers for the Secretary of State (sometimes “the Minister”), and the responsibility and accountability for the issue lies with them. This is the convention of “ministerial responsibility”. As the law applies also to the Government and to the ministers they may be subject to injunctions or other control instruments. This is an expression of rule of law. The minister is thus responsible for the department’s tasks. Much administration, including authoritative decision-making, is in reality carried out by civil servants, often without involvement of the minister. Formally, and legally, however, the minister is the responsible and accountable decision-maker.⁷⁷⁸

The civil service carries out most of the day-to-day administration of government. They will generally receive their administrative powers through statutory regulation or through lower level legislation.⁷⁷⁹ A wide variety of executive agencies headed by professional non-civil servant chief executives, carry out administrative tasks in different specialised fields. The agencies have no part in the development of general policy, but have extensive administrative responsibilities in their respective administrative areas, which is again problematic for the issue of ministerial responsibility and accountability. There are different kinds of organisations with both private and public tasks and organisational features.⁷⁸⁰ The Government, through the Treasury, issues general control over the civil service and may take disciplinary action against its servants.⁷⁸¹

Local authorities are directly and locally elected bodies, which also have governmental functions and tasks. The structure of these local bodies is

⁷⁷⁷ Wade, W., and Forsyth, C., *Administrative Law* pp. 45–47.

⁷⁷⁸ Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 228–230; and Wade, W., and Forsyth, C., *Administrative Law* p. 51.

⁷⁷⁹ Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 232–233.

⁷⁸⁰ Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* p. 230; Wade, W., and Forsyth, C., *Administrative Law* p. 48.

⁷⁸¹ Wade, W., and Forsyth, C., *Administrative Law* p. 52.

complex. There are counties, districts, and unitary authorities, and in London a Greater London Authority as well as London boroughs. These authorities are responsible for many different areas such as housing, public health issues, and town and country planning.⁷⁸² As such they will be involved in environmental law regulation. The structure suggests that the local authorities are autonomous from central government, but in reality their work is more or less tied to and controlled by central government. Their decisions may also be subject to judicial review.⁷⁸³

In summary the English system is principally based on ministerial responsibility and central government. This could be argued to emphasise the authority of administrative guidance and policy statements. Nevertheless, the everyday operational exercise of administrative authority is generally carried out by local governments and agencies. Central authorities in principle direct and control the administration, but in reality they are often separate from the actual administrative work. Another way to supervise and control the administration under law is through court remedies. Such remedies will be presented after an introduction to the courts.

4.2.3 The Court System – and Tribunals

The High Court is central in the English court system. It handles both criminal and civil cases, some as first instance, and some on appeal. They also have the jurisdiction to supervise the administration through judicial review. There is no separate line of administrative courts. There is however an administrative law branch – the Administrative Court – established within the High Court’s Queens Bench Division, to which administrative law cases are directed, both appeal cases and judicial review.⁷⁸⁴

High Court Judgments may commonly be appealed to the Court of Appeal (in administrative law cases to the Civil Division) and further to the Supreme Court. Generally, appeal to these higher instances will require a permission or leave to appeal.⁷⁸⁵ It should be noted that the Supreme Court has since 1 October 2009 taken over the judicial tasks of the House of Lords, according to Section 23 of the Constitutional Reform Act 2005.⁷⁸⁶

Under the High Court we find Crown Courts, Magistrates’ Courts, and County Courts. Administrative decisions may often be appealed to for example a County Court and then further to the High Court. Moreover, a tribunal judiciary is set up by the Tribunals, Courts and Enforcement Act 2007. The tribunals handle appeals in many administrative cases, where specifi-

⁷⁸² Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 231–232.

⁷⁸³ Wade, W., and Forsyth, C., *Administrative Law* pp. 108, and 124.

⁷⁸⁴ Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* p. 252; Wade, W., and Forsyth, C., *Administrative Law* p. 651.

⁷⁸⁵ Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 252–253.

⁷⁸⁶ One purpose of this reform was to separate judicial and legislative functions more clearly.

cally prescribed, to a First-tier Tribunal or an Upper Tribunal. The decisions of the Upper Tribunal can, according to Section 13 of the Act, be further appealed to the Court of Appeal. It is also possible to direct some judicial review cases to the tribunals, in Sections 15–21.

I will not describe the complex structure of the English Courts' jurisdiction further.⁷⁸⁷ Different fields of law regulate the jurisdiction and access to the courts differently. Some comments on the supervision and jurisdiction of the courts will nevertheless be made, as also on the access to these procedures. These are essential instruments of control of the administration.

4.2.4 Judicial Review and Appeal

The main routes to the courts in administrative cases will now be described and distinguished. These routes are judicial review and appeal.

Judicial review is a procedure in which the courts exercise their supervisory jurisdiction over public bodies. It was developed by the courts themselves at common law and in part codified in the Civil Procedure Rules⁷⁸⁸ Part 54. Before recourse to judicial review, available appeal options must be exhausted. Judicial review is hence reserved for cases where this is most appropriate and best needed.⁷⁸⁹

Appeal is regulated in statutes governing different areas of administration, stating whether, when, where and by whom an administrative act may be appealed. Rules on administrative enforcement of environmental law will commonly – but not invariably – provide for such appeal, in specific rules.⁷⁹⁰ There is, however, no generally prescribed course of appeal, and some administrative decisions may only be brought to court through judicial review. Many administrative decisions may not be appealed to the courts, but instead to the Secretary of State. His or her decision may subsequently be subject to judicial review.

The lack of access to a full appeal to the court has been discussed in the context of the right to trial and the wide European law view on civil rights and duties within administrative cases. The scope of court review of administrative cases is nonetheless held to be built on a balance between administrative discretion and judicial powers – between appropriate realisation of

⁷⁸⁷ See: http://www.supremecourt.gov.uk/docs/UKSC_StoryPanel_9_1100hx800w_v6.pdf, for a map of the UK Court System.

⁷⁸⁸ A kind of secondary legislation written by a committee consisting of people from the judiciary, and enacted through a statutory instrument.

⁷⁸⁹ *R. v. Inland Revenue Commissioners, ex p. Preston* [1985] A.C. 835, p. 852; Cane, P., *Administrative Law* p. 32; and Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* p. 252.

⁷⁹⁰ These rules on appeal will be presented under Section 4.3.2.

policy and protection of legal rights. This motivates limits to the jurisdiction of the courts, and the access to appeal.⁷⁹¹

An essential difference between appeal and judicial review is that while the judicial review procedure is all about determining if a decision is lawful or not, the appeals procedure is concerned with the merits of a decision, reviewing the decision to assess whether it is correct. The distinction is emphasised at common law.⁷⁹² An appeal case will thus extend to substantive considerations – balancing of interests and issues of fact.⁷⁹³ The judicial review case on the other hand is an investigation of the legality and procedural correctness of the administrative decision or procedure, and whether the public body has acted within its powers.⁷⁹⁴ This is the *ultra vires* doctrine.⁷⁹⁵ This difference between reviewing an issue of law and full appeal is, however, not always clear.⁷⁹⁶ They overlap, for example when certain materials have not been properly considered in the procedure. Is that a question of unlawfully disregarding relevant facts, or of discretionary evaluation of substantive facts?⁷⁹⁷

The function of the courts' power of review is thus to ensure that public bodies have fulfilled their duties, and that their actions are legally based. This reflects the notion of separation of powers.⁷⁹⁸ The judicial review instrument also involves a feature of protection of legitimate rights and expectations of the individual. An aggrieved person may challenge the way in which government has exercised its discretion. Decisions of both central and local authorities are subject to review.⁷⁹⁹ The procedural legality of an inferior court may also be challenged.⁸⁰⁰ The procedure is available in both civil

⁷⁹¹ See, for example: *R. (Alconbury Developments Ltd and Others) v. Secretary of State for the Environment, Transport and the Regions*, [2003] 2 A.C. 295, investigating the lack of possibilities for full appeal in planning law cases.

⁷⁹² For example in: *Kemper Reinsurance Company v. Minister of Finance* [2000] 1 A.C. 1, pp. 14–15; *R. v. Secretary of State for the Home Department, ex p. Launder* [1997] 1 W.L.R. 839, p. 857. See, also: Thompson, K., and Jones, B., *Administrative Law of the United Kingdom*; and Wade, W., and Forsyth, C., *Administrative Law* p. 33.

⁷⁹³ Cane, P., *Administrative Law* p. 30.

⁷⁹⁴ Darbyshire, P., *Edey & Darbyshire on the English Legal System* p. 170.

⁷⁹⁵ The decision is *intra vires* (within the power of the authority) or *ultra vires* (beyond their power, hence illegal).

⁷⁹⁶ Cane, P., *Administrative Law* pp. 31–32.

⁷⁹⁷ See: *R. v. Secretary of State, ex p. Council of the London Borough of Richmond and Others* [1994] Env. L.R. 134, where most of the arguments were deemed as cleverly disguised arguments on the merits. The case commentary heavily criticised this point of common law which makes judicial review a very narrow road to controlling ministerial powers, thus leaving it to democratic channels of general election instead.

⁷⁹⁸ Cane, P., *Administrative Law* p. 29; Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 250–251.

⁷⁹⁹ Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* p. 231. Local authorities are elected locally, but they are created by Acts of Parliament and are therefore subject to the court's control through judicial review.

⁸⁰⁰ Darbyshire, P., *Edey & Darbyshire on the English Legal System* pp. 147 and 169.

and criminal law cases⁸⁰¹ and it is a central instrument of control of public decision-making, in accordance with administrative rules and principles.⁸⁰²

Challenge by way of judicial review is available to parties with “sufficient interest” in the subject matter, as stated in s. 31(3) of the 1981 Supreme Court Act. The term is not defined but has in practice been given a quite wide application. Today there is no requirement of direct legal or financial interest, even though it is not enough to just assert an interest, individually or in a group. There has to be some substantive interest. The term has been described as liberalised over time. A wide range of individual claimants, companies, or reasonably serious groups or associations with a genuine concern, may thus have access to the courts.⁸⁰³

The court can as a result of its examination on judicial review make an order quashing the defective decision, make a mandatory order that the body carry out its duty, or make a prohibition order, in order to prevent further unlawful action by the reviewed body.⁸⁰⁴ The main remedy is the quashing order, depriving the order of legal effect.⁸⁰⁵ The procedures of judicial review and appeal can thus be distinguished by the fact that the review is cassatory in result while the appeal is reformatory. In the appeals case, the court is normally more free to set a new decision in the place of the overturned one.

Having thus described shortly the administrative order, and the court’s control of the administration, we will now go the actual administrative law norms. These are based in the constitutional principle of the rule of law, fundamentally expressed in the judicial review procedure.

⁸⁰¹ Darbyshire, P., *Eddey & Darbyshire on the English Legal System* p. 169.

⁸⁰² Cane, P., *Administrative Law* p. 28.

⁸⁰³ See: *Inland Revenue Commissioners v. National Federation of Self-employed and Small Business Ltd.* [1982] A.C. 617, an important case applying a rather liberal rule on standing based on sufficient interest, where direct legal or financial interest is not required. The case concerned a federation representing taxpayers; *R. (Feakins) v. Secretary of State for the Environment, Food and Rural Affairs* [2004] 1 W.L.R. 1761, stating at para. 21 that the rules on standing have been liberalised. See, also: *R. v. Secretary of State for the Environment, ex p. Rose Theatre* [1990] 1 Q.B. 504 (on standing for a trust set up by individuals wanting to preserve the remains of a theatre from property development) at pp. 520–521. See, moreover: Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 254–256, exemplifying by standing for Greenpeace in *R. v. Her Majesty’s Inspectorate of Pollution, ex p. Greenpeace Ltd* [1994] 4 All E.R. 329, see esp. p. 350.

⁸⁰⁴ Darbyshire, P., *Eddey & Darbyshire on the English Legal System* p. 169; Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* p. 253.

⁸⁰⁵ This is somewhat contradictory as the illegal decision is seen as null and void and cannot therefore be deprived of its legal effect. It already has no such effect. But even so, this remedy is called a quashing order, or traditionally an order of certiorari. See: Cane, P., *Administrative Law* pp. 82–83.

4.2.5 Fundamental Principles of Administrative Law

4.2.5.1 Rule of Law in Administrative Law

The purpose and function of English administrative law is, as in other systems, to require that public bodies carry out their tasks, and that their exercise of authority is carried out within legal bounds, so as to realise public policy and protect the citizen against the always possible abuse of these powers. The fundamental constitutional rule and doctrine of the rule of law also expresses an administrative law principle, which will here be elaborated. It is sometimes seen as synonymous with, or a translation of the continental Rechtsstaat principle or legal certainty. Some caution should, however, be exercised in the comparison, even though their general functions, meaning, and developments parallel.⁸⁰⁶ I will portray the common law rule of law, and note some observations on parallels between the different doctrines and terminologies. The purpose of this discussion is to serve as a basis for comparison of the administrative enforcement systems.

The rule of law has different meanings in the administrative law context. The primary meaning is one of legality; everything must be done in accordance to law. Applied to government administration it means that every act of government power must be authorised by law if they affect the legal rights, duties and freedom of any individual. This also implies absence of arbitrary power, and equality before the law.⁸⁰⁷ Both the power to take a certain measure and the manner in which it is done must be in accordance to law, and the public body should show that they have such support.⁸⁰⁸ Acts of Parliament confer powers on the executive. In general these rules entail quite wide discretion within the relevant authority's function and responsibility.

However; showing formal legal support is not enough, as this could entail unrestricted discretionary and potentially arbitrary powers, as long as it follows the letter of the law. Administrative law to a large part contains norms and standards that restrict abuse of these wide powers. The judicial review entails application of these norms of administrative law, requiring that the administration has legal warrant for its measures and that the citizen has an effective remedy in cases of unlawful administration.⁸⁰⁹ This of course ties to rule of law, but in its wider sense. The idea is that governmental activity which Parliament is not believed to have intended is not allowed. Parliamen-

⁸⁰⁶ See Section 2.2.1 on the Rechtsstaat doctrine and legal certainty, and the terminology, and footnote 178, for my comments on the terminology.

⁸⁰⁷ Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* p. 227; Wade, W., and Forsyth, C., *Administrative Law* p. 20.

⁸⁰⁸ Wade, W., and Forsyth, C., *Administrative Law* pp. 20–21; and Schwarze, J., *European Administrative Law* pp. 220–221.

⁸⁰⁹ Wade, W., and Forsyth, C., *Administrative Law* p. 5

tary intent is presumed always to be based on the rule of law and principles derived thereof.⁸¹⁰

4.2.5.1 Judicial Review Grounds as Principles of Administrative Law

The grounds for judicial review constitute a basis for judicial control over the public exercise of power. These grounds could be described as, or compared to, administrative law principles. They will be introduced in the following, with the main purpose of providing an understanding of the somewhat differently expressed common law principles of administrative law.

The basis for judicial review is commonly described as comprising three different grounds; procedural impropriety, illegality, and irrationality.⁸¹¹ The procedural impropriety ground basically involves procedural standards, and expresses traditional principles of natural justice, or fairness. Illegality is where the decision-makers' understanding of their administrative functions and powers, and the purposes thereof, are challenged. Irrationality, finally, entails challenge to a decision's reasonableness, when the decision clearly defies common sense, logic or accepted moral standards, or sometimes when the decision-making is not based on appropriate materials. In reality, the grounds will overlap, or rather be applied as interrelated aspects of the rule of law, justice and protection of individual rights.⁸¹²

It should also be noted that administrative law and the concept of rule of law have been, and still are, developing under the influence of European law and fundamental documents of human rights. This has been argued to bring with it a more substantive concept of rule of law, which suggests a parallel to the developments of the Rechtsstaat doctrine.⁸¹³ Some such topical influential principles or rights are proportionality, legal certainty (and legitimate expectation), the right to protection against self-incrimination and the right to a fair hearing, due process and the duty to give reasons, and also equality and subsidiarity, which must be considered by the national courts.⁸¹⁴ These concepts are also connected to the idea of good administration (described in Chapter 2). The European law development of a doctrine of good administration is certainly valid also in English administrative law. Having said that, the traditional grounds for judicial review will now be introduced.

4.2.5.2 Procedural Impropriety and Fair Administrative Authority

An investigation of the grounds of impropriety will start with procedural ultra vires, that is; if the decision-maker has not followed express statutory

⁸¹⁰ David, R., and Brierley, J., *Major Legal Systems in the World Today* p. 383.

⁸¹¹ See, for example: *Council of Civil Service Unions and Others v. Minister for the Civil Service* [1985] A.C. 374, p. 410.

⁸¹² Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* p. 263.

⁸¹³ Fogelklou, A., *Rättsstaten – idéhistorisk exposé* p. 17; and Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* p. 227. For comparison, see: Section 2.2.1.2.

⁸¹⁴ Darbyshire, P., *Eddey & Darbyshire on the English Legal System* pp. 70–71.

procedural requirements. It there is no such clear procedural breakdown, traditional rules of natural justice come in. These are common law procedural rules, which roughly concern impartiality of the decision-maker; and procedural requirements aimed at protecting the interests of the person subject to the relevant decision; fair hearing rules.⁸¹⁵ The concept of natural justice hence comprises protection against bias, right to be heard, in some cases legal assistance, information about the case against the accused, and in some cases to state reasons.⁸¹⁶ These principles parallel European law on fair trial, and also include protection against self-incrimination which will be further analysed in Chapter 7.

Importantly, common law rules on procedure are based on the idea of an adversarial system. The idea is that the truth is best discovered by allowing parties with conflicting versions of the law or circumstances of the case each to present their version of the truth in its strongest possible form, and leave the decision of which version is correct to a third impartial party.⁸¹⁷ As this argument and the formulation of procedural standards suggest, the concept of natural justice has emanated from rules applicable to court procedure. However, with the development of the administration and of administrative law, the scope of the concept has widened and will apply more purposively to cases where a person's rights are affected, including decision-making by a purely administrative authority. This was held in the case of *Ridge v. Baldwin*.⁸¹⁸ This suggests a wider regulation of the duty of proper administrative procedure, which may parallel the concept of good administration. The scope and meaning of the standards are, however, flexible and apply differently in different kinds of cases.⁸¹⁹

⁸¹⁵ Cane, P., *Administrative Law* p. 133. The traditional natural justice principle have been expressed in legal maxims stating that both sides should be heard and that this should be done in absence of apparent bias, see Schwarze, J., *European Administrative Law* p. 1277; and Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 269–270.

⁸¹⁶ *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others ex p. Pinochet Ugarte (No. 2)*, [2000] 1 A.C. 119, setting aside an earlier decision of the House of Lords on the grounds that one of the judges was deemed biased due to his involvement in an organisation promoting the same issues; *Davidson v. Scottish Ministers*, 2004 Scots Law Times 895 para. 6, stating that bias does not have to be overt impartiality but more often circumstances which could distort the judge's objectivity; *R. v. Board of Visitors of H.M. Prison, the Maze, ex p. Hone and MacCartan* [1988] 1 A.C. 379, on rights to be heard and to be represented; *Ridge v. Baldwin* [1963] 2 All E.R. 66, on the duty to inform and hear a police officer before dismissing him on grounds of misconduct; *Stefan v. General Medical Council* [1999] 1 W.L.R. 1293; and *R. v. Higher Education Funding Council, ex p. Institute of Dental Surgery* [1994] 1 W.L.R. 242, on duty to state reasons for a decision. See, also: Schwarze, J., *European Administrative Law* pp. 1274–1278; and Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 269–274.

⁸¹⁷ Cane, P., *Administrative Law* p. 136.

⁸¹⁸ *Ridge v. Baldwin* [1963] 2 All E.R. 66, confirmed in *R. v. Higher Education Funding Council, ex p. Institute of Dental Surgery* [1994] 1 W.L.R. 242, p. 258.

⁸¹⁹ Schwarze, J., *European Administrative Law*, esp. p. 1277.

A general assessment of the fairness of the procedure against the individual will commonly complement the assessment of procedural impropriety. For example in the case of *R v. Higher Education Funding Council, ex parte Institute of Dental Surgery* the circumstances of the specific case called for a duty to give reasons, even though the administrative act was not such that it would routinely so require.⁸²⁰ This can be seen as a general assessment of procedural fairness; does the procedure ensure appropriate protection of the individual's rights.⁸²¹

4.2.5.3 Illegality and Administrative Discretion

The challenge for "illegality" is fundamental. It goes to the basis for the decision, and the decision-making competence in law: that is, if the action is authorised by Parliament or common law, under the rule of law.⁸²² An example of the illegality ground for judicial review can be seen in *Lewisham LBC v. Hall*⁸²³ where it was held that it was an error in law for a court to require acoustic measurements as evidence to support an enforcement decision. The justices had no right to ask for specific types of evidence. This was against the legal description of their powers and functions, and of the relevant statutory rules. Another example of procedural ultra vires action is seen in the case of *R. v. Secretary of State for Social Services, ex parte Association of Metropolitan Authorities*,⁸²⁴ where the Court held that the Secretary of State had not undertaken the sufficient consultation to meet the procedural obligations of statutory law. Often, however, the review is not a case of non-compliance with a clear rule. Assessment of legality is complicated by the wide administrative discretion generally given to public authorities.

As indicated earlier in Chapter 2, a narrow sense of legality implies a wide scope of public authority within the framework of the law. But the legal authorisation of legitimate exercise of power is further regulated within this frame, mainly through assessment of purposiveness, objectivity, and proportionality. In the English system such regulation is made in terms of reasonableness, rationality, and a purposive interpretation of the legal

⁸²⁰ [1994] W.L.R. 242 at p. 261.

⁸²¹ The relationship between the concept of fairness and natural justice is sometimes unclear. The concept of fairness has a sliding scale of meaning. Fairness is sometimes used in a rule of law meaning, stating that government should exercise its powers and apply the law evenhandedly. Sometimes fairness refers to procedural standards for administrative decision-making concerning the rights and duties of individuals, rules which are more flexible than the principle of natural justice, which apply more widely on administrative procedure. See further in: Cane, P., *Administrative Law* pp. 159–161; Schwarze, J., *European Administrative Law* pp. 1278–1284; Wade, W., and Forsyth, C., *Administrative Law* pp. 22–23.

⁸²² Schwarze, J., *European Administrative Law* pp. 220–221; Wade, W., and Forsyth, C., *Administrative Law* pp. 20–21.

⁸²³ [2002] Env. L.R. 4. This was not a judicial review case but an appeal case, but the issue concerned evidence, and the statements made by the Court implied that this would have been successfully challenged on review.

⁸²⁴ [1986] 1 W.L.R. 1.

grounds for administrative authority. Recently, through the influence of European Law, proportionality is rising as an important ground and principle of administrative law.⁸²⁵ These perspectives will soon be discussed. However, legality also has some procedural implications, which can be paralleled to the principle of due procedural care, and good administration. The proper and careful procedure safeguards a lawful decision, and provides the parties concerned with information needed to challenge the legality of the decision.

A wider aspect of requiring lawful exercise of public administration is the question of what factors the authority should reasonably consider in order to ascertain the lawfulness of the actions.⁸²⁶ Not considering relevant matters may for example involve the ignorance of available scientific evidence contradicting the decision involved, or disregarding relevant ministerial guidance. These matters may amount to abuse of directional powers and thus error challengeable by judicial review. Both to consider irrelevant factors or circumstances, and not to consider relevant matters can amount to such error.⁸²⁷ The consideration of irrelevant materials may involve a breach of equal treatment, and not considering the relevant materials may be a breach of proper procedure. The issue of legitimate expectations may also be relevant. There are expectations of how a decision-maker should reasonably act in certain circumstances, and with the different kinds of available decision-making materials. Decision-making based on different materials will entail uncertainty for the concerned parties.

The procedural matters relate to legality and reasonableness, as the proper procedure reflects a reasonable approach to ensuring lawfulness of the relevant decision. Oppositely, a quite unreasonable decision may be seen to indicate that discretion has been abused. In the case of *J.A. Pye (Oxford) Estates Ltd v. Wychavon DC and Secretary of State for the Environment*,⁸²⁸ a planning authority had refused a planning permission although ministerial policy set out in ministerial circulars indicated that permission should be given. The decision stated no proper, adequate or intelligible reasons for this decision. It was held that the decision-maker had misinterpreted or failed to follow the ministerial policy that planning permission should be granted unless there were sound and clear reasons for refusal.

However, the English Courts have generally not been so strict in their review of the authorities' investigative procedure, and they have avoided demands on the authority to prove that they have considered all the relevant matters, and mostly limited its review to deciding whether or not the consid-

⁸²⁵ Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 263–269; Wade, W., and Forsyth, C., *Administrative Law* pp. 344 – 345, 349–350, and 354–356.

⁸²⁶ For example: *R. v. Secretary of State for the Environment, ex p. Hammersmith and Fulham BC* [1990] 3 W.L.R. 898.

⁸²⁷ Cane, P., *Administrative Law* p. 221; and Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990–2002* pp. 573–574.

⁸²⁸ [1982] J.P.L. 575.

erations argued by the claimant should reasonably have been had regard to.⁸²⁹ Typically, in *Mazzaccherini v. Argyll and Bute District Council*,⁸³⁰ (applying *De Falco v. Crawley Borough Council*, *Silvestri v. Crawley BC*⁸³¹) it was stated that as long as the authority has had regard to the relevant guidance, they can depart from it as they think fit. They are not bound by the guidance as to a statute, and the circumstances in the case may give reason for a not so rigid application of Secretary of State Guidance.

Illegality also includes authorities' pursuing improper purposes in their decision-making. Thus the purpose and the motives of the decision-maker in his action make grounds for challenge. If there can be identified a purpose which was consciously pursued, but was not within the purposes stated expressly or by implication for the administrative powers, the decision can be deemed invalid.⁸³² The matter of legality will involve investigation and legal interpretation to ascertain the purposes Parliament had intended as regards the administrative task and how discretion be exercised.⁸³³

4.2.5.4 Irrationality and Unreasonableness – and Proportionality

Irrationality is often referred to as unreasonableness. The terms sometimes seem to be used as synonyms, and at other times they show different aspects of appropriate and purposive exercise of public power and administrative discretion. Wade argues that unreasonableness refers to lack of satisfactory reasons, and irrationality to lack of reason altogether.⁸³⁴ Perhaps this implies a procedural and a substantive side of legitimate decision-making.

Famous authority on reasonableness is the case of *Associated Provincial Picture House Ltd v. Wednesbury Corporation (Wednesbury)*.⁸³⁵ The case concerned a local authority's authorisation of a cinema giving Sunday performances, but having stated conditions that were challenged for being ultra vires for unreasonableness. In the words of Lord Greene, Master of the Rolls (MR),⁸³⁶ the decision could not be held illegal for considering irrelevant matters within their admittedly very wide discretion. However:

⁸²⁹ Cane, P., *Administrative Law* p. 222.

⁸³⁰ 1987 S.C.L.R. 475.

⁸³¹ *De Falco v. Crawley Borough Council, Silvestri v. Crawley BC* [1989] Q.B. 460.

⁸³² Cane, P., *Administrative Law* p. 226.

⁸³³ Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 263–265; Wade, W., and Forsyth, C., *Administrative Law* pp. 21, and 363, with illustrative example from planning law on pp. 404–405.

⁸³⁴ See: Wade, W., and Forsyth C., *Administrative Law* p. 354, on terminology.

⁸³⁵ *Associated Provincial Picture House Ltd v. Wednesbury Corporation* [1948] K.B. 223.

⁸³⁶ The Master of the Rolls (MR) is a Court of Appeal Judge, President of its Civil Division, and member of the Privy Council. He or she is second in judicial importance, after the Lord Chief Justice, the Head of Criminal Justice and President of the Courts of England and Wales. As the Master of the Rolls is the leading judge dealing with the civil work of the Court of Appeal, her or she presides over the most difficult and sensitive cases. For further information on the English Judiciary, go to: <http://www.judiciary.gov.uk/about-the-judiciary>.

...although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the law by acting in excess of the powers which Parliament has confided in them.⁸³⁷

It is not easy to assess the range and use of the principle. In the words of Lord Greene it concerns “a conclusion so unreasonable that no reasonable authority could ever have come to it”. This seems a narrow possibility of challenge, paralleling Wade’s concept of irrationality. The definition by Lord Diplock in the case of *Council of Civil Service Unions v. Minister for the Civil Service* states that an irrational, or unreasonable, decision is:

... so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.⁸³⁸

A perhaps wider principle of unreasonableness is illustrated by Lord Donaldson, MR, stating that an unreasonable decision is one to which one can say:

... my goodness, that is certainly wrong ...⁸³⁹

The matter may also connect to the previously discussed issue of what circumstances have been considered: For reasonable and rational decision-making and exercise of administrative discretion, within the administrative task and competence prescribed by Parliament, the authority must consider all the relevant materials and circumstances, and disregard irrelevant ones. This also points to aspects of due procedural care. The assessment of what materials are relevant is the challenging part, and will be determined in terms of reasonableness and interpretation of the legislation and the prescribed administrative tasks.⁸⁴⁰

⁸³⁷ *Associated Provincial Picture House Ltd v. Wednesbury Corporation* [1948] K.B. 223, p. 234.

⁸³⁸ *Council of Civil Service Unions and Others v. Minister for the Civil Service* [1985] A.C. 374, p. 410.

⁸³⁹ *R. v. Devon County Council ex p. George* [1989] A.C. 537, referring to statements in *Neale v. Hereford and Worcester County Council* [1986] I.C.R. 471.

⁸⁴⁰ See for example: *R. v. Ealing London Borough Council, ex p. Times Newspapers Ltd* [1987] Industrial Relations Reports (IRLR) 120. See, also: Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* p. 264–265.

It is sometimes not clear whether the unreasonableness ground of review is an independent ground or more a standard of review.⁸⁴¹ Already in the *Wednesbury* case Lord Greene mentioned the apparent similarity of the situations of making an unreasonable decision and making a decision based on irrelevant considerations. However, the citation above indicates that these aspects are distinguished, the first one stating the legal frames for the decision-making powers prescribed by law, while the other looking more to the substantive irrationality in a decision within these powers. This can be seen in the case of *R. v. Falmouth and Truro Port Health Authority ex parte South West Water Ltd (Falmouth)*,⁸⁴² where it was argued that while the enforcers were free to make a blank order to abate a nuisance, and leave it to the addressee to find out how, such an order could in some extreme circumstances be unreasonable. It could then be regarded as outside the authority's powers. This seems to echo considerations of proportionality. Additionally, unreasonableness has sometimes been used as a qualification of what seems irrelevant to consider, or must be considered. An example can be seen in *R. v. Secretary of State for Transport ex parte Council of the London Borough of Richmond and Others*, where the use of decision-making materials was not so unreasonable as to qualify as illegal.⁸⁴³

In some ways, the assessment of reasonableness will parallel considerations of proportionality, at least as regards the connection of the measure to its legitimate aims and purposes – the administrative act must be necessary and appropriate in view of its purpose.⁸⁴⁴ The principle of proportionality is however not part of the common law legal tradition in the same way as in the continental legal order, or as in European law for that matter. It has been introduced to the common law system through the influence of European law, and can now be seen as part of general administrative law in the UK, and may develop as an independent ground for review.⁸⁴⁵

As a rule, all legislation must when possible be interpreted in line with the ECHR through the Human Rights Act 1998. The courts have accepted the use of the proportionality principle in cases applying European law, even though somewhat cautiously. The common law system's encounter with European law has also a wider reformative aspect, and the principle of proportionality is noted to be more generally applicable and becoming gradually implemented and applied by the courts in relation to the common law principles, perhaps creating an own version of the principle. Such a principle may

⁸⁴¹ Cane, P., *Administrative Law* p. 252.

⁸⁴² [2000] Env. L.R. 658. This case will be further described and analysed in Chapter 8.

⁸⁴³ [1994] Env. L.R. 134.

⁸⁴⁴ See above under Section 2.2.2.3, compared to Jacobs, F., *Recent Developments in the Principle of Proportionality in EC Law* p. 1, referring to the German law basis.

⁸⁴⁵ See Lord Slynn's statement in *R. (Alconbury Developments Ltd) v. Secretary of State for the Environment Transport and the Regions* [2003] 2 A.C. 295. p. 321. See, also: Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 268–269.

be modelled on the Wednesbury principle of unreasonableness, or on the principle of fairness. There are claims suggesting that the principle of proportionality may replace completely the Wednesbury test,⁸⁴⁶ but there is some struggle in fitting typically civil law principles into common law.

4.2.5.5 Reasonableness, Proportionality, and Distinction from Review on the Merits

One argument against the use of the principle of proportionality is that it entails a substantive assessment, and in this context a review on the merits of the case.⁸⁴⁷ This would conflict with fundamental administrative discretion; an argument that could be tied to a principle of separation of powers. This would be a fundamental difference from the concept of reasonableness. The Court in *Wednesbury* stresses that this is a review of the lawfulness of exercise of authority, and despite the apparent focus on the substantive decision, it is not a challenge on the merits of the decision. The decision was so unreasonable that it could not be perceived as legitimate under the relevantly provided administrative discretion.

It is nevertheless, not always that easy to distinguish an assessment of whether the authority has reasonably followed the rules on competences to effectuate substantive public law, from an assessment of whether the resulting decision was substantively reasonable according to the same law. In the case of *Kelly v. Monklands District Council* the Court came to the conclusion that the relevant decision was a conclusion to which no reasonable authority could have arrived.⁸⁴⁸ The decision was that a 16 year old girl, who had no capital and had left home to escape her father's abuse, was not to be seen as "vulnerable" in the word of the law, and thus not having a prioritised need for housing. Lord Ross stated there was no indication that the authority had taken into account the context and meaning of the prerequisite "vulnerable" described in the code of guidance. Additionally, no reasonable authority could, having taken the code's guidance into account, have failed to conclude that the girl was "vulnerable". The housing authority had thus failed to have due regard to the relevant materials, as had they made an unreasonable decision in concluding that the girl was not "vulnerable" within the meaning of the Act. It is a review of a substantive decision, relating both to the questions of how the authority came to the decision and how they should apply the relevant norms. This case could however be compared to the case of *R.*

⁸⁴⁶ Green, N., *Proportionality and the Supremacy of Parliament in the UK* p. 164; Wade, W., and Forsyth, C., *Administrative Law* p. 371.

⁸⁴⁷ Held, for example, by Lord Donaldson, MR, in *R. v. Secretary of State for the Home Department, ex p. Brind* [1991] 1 A.C. 696, pp. 717–718. Notably, this judgment was delivered years before the introduction of the Human Rights Act, and should not be taken to be currently valid. Nevertheless it formulates a central point of criticism against the principle of proportionality. Note similar arguments by Jacobs, F., *Recent Developments in the Principle of Proportionality in EC Law* p. 20.

⁸⁴⁸ *Kelly v. Monklands DC* 1986 S.L.T. 169, pp. 171–172.

v. Secretary of State for Transport,⁸⁴⁹ where the Secretary of State's actions in reforming provisions on night flights were challenged based on the reasonableness of the decision in view of certain relevant materials. In this case the Court held that it had not been shown that the decision-maker had misunderstood (or ignored) the said materials. The Court did not, as in the earlier case of *Kelly v. Monkland District Council*, assess the reasonableness of the decision in view of the materials. One explanation could be the complexity and technical character of the information, and the consequential difficulty to show that it had been unreasonably, and unlawfully misapplied. The challenge in the case on night flights was deemed a cleverly disguised plea on the merits, and thus not for the Court to decide. Poor, but lawful ministerial decisions should instead to be dealt with by democratic political routes.

Notwithstanding the described problems of distinguishing the assessment of legality and legitimacy, or the frame of the law and the appropriateness within it, I would suggest that it is clear that the principles of English Administrative law will entail consideration of both these aspects, commonly under the principle of reasonableness as a ground for judicial review.

It is sometimes argued that at the end of the day the unreasonableness of a decision seems ultimately to depend on the court's assessment of the arguments for and against the decision and on the extent to which it can be said to give effect to the policies and purposes for which the decision-making powers were prescribed.⁸⁵⁰ This links with the argued wider understanding of legality; interpreting the legislative intentions into the grounds for administrative competence. A parallel argument is presented in the context of the Rechtsstaat principles above in Section 2.2.2. This also suggests a more substantive supervision of exercise of public authority.

Consequently, the distinction of assessment of a substantively reasonable decision, and reasonably following the rules on competences to effectuate substantive public law, is not that evident. But even though these approaches will overlap or blend, the principal non-involvement in administrative discretion will probably lead to some extent of restraint from the courts in the review of administrative exercise of authority.⁸⁵¹

Having thus presented some fundamental features of the administrative law structure, tradition, and principles, it is time to introduce the reader to the environmental law system, and the relevant and available sources of law.

⁸⁴⁹ *R. v. Secretary of State for Transport ex p. Council of the London Borough of Richmond and Others* [1994] Env. L.R. 134.

⁸⁵⁰ Cane, P., *Administrative Law* p. 251, referring for example to the asylum case of *R. (Asif Javed) v. Secretary of State for the Home Department* [2002] Q.B. 129 concerning the decision whether there was risk of prosecution in the homeland. Note also Thompson, K., and Jones, B., *Administrative Law in the United Kingdom* pp. 265–266, discussing statements in the Appellate Court and the House of Lords in *R. v. Secretary of State for the Environment, ex p. Hammersmith and Fulham LBC* [1990] 3 W.L.R. 898.

⁸⁵¹ Compare: Wade, W., and Forsyth, C., *Administrative Law* pp. 362–363.

4.3 Environmental Law

4.3.1 Introducing Environmental Law; Historical Development, Characteristics, and Sources

4.3.1.1 Starting from Neighbour Law and Planning Law

Environmental law has since medieval times existed in common law through the tort of nuisance, with its focus on the protection of property rights.⁸⁵² When a person suffers damage to his or her enjoyment of property, a nuisance action can be brought to court.⁸⁵³ At the core lies the traditional principle of good neighbourliness.⁸⁵⁴ This private law nuisance concept was later developed through regulations aimed at human health, which has of course been an essential area of public concern. The health law origin of environmental law can be detected in the strong position of public interests and the focus on strict liability criminal sanctions.⁸⁵⁵ Historically in tort law there was no idea of generally linking liability to fault but instead to any one of a series of specific civil wrongs. Later on a general principle of civil liability developed in the tort of negligence, but the special regimes still remain.⁸⁵⁶

Nuisance thus originated as a concept of tort law but has evolved and spread beyond that in its use. So-called statutory nuisance refers to a specific situation regulated under statutory law. These rules prescribe liabilities subject to administrative regulation. Statutory nuisance is where the supervisory and controlling authorities step into the picture, defending the interests of the public, and enforcing the tort and prosecuting the criminal offences that a breach of the enforcement measures entail.⁸⁵⁷ Statutory nuisance has since the 19th century been used by Parliament to provide preconditions for the administrative enforcement procedures for local authorities in the context of public health and local environmental problems.⁸⁵⁸ Environmental law involving regulations on statutory nuisance is now mainly found in Part III of the Environmental Protection Act 1990 (EPA).

Planning law and housing law, partly with a human health purpose, also served as important historical starting points for environmental law. For a

⁸⁵² Thornton, J., and Beckwith, S., *Environmental Law* p. 8.

⁸⁵³ Jones, B., and Parpworth, N., *Environmental Liabilities* p. 5.

⁸⁵⁴ Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990–2002* p. 366. See for example in: *Baxter v. Camden LBC* [2000] Env. L.R. 112: The House of Lords considered the basic principles of common law nuisance; see especially Lord Hoffman (at p. 126) and Lord Millet (at p. 132).

⁸⁵⁵ Hughes, D., et.al., *Environmental Law* p. 5.

⁸⁵⁶ David, R., and Brierley, J., *Major Legal Systems in the World Today* pp. 320–321.

⁸⁵⁷ Hughes, D., et.al., *Environmental Law* p. 130; and EPA 1990 Sections 79–80.

⁸⁵⁸ Jones, B., and Parpworth, N., *Environmental Liabilities* p. 417; Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990–2002* p. 353.

long time planning law has served as a primary form of environmental law control, regulating development on, over or under land, or other land use, through different strategic plans and authorisation procedures.⁸⁵⁹ The main statutory regulation is found in the Town and Country Planning Act of 1990.

The environmental relevance of planning is in steering the location of certain types of activities, such as the separation of areas for industry and for housing, in the protection of amenities, and in the containment of urban sprawl.⁸⁶⁰ The purposes of planning law have also in some geographical areas focused on helping industry establish and grow and making this easier in way of bureaucracy and providing suitable locations etc.⁸⁶¹ Today sustainable development ideas are also starting to influence planning.⁸⁶²

England was industrialised early on in history, and the problems with industrial pollution followed. The law on public control of air pollution developed already in the 19th century, mainly through the so called Alkali Act, regulating industrial air pollution.⁸⁶³ This can be described as a root of modern environmental law regulation in the UK, with its focus on permitting regimes, some of which will be described here. Environmental risks and damage are however caused by a wider variety of activities than those regulated by environmental permitting. These further activities are often smaller ones, tied to local environmental problems. They are to some extent regulated through the rules on statutory nuisance in the Environmental Protection Act, and also planning in the Town and Country Planning Act 1990. Local governments are primary regulators in these areas of law. They will prepare plans and determine planning permissions, and they have administrative enforcement powers under these rules. Further down, I will describe some features of regulation under the statutory nuisance regime.

4.3.1.2 Modern Environmental Law

Environmental law has now developed beyond planning and neighbourliness, through health law and pollution control, into its own regulatory area largely based on concession regimes involving the registration and control of polluting industry. This English environmental law structure introduced public control through specific permitting systems; the PPC-regime, water discharge and extraction consents, etc. Today the area is of course to a great part driven by developments within EU law. Planning law permissions may however still be of interest in environmental steering. There is also a comprehensive local authority control of health and environment within statutory

⁸⁵⁹ See the Town and Country Planning Act 1990.

⁸⁶⁰ Hughes, D., et.al., *Environmental Law* p. 180.

⁸⁶¹ Hughes, D., et.al., *Environmental Law* pp. 8–9.

⁸⁶² Hughes, D., et.al., *Environmental Law* p. 9 and Chapter 2.

⁸⁶³ Thornton, J., and Beckwith, S., *Environmental Law* pp. 292–293. Notably, the preparations of the Swedish 1969 Environmental Protection Act were inspired by comparative study, of for example the English Alkali Act system, see: SOU 1966:65 pp. 182–183.

nuisance law. The connection to planning, neighbourliness and health law is therefore still present. All these developments have expanded the scope and the role of environmental law in the UK, but also brought with it a rather complex system of diverse rules and regulatory orders.

In recent decades the focus has been to develop an integrated approach to regulating environmental interests, for example through the 1990 Environmental Protection Act, providing legislative framework for the system of Integrated Pollution control. These rules were subsequently developed through the Pollution Prevention and Control Act 1999 and the regulations linked to it, implementing the IPPC directive.⁸⁶⁴ Another example is the creation, through the Environment Act 1995, of the Environment Agency as a central regulating authority.⁸⁶⁵ This Act also includes a statutory reference to sustainable development, in the statement in Section 4, of the aims and objectives of the Environment Agency. Explicit statutory regulation of broad principles of environmental law is otherwise hard to find. This suggests that environmental law principles, which of course the UK is bound by under international law, more specifically the EU-treaties, are directed at the regulators and not the citizen. They guide administrative authorities in their exercise of regulatory powers, but do not enjoy any status as general law which binds each and every one. It nevertheless reflects state policy, and thus fulfils the state responsibilities under international law.⁸⁶⁶

However, environmental law was still argued to be influenced by its sectoral history and patchwork character.⁸⁶⁷ An important step towards an integrated and more easily administered environmental regulation system was taken with the coordination of permitting schemes in the Environmental Permitting (England and Wales) Regulations of 2007, and further in 2010. With these steps a comprehensive and cohesive order for environmental permitting and compliance control was introduced.

⁸⁶⁴ The earlier IPC regime introduced an integrated licensing regime for prescribed processes. This has also been described as the blue print for the IPPC regime of the European Union. The IPC regime was phased out and replaced over the period 2001–2007, by the PPC regime, through the Pollution Prevention and Control Act 1999, and the Pollution Prevention and Control (England and Wales) Regulations 2000. The PPC regime is focused on installations instead of processes, and opened up a more holistic and preventive approach, not being limited to the release of certain prescribed substances. See: Thornton, J., and Beckwith, S., *Environmental Law* Chapter 5.

⁸⁶⁵ Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990–2002* pp. 5 and 565–566.

⁸⁶⁶ See, on sustainable development: Environment Act 1995 Section 4, and further: The Environment Agency's Objectives and Contributions to Sustainable Development: Statutory Guidance by the Secretary of State for Environment, Food and Rural Affairs, December 2002.

⁸⁶⁷ Hughes, D., et al., *Environmental Law* pp. 3–9; Thornton, J., and Beckwith, S., *Environmental Law* pp. 9–10. See, also: Explanatory Memorandum to the Environmental Permitting (England and Wales) Regulations 2007, 2007 No. 3538 Para. 7.1; and Explanatory Memorandum to the Environmental Permitting (England and Wales) Regulations 2010, 2010 No. [DRAFT] Para 7.1.

4.3.1.3 Environmental Permitting Regime

The environmental permitting regime is the main regulatory scheme, prescribed through the Environmental Permitting (England and Wales) Regulations 2010 (EP Regulations). It is a streamlined permitting system for different kinds of environmental activities, previously regulated sector by sector. It entered into force in 2008, then replacing over 40 statutory instruments, mainly on waste and pollution control. In 2010, the scope of the regime was extended to include also the area of water law regulation, and more. The Regulations comprise a separate body of rules for the regulatory procedure, while substantive environmental standards, etc., are still regulated in the sectoral legislation. It should be kept in mind here, that the same authority will perform the functions of permitting, supervision, and enforcement. The Regulations hence prescribe also administrative enforcement competences.⁸⁶⁸

The main purpose of the reform was to make the system of environmental regulation clearer and more easily managed, and to lessen the administrative burdens for both operators and regulators without lowering environmental standards. Environmental regulation should be integrated and comprehensive, but at the same time simpler, and faster. This is tied to the Better Regulation policy. A parallel aim of the reform was to strengthen flexible and risk based environmental regulation, and thus more appropriate and effective regulation. It is also argued that this system would be easier to keep updated in view of EU law and technical developments.⁸⁶⁹ These aspects are reflected in guidance statements on the aim of the regulations: to protect the environment to realise statutory and policy environmental objectives, regulating relevant activities effectively and efficiently in a way that provides increased clarity and minimises administrative burdens, to encourage promotion of best practices, and to fully implement European legislation.⁸⁷⁰

The EP Regulations prohibit unauthorised water discharges, or unauthorised operation of regulated installations. A permit is according to Regulation 12 obligatory. Contravention of this prohibition or the conditions of a permit is a criminal offence (Regulation 38(1) and (2)). Conditions will seek to prevent and minimise of pollution, and deal with energy efficiency, BAT, quality standards, limit standards for pollutants, etc. The EP Regulations also introduced standardised regulation in Chapter 4. The Secretary of State⁸⁷¹ or the Environment Agency may set standard rules for each category of activi-

⁸⁶⁸ Explanatory Memorandum to the Environmental Permitting (England and Wales) Regulations 2007 Section 4, and Explanatory Memorandum to the Environmental Permitting (England and Wales) Regulations 2010 Sections 2 and 4.

⁸⁶⁹ Explanatory Memorandum to the Environmental Permitting (England and Wales) Regulations 2007; and Explanatory Memorandum to the Environmental Permitting (England and Wales) Regulations 2010.

⁸⁷⁰ Environmental Permitting Guidance. Core Guidance para. 2.1.

⁸⁷¹ Or for Wales: the Welsh Ministers.

ties.⁸⁷² The Agency can utilise these rules as permit conditions, thus applying general norms in a standardised regulation.⁸⁷³ The rules are prepared in consultation with affected representatives of industry, and they are to be continuously adjusted in view of technical developments, etc. Consequently, the permit conditions will update automatically. As part of a standardised regulatory approach application for such a permit is faster and simpler. Application for standard permitting is the choice of the actor – the applicant. Consequently, according to Regulation 27(3), standard rules conditions cannot be appealed.⁸⁷⁴ Governmental Guidance states as qualitative safeguards, that standard rules must achieve the same high level of environmental protection as site-specific conditions, and that they should not be used for applications that require site-specific assessment of risk and impact.⁸⁷⁵

All the activities regulated in the permitting regime are also subject administrative enforcement from the permitting authority. This includes supervision and enforcement of the relevant rules for the activity. These instruments will be further described in Section 4.5.

4.3.1.4 Water Law

Water law was traditionally to a great extent a separate area of regulation in the UK with its own distinctive character and background. The specifics of this extensive area of regulation will not be analysed here, but it can be noted in general that through the recent reforms of the permitting system, water law regulation is now coordinated into the permitting regime. Permitting of discharges to water, etc., which was earlier regulated in a separate order, is now consolidated within the EP Regulations. This is also the case for compliance control, which is now exercised through the above described powers of enforcement and suspension notices, and with the instruments tied to the permits. There are however, still some special enforcement powers when it comes to particular water law issues. Such powers can be found, for exam-

⁸⁷² These standard rules are easily accessed at official-websites of the regulators. They will state the specific rules generally applicable to special types of standard activities, and there are an enormous amount of – constantly revised – standard rules. Aside from general conditions for example that "the activity has to be carried out indoors", or more specifically specified emission standards, standard rules will refer to documents specifying BAT for the relevant activity, or substantive requirements in EU-directives, etc., that have to be complied with. These rules thus become directly applicable as conditions of the relevant permit. For an example, see: SR2008No23 Waste electrical and electronic equipment authorised treatment facility (AFT) excluding ozone depleting substances, at: <http://www.environment-agency.gov.uk/business/topics/permitting/35930.aspx>.

⁸⁷³ Permits that only state standard rules as conditions are called "standard permits".

⁸⁷⁴ See: Environmental Permitting Guidance. Core Guidance para. 8.4.

⁸⁷⁵ Environmental Permitting Guidance. Core Guidance para. 8.3 and 8.10.

ple, in the Water Resources Act 1991,⁸⁷⁶ and in EP Regulations 57 and 58 and Schedules 21 and 22.

4.3.1.5 Sources of Environmental Law in the UK

Sources of contemporary environmental law in the UK are mainly found in legislation, in statutory acts, and regulations, with accompanying schedules. Central environmental legislation in the context of this thesis is found in the Environmental Protection Act 1990, comprising for example provisions on statutory nuisance; the Environment Act 1995 which called for a more integrated legal approach and established the Environmental Agency; the Water Resources Act 1991 on management and pollution of water resources; and the Water Industries Act 1991, concerned with the supply of water and the handling of sewage.⁸⁷⁷ These and other bodies of environmental sectoral legislation provide fundamental rules and standards for the different kinds of activities involving environmental risks. Additionally, and topically in the context of this thesis, there are rules on enforcement and sanctions in the Environmental Permitting Regulations, and the Environmental Civil Sanctions Order and Regulations, all from 2010.

A lot of environmental law obligations are found in the form of statutory instruments, drawn up under the responsibility of a relevant Secretary of State. In addition to this, obligations may be found in guidance and policy statements. Central are government documents referred to as Guidance.⁸⁷⁸ These instruments can be described as sources of soft law. They will state the views of the Secretary of State on how the relevant rules should be interpreted and applied. There are different kinds of policy statements and circulars prepared at different levels of the administration. These documents, generally, are not directly enforceable by criminal or civil proceedings, but they have some legal status. A regulatory body will often have to “have regard to” matters in these documents, and an administrative authority taking a decision without regard to such matters may through an action for judicial review, as described earlier, be compelled to reconsider its decision.⁸⁷⁹

Case law is an important source of law in the UK. However, in the areas of administrative enforcement law relevant to this thesis, authoritative case law is scarce. Permitting and compliance control of industry is commonly handled between the competent enforcement authority and the actor, sometimes with involvement of the Secretary of State. From what my studies have shown, the administrative practice of the Secretary of State is not referred to

⁸⁷⁶ The act has been extensively reformed in order to implement the Water Framework Directive, see Amendment (England and Wales) Regulations 2009 No. 3104, and connected Explanatory Memorandum (found at: <http://www.legislation.gov.uk/ukpga/1991/57/contents>).

⁸⁷⁷ Thornton, J., and Beckwith, S., *Environmental Law* pp. 14–15.

⁸⁷⁸ For example the Environmental Permitting Guidance; Core Guidance. For the Environmental Permitting (England and Wales) Regulations 2010.

⁸⁷⁹ Thornton, J., and Beckwith, S., *Environmental Law* p. 15.

as an authoritative source of law, and few determinations on administrative enforcement matters are challenged through judicial review. Pollution control seems an affair much handled through consultation and other such less transparent and legally authoritative means. The situation is different in the area of planning and statutory nuisance, where there is a lot of case law. In the context of this study, planning case law proves valuable when establishing the law on enforcement in other areas of environmental law where there is little guidance in case law but enforcement powers are prescribed in similar wording.⁸⁸⁰ Statutory nuisance cases are somewhat differently regulated, but this parallel regulatory scheme will provide valuable materials for a wide analysis of enforcement law. Different documents on administrative policy, presented earlier, will complement the sources of administrative practice.

With an idea of some basic environmental law features and sources, the central institutional organisation of administrative execution of environmental law and policy will next be introduced.

4.3.2 Institutional Organisation, Regulatory Tasks and Procedure

4.3.2.1 Defra and the Secretary of State

As indicated earlier, the departments of government and their ministers are central administrative bodies with extensive responsibilities. Environmental policy and law is chiefly the responsibility of the Department for the Environment, Food and Rural Affairs (Defra).⁸⁸¹ Defra is, as described above, headed by a Secretary of State, who issues regulations called statutory instruments under legislative competence delegated to him or her in various statutes. Defra will draw up environmental policy, and seek proper implementation of existing legislation through Circulars and Guidance. Such documents set out the views of the relevant Secretaries of State on the interpretation and application of the relevant rules. Apart from these policy functions, Defra also has considerable influence on the organisation of the Environmental Agency, which will be described in the below.

An important function of the Secretary of State is enforcing the statutory duties of those taking environmental decisions, and ensuring that their decisions are properly taken.⁸⁸² The Secretary of State can control the administration, both indirectly through general and organisational means, but also through more direct and specific instruments. He or she has many supervi-

⁸⁸⁰ See for example Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990–2002* pp. 66–67.

⁸⁸¹ For a more extensive account for ministerial responsibilities, see the List of Ministerial Responsibilities; Including Executive Agencies and Non-Ministerial Departments, Cabinet Office July 2010.

⁸⁸² Thornton, J., and Beckwith, S., *Environmental Law* p. 17.

sory functions; starting with a general power stated in the Environment Act 1995 s. 40, to direct the Environment Agency. More specific rules on ministerial direction to the regulator are prescribed in legislation, for example in the Environmental Permitting Regulations 2010, Regulations 61–66.⁸⁸³ She can direct the regulator in a specific issue; to exercise a certain power, or not, and how it should be exercised. They can also direct the regulator to refer a case directly to the Secretary of State. The relevant regulators then have a duty to comply with these directions, and to have regard to the guidance issued. This means that the Secretary of State has considerable control over the regulators' activities, by directing or issuing guidance with respect to how they carry out their functions. The Secretary of State is also often the only appellate body for environmental permits and administrative enforcement of the permit regulations (see: EP Regulation 31). His or her determination of a case may, however, be challenged through judicial review.

4.3.2.2 Environment Agency and Local Authorities as Operative Environmental Authorities

The authorities responsible for the operational environmental supervision and regulation are chiefly the Environment Agency and local authorities. The Agency is referred to as an executive non-departmental public body under the remit of Defra. It is responsible to the Secretary of State, and to the National Assembly for Wales, who also appoint the Environment Agency Board and Chairman, set the Agency's budget, and its general policy and objectives. It was created by the Environment Act 1995, bringing three previous separate regulators into one, with an aim to centralise environmental regulation. This was made in recognition of the complex and integrated nature of environmental problems, which can be more effectively addressed with a comprehensive and integrated approach in a large organisation with wide expertise. This large organisation is based on eight regional offices, which operate through 26 "areas". This helps to secure the realisation of national environmental aims and policies, while being able to consider the interests of local communities and stakeholders as well. There is also a Head Office which manages the Agency, develops policy, and sets strategic and operational objectives.⁸⁸⁴

The Agency has responsibility and competence for most matters of environmental regulation, according to the Environment Act 1995. Under the environmental permitting regime, which will be described below, the

⁸⁸³ It should be noted that these rules prescribe powers to direct for the "appropriate authority", entailing for England the Secretary of State, and for Wales the Welsh ministers (see EP Regulation 2 for definitions).

⁸⁸⁴ Thornton, J., and Beckwith, S., *Environmental Law* pp. 10 and 18; Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990–2002* pp. 565–566; and information from the official website of the Environment Agency: <http://www.environment-agency.gov.uk/aboutus/default.aspx>.

Agency issues permits for larger facilities, or activities. Local authorities do the same for smaller ones. Local authorities are, moreover, largely involved in the different functions of planning law regulation, and they are the primary regulator of the statutory nuisance regime. It should be noted that generally in the English administrative order, the respective permitting authority is also responsible for supervising and enforcing compliance of the thus regulated activities. They may, furthermore, initiate criminal law enforcement procedures.⁸⁸⁵ The same authority will thus perform permitting, supervision, and administrative and criminal enforcement functions. Before describing the administrative control system more closely, some remarks will be made on courts and appellate bodies that become relevant in these cases.

4.3.2.3 Relevant Court Structure

There is no specialist environmental court in the English system, although such specialisation has been proposed and extensively debated.⁸⁸⁶ Environmental cases will be handled within the ordinary court system described in s. 4.2.3. Decision-making by the administrative authorities in the relevant enforcement cases is generally challengeable by judicial review. Such review will be handled by the Administrative Court within the High Court, the Civil Division of the Appellate Court, and the Supreme Court. Possibilities for appeal to the courts are rarer in the relevant area of law. Environmental permitting and administrative enforcement of the regulated activities are generally only appealable to the Secretary of State (or for Wales, the Welsh Ministers). Enforcement in statutory nuisance issues and planning, etc., are however generally appealed to Magistrate's courts, and beyond.

However, the development of new environmental civil sanctions (presented in s. 4.4) introduces appeal to a Tribunal Judiciary.⁸⁸⁷ Within the Tribunal Judiciary there is a specialised environmental branch that will hear

⁸⁸⁵ The Crown Prosecution Service is a national prosecution service. They undertake most prosecutions, and always the most serious ones. However, government departments and agencies, both central and local such, often have statutory powers of prosecution, as do private citizens under certain circumstances. See: Darbyshire, P., *Eddey & Darbyshire on the English Legal System* pp. 175–176.

⁸⁸⁶ Crucially the appropriateness of dealing with environmental issues, including environmental offences, in the regular court system has been questioned, as has the possibilities of handling the potential to meet the demands of access to justice in environmental cases, mainly in the Aarhus Convention. See Woolf, H., *Are the Judiciary Environmentally Myopic?, a public lecture, which led to numerous studies and reports on the matter, for example: Grant, M, Environmental Court Project: Final Report*, Department of the Environment, Transport and the Regions, London 2000 (See review by Tromans, S., in *Journal of Environmental Law* Vol. 3 Issue 13, 2001); Macrory, R., and Woods, M., *Modernising Environmental Justice, Regulation and the Role of an Environmental Tribunal*, commissioned by Defra, June 2003. See, also: Jones, B., and Parpworth, N., *Environmental Liabilities* pp. 259–265; Macrory, R., *Regulation, Enforcement and Governance in Environmental Law*, p. 21 and Chapter 5; and the comments in the Judgment of *Morgan and Baker v. Hinton Organics* [2009] Env. L.R. 30.

⁸⁸⁷ See Section 4.2.3.

appeals against the new civil sanctions.⁸⁸⁸ As the scope of the civil sanctions system is extended, these specialised tribunals will probably become more and more important.

Criminal cases will become relevant in the administrative enforcement of environmental law as non-compliance with a notice is a criminal offence. These are tried by the criminal courts; summary trials at Magistrates' courts or otherwise the Crown Court. Appeals are made to the Queens Bench Division of the High Court, and the Criminal Division of the Court of Appeal, and then finally to the Supreme Court. Apart from these appeals procedures, the courts may also be involved in enforcement, as the administrative enforcer may turn to the High Court for an injunction, in order to enforce compliance with different kinds of notices (for example: Environmental Permitting Regulation 2010, Reg. 42).⁸⁸⁹

4.3.2.4 Appeals and Procedural Access

We will find general rules on appeal and procedural access in the separate sectoral legislation. With the reform of the regulatory procedure, the rules are now easily located in the EP Regulations, Regulation 31. According to Para (2), a permit applicant or otherwise aggrieved person may appeal a permit decision. It should be noted that the provision of right to appeal in EP Regulation 31 specify a limited view of aggrieved persons. These are generally the operator themselves; who has been refused an applied permit, or variation of a permit, etc., or that disagree with the conditions imposed on them, or have been served with a revocation, enforcement, or suspension notice, etc.⁸⁹⁰ The concerned public is not included. In permitting cases, there are rules in Sch. 5 on consultation with concerned parties, and with the public, but not in enforcement cases.

Moreover, the addressee of a notice of variation, revocation, enforcement or suspension, may appeal against the notice to the Secretary of State.⁸⁹¹ The Secretary of State may then, according to Para. (6) quash or affirm the notice, and if affirming it do so in its original form or with such modifications as she sees fit. They may also direct the regulator on what permit conditions to impose.⁸⁹² According to Para. (9), an appeal generally does not suspend a notice, except for an appeal against a revocation notice, which is suspended until the final determination or withdrawal of the appeal. Further rules on the appeals procedure are found in Sch. 6.⁸⁹³

⁸⁸⁸ See: <http://www.tribunals.gov.uk/environment/AboutUs.htm>. For the environmental law area, this is regulated in the Environmental Civil Sanctions Order 2010, Section 10.

⁸⁸⁹ See Section 4.5.5.2.

⁸⁹⁰ See: Environmental Permitting Guidance. Core Guidance para. 13.1.

⁸⁹¹ Except for cases where the notice or decision is based on a direction by the Secretary of State (para. (4), referring to the Secretary of State's powers, mainly in Regulation 61, to steer the regulator's exercise of the relevant functions).

⁸⁹² Environmental Permitting Guidance. Core Guidance, para. 13.20.

⁸⁹³ See further in the Environmental Permitting Guidance. Core Guidance, Chapter 13.

As noted above, decisions on the new environmental civil sanctions are appealed to the environmental jurisdiction of the First-tier Tribunal (Environmental Civil Sanctions (England) Order 2010 Section 10(1))⁸⁹⁴, and further to the Upper Tribunal, and then the Court of Appeal. The addressee of a final notice imposing a sanction (including a stop notice) may appeal (Environmental Civil Sanctions Order Sch.1 Para. 8, Sch. 2 Para. 8, and Sch. 3 Para. 3). The tribunal may suspend or vary a stop notice, and withdraw, confirm, or vary, other kinds of notices, etc. Notably, civil sanctions are based on the commission of a criminal offence, and when this matter has to be decided, the criminal standard of proof will apply (Section 10(2)).⁸⁹⁵

Under the statutory nuisance regime, the person addressed with the enforcement order – an abatement notice – may, according to EPA 1990 s. 80(3), appeal that notice to a Magistrate’s court. This has to be explicitly stated in the notice.⁸⁹⁶ Further appeal is made to the Crown Court,⁸⁹⁷ and thereafter to the High Court. Rules on appeal are specified in Sch. 3 to the Act, and further in the Statutory Nuisance (Appeals) Regulations 1995. Regulation 2(2)(a) specifies the grounds on which a notice may be appealed, for example that the notice is not justified under s. 80 of the Act; including that the enforcement action is unreasonable or unnecessary, or that there has been some material informality, or error.

On the hearing of the appeal the court may, according to Regulation 2(5), quash the notice, vary it in favour of the appellant, or dismiss the appeal. A variation of a notice may be done in such a manner as the court finds fit. With some exceptions, an abatement notice is not suspended by the application for appeal (Regulation 3(1)).

In conclusion it should be noted that the appeal routes are different for the different regulatory orders, and that the environmental permitting regulation measures are appealable only to the Secretary of State. It can also be noticed that while procedural access is wide in the context of a permitting procedure, the administrative enforcement process seems a matter between the regulating authority and the addressee only. In this context it should also be kept in mind that the decisions of the administrative authority may be challenged by judicial review, but only after the course of appeal has been exhausted. Such review starts at the Administrative Court within the High Court.

⁸⁹⁴ The same applies for the Welsh Order.

⁸⁹⁵ See, also: Civil sanctions for environmental offences. The Environmental Civil Sanctions Order & Regulations 2010; Guidance to regulators in England on how the civil sanctions should be applied, and draft guidances for Wales, January 2010 (in the following referred to as the Environmental Civil Sanctions Guidance) Section 2.10.

⁸⁹⁶ Sch. 3 to the EPA 1990, Para. 6. This is also stated in the Enforcement Concordat under “Principles of Good Enforcement: Procedures”.

⁸⁹⁷ EPA Sch. 3 Para. 1(3). Through EPA 1990 Section 81(7).

4.4 Administrative Enforcement

4.4.1 Introduction; General Remarks on Enforcement

The English system of environmental law enforcement has developed from a complex order of sectoral legislation stating different rules on authorisations, compliance control, and criminal offences, and initially also many different regulators. As efforts have been taken to coordinate environmental regulation a comprehensive environmental control order has been developed, with the Environment Agency as a centralised and unitary enforcement organisation, and an integrated environmental permitting regime. There is however no comprehensive body of enforcement law for all kinds of environmental risks and effects. Administrative enforcement of environmental law is carried out through the permitting regime, and thus only for activities under permit obligation. Compliance control and administrative enforcement instruments are thus regulated in Part 4 of the EP Regulations 2010, and supported by the relevant sectoral legislation, and the Environment Act 1995, stating enforcement tasks and competences.

Environmental control outside the EP Regulations will often rest on the rules on statutory nuisance – if there is no specific legislation for the particular problem. The statutory nuisance provisions of the Environmental Protection Act 1990 regulate pollution and public health issues, typically in situations of persons disturbed by a neighbouring activity, be it an industry, a neighbour with barking dogs, or a farmer letting his fields for rave parties. These rules will often be adequate for smaller activities with local environmental effects; activities that are often not regulated by the permitting regime. The statutory nuisance regime is, however, applicable also for the larger operations regulated by the EP Regulations. To avoid risk of double jeopardy, and generally to avoid over-regulation, there are duties to cooperate and coordinate the regulation, and also to consult the EP regulator before initiating summary proceedings in a statutory nuisance case (EPA 1990 Section 79(10)).⁸⁹⁸

Following criticism and debate about ineffective regulatory orders, and the lack of appropriate enforcement instruments, the enforcement system is presently undergoing reform. In recent years the efforts to develop the environmental control system have been tied to Better Regulation and a wider reconstruction of the public regulatory order.⁸⁹⁹ The reforms have meant new and more integrated and coordinated regulatory structures for permitting and compliance control in the EP Regulations, as well as new regulatory instru-

⁸⁹⁸ Environmental Permitting Guidance. Statutory Nuisance s79(10) Environmental Protection Act 1990. For the Environmental Permitting (England and Wales) Regulations 2010, March 2010, Version 1.0.

⁸⁹⁹ Macroy, R., *Regulation, Enforcement and Governance in Environmental Law* p. 20.

ments as alternatives to criminal enforcement. Criminal sanctions have traditionally been the dominant form of legal sanction. Indeed, administrative authorities have competence to prosecute offences in the UK, and many environmental offences are drafted in strict liability terms. This makes the sanctions more accessible to the regulators. It has however been argued that because of this wide scope and use of criminal enforcement, the perception of environmental crime has lost its stigmatising and deterring effects. It is argued that this is reflected in the courts' general imposition of low fines that will often not neutralise the financial gain from the offence.⁹⁰⁰

This criticism has called for a more flexible enforcement system with a range of instruments that can be tailored to the varying situations. New regulatory policy direction has developed, with a focus on targeted and proportionate regulation aimed primarily at changing behavior rather than punishing “wrong” behavior. Regulation is thus developing towards a system of flexible administrative enforcement efforts rather than prosecution.⁹⁰¹ Consequently, administrative fines have been introduced, as well as orders of different characters and aims, and a possibility for the actor to suggest a voluntary undertaking – to avoid sanctions. These are established in the Regulatory Enforcement and Sanctions (RES) Act 2008, and introduced into the environmental law area through different statutory instruments, especially the Environmental Civil Sanctions Order 2010, for England and Wales respectively.⁹⁰² These rules provide a wider range of enforcement instruments, and thus a more flexible, targeted and proportionate enforcement approach. The idea is that the enforcer can choose the method, and set a level of fine which is proportionate to the risks and type of offence involved, and a sufficient incitement to change the behaviour. Such effective and proportionate enforcement should also level the playing field for business competition.⁹⁰³

⁹⁰⁰ Jones, B., and Parpworth, N., *Environmental Liabilities* p. 217; Macrory, R., *Regulation, Enforcement and Governance in Environmental Law* pp. 12, and 26–28, and *Regulatory Justice: Making Sanctions Effective* pp. 15–23. It should nevertheless be noted that these “low fines” are often far higher than in the Swedish system.

⁹⁰¹ Hampton, P., *Reducing Administrative Burdens – Effective Inspection and Enforcement*, a review for the Treasury, which suggested integration of regulatory authorities, and a move towards a more risk based approach, with stricter and quicker regulatory action; Macrory, R., *Regulatory Justice: Making Sanctions Effective*, a review for the Cabinet Office where the entire regulatory system was studied and fundamental reform suggested. These findings have been accepted by government, and have partly been realised through the RES Act 2008, and the Environmental Civil Sanctions (England) Order 2010. On these developments, see: Macrory, R., *Regulation, Enforcement and Governance in Environmental Law*, Chapter 1.

⁹⁰² The 2008 Act establishes the different civil sanctions, and prescribes their contents, purposes and procedure, etc., but the regulators do not automatically have access to the power to decide on such sanctions. Such powers are granted by ministerial order. The Environmental Civil Sanctions Orders or 2010 grant such powers for listed offences and in specified extent (see: Regulatory Enforcement and Sanctions Act 2008; Guidance to the Act, p. 28).

⁹⁰³ Regulatory Enforcement and Sanctions Act 2008; Guidance to the Act pp. 5–6. and 27–28; Environmental Civil Sanctions Guidance pp. 3–5, and 35–37; Macrory, R., *Regulatory Jus-*

Factors to be weighed when setting the fine are thus the environmental damage or risk involved, the economic gains made by the perpetrator, as well as the sought-after deterrent effect.⁹⁰⁴ This is viewed as much more effective than prosecution, both functionally and financially, as criminal enforcement will often result in low penalties and costly court procedures, and it does not focus on making the perpetrator improve the situation. The reform thus coincides with the Better Regulation efforts to reduce administrative burdens, as well as environmental law focus on the effects in the environment (reactor orientation). Prosecution is still argued to have an important function. It should however be saved for serious cases where there is a need to make a statement of disapproval – involving stigma and heavy penalties. These serious cases would typically be where there is evidence of intentional or reckless behaviour or repeated flouting of the law.⁹⁰⁵

The new enforcement instruments are still under development, and there has not been that much opportunity for development of regulatory practice. I will describe some changes and new instruments, with both steering and sanctioning functions. The thesis analysis however is more focused on the use of the instruments and the formulation of orders and will therefore have to be focused on older case law, complemented by more recent statements of enforcement policy.

4.4.2 Administrative Enforcement Aims and Competence

The functions, duties, and aims of the Environment Agency are stated in the Environment Act 1995 Sections 2–8. These are expressed in general terms, requiring consideration and contribution to certain aims, thus providing the Agency with quite extensive discretion in the exercise of its functions.⁹⁰⁶ The Agency's principal aim is stated in Section 4 of the Environment Act 1995 as to protect and enhance the environment, and with this contribute to the achievement of sustainable development. They must exercise their discretionary powers with regard to this aim, and to governmental policy and guidance on this matter. The aim is given further meaning and context through guidance, and the UK Sustainable Development Strategy.⁹⁰⁷ The key principles of this strategy are: living within environmental limits; ensuring a

tice: Making Sanctions Effective, see pp. 7–12, for a summary of the criticism and the recommendations.

⁹⁰⁴ Regulatory Enforcement and Sanctions Act 2008; Guidance to the Act p. 38.

⁹⁰⁵ Macrory, R., *Regulatory Justice: Making Sanctions Effective* p. 38.

⁹⁰⁶ Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990–2002* p. 572. The Agency state that “We are responsible for protecting and improving the environment of England and Wales. We also have responsibility for protecting communities from the risk of flooding and managing water resources.” See at: <http://www.environment-agency.gov.uk/aboutus/work/35696.aspx>.

⁹⁰⁷ *Securing the Future; delivering the UK Sustainable Development Strategy*, March 2005; and further in guidance documents on specific regulatory tasks and areas of law.

strong, healthy and just society; achieving a sustainable economy; using sound science responsibly; and promoting good governance.⁹⁰⁸

More specifically, the Agency must have regard to economic and social considerations in the exercise of their public tasks. They must take a long term perspective and respect the precautionary principle and make the polluter pay. They must also ensure transparency, information, and procedural access, among other things.⁹⁰⁹ The realisation of these aspects is elaborated in different policy documents, some of which will be presented below.

Local authorities are established under the Local Government Act 1972. These have a different constitutional basis from a regulatory agency. When it comes to the aims and competence in administrative enforcement by the local government authorities, these are provided in the specific legislation the compliance of which they are to control.

4.4.3 Enforcement Tasks and Duties

The powers and duties of the different authorities to deal with environmental issues are wide and apply over a wide context. Apart from the functions as permit authority, the above described regulators have been given public tasks to control compliance with legal standards and environmental permits. They should inspect, review permits and enforce compliance, and also prosecute prescribed offences, or impose civil sanctions. There is no general duty to take enforcement action. Decisions about method and priority are generally left to the discretion of the authority. There are, however, some provisions on regulatory duties, in the relevant legislation.

The EP regime involves duties, stated in Regulation 34, to review permits, and to execute appropriate periodic inspections of the regulated operations, to check that the conditions of the permit are followed. They may to that end direct the actor through administrative enforcement orders – notices. They also have access to instruments more directly tied to their role as permit authority, such as varying, suspending or revoking the permit. There is, however, no duty stated in the relevant legislation, to take such enforcement measures based on what is discovered in these supervisory capacities. The decision to take enforcement action is thus a discretionary choice for the regulating authority, even though they must have regard to relevant policy statements and guidance in the exercise of this discretion.

The EP Regulations, as recently amended, also include special tasks and duties for regulators in relation to water law. Schedule 22 Para. 6 prescribes

⁹⁰⁸ *Securing the Future; delivering the UK Sustainable Development Strategy*, March 2005 p, and also at <http://www.defra.gov.uk/sustainable/government/what/principles.htm>.

⁹⁰⁹ *The Environment Agency's Objectives and Contributions to Sustainable Development: Statutory Guidance* by the Secretary of State for Environment, Food and Rural Affairs p. 8. On the duty to “have regard to” guidance, etc., see Section 4.1.2, and Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990–2002* pp. 573–574.

a duty for the regulatory authorities to take steps for the purpose of implementing EU Water law, crucially the Water Framework Directive. The Water Resources Act 1991 provides more substantive water law rules, and states, in section 84, a duty for the regulator to monitor the extent of pollution in controlled water, for the purposes of carrying out its relevant functions. This regulator is generally the Environment Agency. Its functions and powers in exercising these duties are the above-presented environmental permitting, and enforcement notices, but also the power according to EP Regulation 57, to take measures to prevent or remedy pollution and recover the expenses from the responsible actor. The Agency also has some competence according to Regulation 58 to specify water emission limit values for an installation or conditions concerning such emissions.

When it comes to the area of statutory nuisance, the local authorities have a duty according to EPA Section 79, to see to it that its area is inspected from time to time, and to investigate complaints from the inhabitants to find out about statutory nuisance which have to be dealt with. Notably, the authority must issue an order according to section 80 to abate any such statutory nuisance. This thus prescribes a duty to enforce. At least in principle. The duty is triggered when the authority is “satisfied that a statutory nuisance exists, or is likely to occur or recur, which suggests that it would be difficult to establish that breach of this duty has taken place. Nevertheless, the duty to enforce was upheld in the case of *R. v. Carrick District Council, ex parte Shelley*,⁹¹⁰ where local authority was held to have acted wrongly in deciding that it was “not appropriate” to serve a notice instead of deciding the fact of whether or not a statutory nuisance did in fact exist and subsequently serving an abatement order in response to that nuisance. The case concerned pollution of a beach from sewerage.

Investigation and prosecution of environmental offences are also included in the administrative enforcement authorities’ functions and tasks. Environmental legislation contains a wide range of crimes, both directly environmentally damaging behaviour, and offences against the control system. Central for this thesis is the fact that failure to comply with a notice is generally an offence.⁹¹¹ The administrative enforcer has the competence – but not the duty - to prosecute all kinds of offences within the relevant legislation. For some environmental offences specifically noted in the Environmental Civil Sanctions Order 2010, they can choose civil sanctions instead of prosecuting.

In summary, the regulators under these areas of environmental law have many administrative enforcement tasks. Duties to inspect and review and ensure realisation of certain EU law are stated in the legislation, but an explicit duty to take enforcement action is only stated for statutory nuisance control. The option is generally left to administrative discretion. Enforce-

⁹¹⁰ [1996] Env. L.R. 273.

⁹¹¹ See, for examples: EPA 1990 s. 80(4) and EP Regulations 2010 Reg. 38(3).

ment policy statements and guidance should however delimit, or at least influence, the exercise of this discretionary power. This provides some foreseeability and consistency of enforcement and is important for the legal certainty of the individual. Some of these documents will be presented next.

Before that it should be kept in mind that proper enforcement is in the UK also ensured through control by central government. If a local authority fails to exercise the function to inspect its area for statutory nuisance, the Secretary of State may declare that authority to be in default, and direct them to perform a specified function, as well as how and when to do this. If the authority refuses to comply, the Secretary of State may take over exercise of the relevant function, at the expense of the defaulting authority. This is prescribed in the EPA Sch. 3, Para. 4. Similarly, the Secretary of State may, at least in theory, direct the regulator under the EP regime, both in general terms and in specific cases, and they may in some instances take over the case themselves (EP Regulations 33, and 61–62). Even though I have found little support for these instruments being used, they provide central government with wide powers to control administrative enforcement of environmental law. Moreover, the Secretary of State functions as the appellate body in cases under the EP Regulations.

4.4.4 Enforcement Policies and Principles

4.4.4.1 The Role of Policy Documents, and other Statements of Principle

Wide administrative discretion has been reiterated as a feature of UK administrative law in general, and in administrative enforcement of environmental law. Enforcement tasks and powers are provided in widely formulated rules on legislative powers, and the courts are careful not to interfere with administrative discretion which can be said to keep within the legal framework. The exercise of this discretion should, however, not be seen as arbitrary or free from steering. As noted earlier, guidance and ministerial control will steer the exercise of administrative authority. Moreover, there are different kinds of statements of enforcement policy and principles to guide the administrative authority, and the individual civil servant, in their work.

Enforcement policy and principles are provided in documents of varying legal status, and of different scope and precision. They will often not have any formal status as a source of law, but nonetheless provide an indication of desired administrative practice. To some extent policy statements may also provide substantive guidance to the review of the purposiveness and reasonableness of the enforcement authorities' exercise of power. In judicial review of the legality and reasonableness of the administrative procedure, the courts will consider whether the regulator has taken different relevant circum-

stances and guidance into account.⁹¹² Guidance and policy documents may provide such materials. The wording of policy documents is however often general and wide, and acknowledge the discretion and judgment of the authority and the specific civil servant. Consequently, policy statements do not provide a strict set of rules, and the general principle is still administrative discretion. They will mainly function as a steering instrument within the administration, and as communication of administrative practice.

There are national enforcement policy documents like the Regulator's Compliance Code,⁹¹³ and the Enforcement Concordat. They aim – in line with the Better Regulation agenda – at business friendly enforcement of regulation. Furthermore, enforcing agencies generally have their own enforcement policy documents, which basically implement the national policies into their own work, and sometimes provide their own understanding of the policy and priorities. The policy explains how the authority exercises its discretion within the context of its tasks and competences, and with regard of its aims. Regulators are to some extent under a statutory duty to provide enforcement policy documents, in order to communicate what can be expected in terms of enforcement action. An example can be seen in the RES Act 2008 Section 64 regarding policies on how offences will be enforced under the civil sanctions regime. Through the access of such policy, the proactive operator who is a potential addressee of these measures, can foresee his position and voluntarily change his behaviour to ensure legal compliance. This promotes effective and efficient steering of environmental behaviour. Policy documents, in this way, provide means for foreseeability and thus for economic welfare and development. They also provide means for governmental control of the enforcers in this wide area of powers and duties. Better Regulation efforts have emphasised the need for steering the exercise of administrative authority, to ensure efficient and effective enforcement, often expressed as a risk-based, proportionate and targeted approach.

Some policy statements will be discussed in the following. I will also introduce some relevant principles formulated in governmental review documents, and since referred to as guidelines for enforcement policy.

4.4.4.2 The Regulators' Compliance Code – and the Hampton Principles

The Compliance Code is a statutory code, issued with parliamentary approval following extensive consultation, in accordance with the Legislative and Regulatory Reform Act 2006 Section 23. It is a central part of the Government's Better Regulation agenda, and is based on the Hampton Principles

⁹¹² See: Sections 4.2.5.3 and 4.2.5.4.

⁹¹³ Regulator's Compliance Code. Statutory Code of Practice for Regulators, Better Regulation Executive, Department for Business Enterprise & Regulatory Reform, 17 December 2007.

on Effective Inspection and Enforcement, and also the Macrory Principles for sanctions and penalties, as presented in important Better Regulation review reports.⁹¹⁴ It asks regulators to perform their duties in a business-friendly way, by planning regulation and inspections in a way that causes least disruption. This is expressed as a risk-based, proportionate and targeted approach to inspection and enforcement. The idea is that high-performing, compliant businesses should bear less of a burden, with regulators focusing their efforts on rogue and higher-risk businesses. The enforcement authorities must, according to Sections 22 and 24 of the Legislative and Regulatory Reform Act 2006, have regard to the Code when determining policies, setting standards or giving guidance in relation to their duties.

According to the Compliance Code regulators must, moreover, support economic progress. They must take measures to collaborate and share data with other authorities to lessen administrative burdens on business, and they must take measures to ensure transparency and thus accountability. They must also provide information and advice, both in general statements and specifically to an individual addressee. The purpose is to enable businesses to understand what is required by law and thus help it to avoid intrusion by the enforcement authority. The enforcers must undertake risk assessment of all their activities and target their resources on the actors least likely to comply. This is reflected not only in the policy of only making inspections following risk assessment, but also in the targeted and proportionate enforcement policy prescribed in the Macrory principles. The Compliance Code states in Section 8.3 that the regulators must consider the Macrory principles when taking formal enforcement action. This provides possibilities for the responsible actor to avoid a lot of enforcement intrusion, and thus lessen its administrative burdens. Notably, the strong statements in this statutory instrument of duties to consider the indicated policy statements, would suggest that clear disregard of the policy would constitute an illegal or unreasonable exercise of administrative authority, and thus be challengeable under judicial review, as described above.

4.4.4.3 The Macrory Principles

The lessening of burdens on business and the economy are central in the Regulators' Compliance Code. Nevertheless, the focus on effective and qualitatively appropriate enforcement is also present, partly through reference in sections 8.3–8.4 to the Macrory review. The Macrory principles focus on the actual enforcement action, and are thus relevant to in this thesis. These state that the enforcement policies should aim to change the offender's behaviour, and to eliminate any financial benefit or gain from non-compliance, to restore harm caused and deter future non-compliance. The

⁹¹⁴ Hampton, P, *Reducing Administrative Burdens – Effective Inspection and Enforcement*; Macrory, R., *Regulatory Justice: Making Sanctions Effective*.

sanctions and penalties should also be proportionate to the nature of the offence and the harm caused, and reasonable and appropriate for the particular offender and regulatory issue. The Macrory review also resulted in recommendations – which are reiterated in the Compliance Code – on transparency and appropriate enforcement policy, and efforts to perfect it. As noted above, these principles are found in a review document, and are thus without direct formal legal status. The above described references to them in the Compliance Code may however be seen as giving them indirect such status

4.4.4.4 The Enforcement Concordat

The Enforcement Concordat is a voluntary, non-statutory, document which sets out Principles of Good Enforcement in relation to policy and procedures. It was launched in 1998 as a result of Cabinet Office's work with local government, business and consumer groups.⁹¹⁵ This voluntary code of practice has had significant impact on the policy and practice of the environmental law enforcers'.⁹¹⁶ The principles of the Enforcement Concordat promote setting clear standards, openness and helpfulness in information and service, proportionality and consistency, and a clear complaints procedure.⁹¹⁷ The Concordat encourages a wide enforcement approach, and expressly advocates focus on informal action; advice, information, help and cooperation.⁹¹⁸ The Concordat emphasises the enforcer's duty of making it clear for the regulated operator what the requirements on him are.⁹¹⁹ The principle of proportionality is also fundamental.

The Concordat Good Enforcement Principles thus aim at making compliance easier for business, through a partnership approach, where the operators and the regulators cooperate, communicate and exchange information, in order to meet their mutual interest of compliance enable voluntary compli-

⁹¹⁵ Enforcement Concordat: Good Practice Guide for England and Wales p. 7; Hawke, N., et.al., *Pollution Control; The Powers and Duties of Local Authorities* p. 2.

⁹¹⁶ Hawke, N., et.al., *Pollution Control; The Powers and Duties of Local Authorities* pp. 2 and 18. According to the Cabinet office internet home page 96% of all central and local government organisations with an enforcement function have adopted the Enforcement Concordat by December 2006. See: www.cabinetoffice.gov.uk/regulation/reform/enforcement_concordat/2006-12-05. In August 2008, the Department for Innovation, Universities and Skills reported the same numbers, see: <http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/bre/inspection-enforcement/implementing-principles/regulatory-compliance-code/enforcement/page46822.html>.

⁹¹⁷ Enforcement Concordat, Cabinet Office, March 1998, available at for example: http://www.cambridgeshire.gov.uk/NR/rdonlyres/0D6CC305-4EC1-4818-A965-BC6D5F392F7C/0/BCEnforcement_Concorde.pdf, and in the Good Practices Guide, see: Enforcement Concordat: Good Practice Guide for England and Wales, Department of Trade and Industry (DTI), Small Business Service 2003, available at <http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/files/file10150.pdf>. The Guide elaborates the principles of good enforcement, and gives advice on their implementation by illustration of current good practices.

⁹¹⁸ Enforcement Concordat: Good Practice Guide for England and Wales p. 8.

⁹¹⁹ Hawke, N., et.al., *Pollution Control; The Powers and Duties of Local Authorities* p. 7.

ance. The involved parties are thus spared lengthy and costly formal procedures. This is argued to bring about better compliance and a level field of business competition, and to allow more resources for the enforcers to target businesses that deliberately flout the law or act irresponsibly. This means more effective and efficient administrative enforcement.

The Enforcement Concordat parallels the Better Regulation policy documents. The focus on risk assessment, proportionality, soft steering and communication run through all these instruments. The Concordat was retained after introduction of the Compliance Code, largely because the Concordat relates to the relationship between the enforcer and business in individual cases, while the Compliance Code applies more generally to the regulatory policy of the enforcement authorities. Also, the Enforcement Concordat applies more widely, particularly to local authorities, most of which have adopted the principles and implemented them in their own policies.⁹²⁰

The Enforcement Concordat thus echoes familiar expressions of good administration and administrative law principles in general, as do the Compliance Code and principles drawn from the above-discussed reviews. These expressions can be described as principles of communication, foreseeability, proportionality, purposiveness, and transparency. These different sets of principles are to guide the enforcer in their discretionary choices of action when exercising enforcement tasks and functions. They help enforcers balance informal action (helping, promoting compliance, etc) versus firm formal action (orders, prosecution, etc). Guidance as regards the decision whether or not to prosecute is also found in the Code for Crown Prosecutors, and in the authorities' own enforcement policy documents.⁹²¹

4.4.4.5 The Code for Crown Prosecutors

Under the Prosecution of Offences Act 1985, the Director of Public Prosecutions,⁹²² is responsible for issuing a Code for Crown Prosecutors.⁹²³ This code provides prosecutors guidance on the general principles applied when making decisions about prosecutions, and is applicable also for other prosecuting authorities such as the Environment Agency and local authorities.⁹²⁴ Their enforcement policies will generally refer to the Code.⁹²⁵

⁹²⁰ <http://webarchive.nationalarchives.gov.uk/+http://www.berr.gov.uk/bre/inspection-enforcement/implementing-principles/regulatory-compliance-code/enforcement/page46822.html>.

⁹²¹ Enforcement Concordat: Good Practice Guide for England and Wales p. 26.

⁹²² The Director of Public Prosecutions is the head of the principal public prosecuting authority for England and Wales (the Crown Prosecution Service).

⁹²³ The Code for Crown Prosecutors, Crown Prosecution Service. (The Code is updated regularly, and the latest version is from February 2010, and can be found at <http://www.cps.gov.uk/publications/docs/code2010english.pdf>.)

⁹²⁴ Hawke, N., et.al., *Pollution Control; The Powers and Duties of Local Authorities* p. 8.

⁹²⁵ For example: The Environment Agency Enforcement and Prosecution Policy (2008) Section 21.

Apart from the general principles of fairness, independence, objectivity, non-discrimination and legality stated in sections 2.3–2.4, the Code establishes the Full Code Test as the principal procedure for the decision whether or not to prosecute (Sections 3.3–3.4 and 4). Prosecutors must only start or continue prosecution when the case has passed both stages of the Full Code Test. This test comprises consideration of evidence and public interest. The prosecutor must have sufficient evidence to provide “realistic prospect of conviction”. Only then are they to carry out a public interest test. The Code lists public interest factors in dating when prosecution is more likely to be required (Section 4:16). Examples include: offences committed against a person serving the public (d), premeditated offences (e), likelihood for continued or repeated offence (s), and positive impact on maintaining community confidence (r). Public interest factors against prosecution are also listed (Section 4.17), for example that the defendant has put right the loss or harms that was caused (i), or that the offence was a result of a genuine mistake or misunderstanding (d). This may become important in environmental law where offences are usually of strict liability.⁹²⁶

In relation to decisions to prosecute, the Code for Crown Prosecutors provides essential authority on the regulators’ exercise of enforcement powers. This guides them in their choice of approach. The Agency’s own enforcement policy also provides statements on prosecution policy. It states that every offence shall normally be followed by an enforcement response, and prosecution will be considered, in parallel to remedial action.⁹²⁷ Offences against the exercise of enforcement functions; obstruction or non-compliance with orders, etc., will normally lead to prosecution if there is enough evidence to support such recourse.⁹²⁸

4.4.4.6 The Environment Agency’s Enforcement and Prosecution Policy

The Environment Agency’s Policy⁹²⁹ formulates the aims and functions of the Agency, and sets out general principles to be followed in the exercise of their functions, including policy in relation to the Compliance Code. It functions as the Agency’s own communication on how they will carry out their tasks – both to the public and to their staff. It steers the staff of the organisation and provides some foreseeability.

⁹²⁶ Hawke, N., et al., *Pollution Control; The Powers and Duties of Local Authorities* pp. 12–13.

⁹²⁷ Enforcement and Prosecution Policy, Doc. No. EAS/8001/1/1, Version 2, Issued 07/08/08, Section 8; and 20.

⁹²⁸ The Environment Agency Enforcement and Prosecution Policy, Doc. No. EAS/8001/1/1, Version 2, Issued 07/08/08, Section 29. According to Section 30, alternative measures of caution or warning are considered in cases where prosecution is not most appropriate.

⁹²⁹ Enforcement and Prosecution Policy, Doc. No. EAS/8001/1/1, Version 2, Issued 07/08/08, and available at: <http://www.environment-agency.gov.uk/business/regulation/31851.aspx>.

The Enforcement and Prosecution Policy sets out the objective of a better environment for the present and the future, and extensive functions of the Agency in many areas of environmental law. It points out that prevention is preferable to cure, and that informal and cooperative steering through advice and exchange of information is important. It also points to the purpose of enforcement to ensure that preventive or remedial action is taken – in order to protect the environment or to secure compliance with the regulatory system. The document presents the different enforcement powers, and points out that even though they expect full voluntary compliance, it will not hesitate to use its enforcement powers where they find this necessary. The principles of enforcement are stated to be proportionality, consistency, transparency, and targeting, as basis for the Agency’s overall policy of firm but fair regulation. It expresses consciousness of the seriousness of prosecution, and the efforts to use alternative means of enforcement. Regulatory efforts are to be directed primarily towards addressees whose activities cause serious damage, or risk thereof, where the risks are least well controlled, and against deliberate or organised crime. Action will also be primarily focused on persons directly responsible for the risks and who are best placed to control it. Targeting is carried out through systems for assessing and comparing risks.

As to enforcement through prosecution, the Agency’s policy set out a presumption of prosecution in certain situations. These parallel the statements on targeted enforcement, focusing on the offenders that do not cooperate voluntarily. Interestingly, the Agency prioritises prosecution in offences against the public control system. This includes breach of permit obligations, and also obstruction of Agency staff in carrying out their powers, failure to comply or comply adequately with formal remedial requirements, failure to supply information without reasonable excuse and supplying false or misleading information where lawfully required by the Agency.⁹³⁰

The Environment Agency has published guidance to their Enforcement and Prosecution Policy,⁹³¹ and many further documents of more specific statements of policy and operational instructions to their staff.⁹³² Central amongst such documents are the Work Instruction: National Investigations Manual.⁹³³ These documents provide more detailed guidance to how to follow the Agency’s policy, and instruct the staff on the normal enforcement response in described situations. It is to be used by all staff when deciding the most appropriate enforcement response.

⁹³⁰ Enforcement and Prosecution Policy, Doc. No. EAS/8001/1/1, Version 2, Issued 07/08/08, Section 29.

⁹³¹ Guidance for the Enforcement and Prosecution Policy, Operational Instruction, Doc. No. 354_03, Issued 07/07/2010.

⁹³² These documents are continuously updated. The latest versions can be downloaded from the Agency’s website.

⁹³³ Work Instruction: National Investigations Manual, Operational Instruction Doc. No. 353_03, Issued 29/09/2010.

4.4.4.7 Local Government Enforcement Policies

It should be mentioned also that local authorities are to a great extent bound by the central enforcement policy documents, either through statutory instruments or voluntarily. Many local authorities apply the Enforcement Concordat and publish local enforcement policy documents that reflect the thus stated principles of enforcement.⁹³⁴ Local government guidance is important for the consistency, transparency and foreseeability of the relevant body's enforcement, just as for central agencies, and thus for its credibility and for legal certainty for potential addressees.

4.4.4.8 Summarising Comment on Enforcement Policy

In summary, the presented statements of enforcement policy are very much tied to a sense of proportionality; effective and efficient enforcement targeted on the actors that do not voluntarily comply with the law, and thus they contribute to the attainment of environmental aims. This effective and efficient approach best furthers both business climate and the environment. Risk assessment is a central part of this. More specific policy statements serve as operational instructions of the administration, providing guidance on how to act in different situations, and also a means of promoting foreseeable. The policy statements are generally not in the form of clear enforceable duties of enforcement action, but they possess considerable authority through their functions of steering the administration, and indicate the framework for their reasonable exercise of power.

4.5 Administrative Enforcement Instruments

4.5.1 Introduction

There is a wide range of administrative enforcement instruments within UK environmental law. There is no general regulation of enforcement competences and tools. Different instruments are accessible in different situations. First of all, the instruments of the EP Regulations 2010 are applicable to activities under environmental permit obligations, while other kinds of environmental problems will have to be dealt with using different enforcement instruments under other rules. An example of such other rules is found in the Environmental Protection Act 1990 on statutory nuisance.

⁹³⁴ Examples include: Chelmsford BC Enforcement Policy, available at <http://www.chelmsford.gov.uk/index.cfm?articleid=8928>; and Swindon Borough Council, Environment and Health and Planning Services; Generic Enforcement and Prosecution Policy, 2007, available at: http://www.swindon.gov.uk/environment-enforcement_policy.pdf.

Furthermore, the recent and ongoing reform of enforcement has introduced a wide variety of enforcement instruments under the Environmental Civil Sanctions Order 2010. These rules are only accessible when explicitly stated to be so in the Order. A note on future developments should be made here. The enforcement reforms have strong support within the policy debate. The idea is that this furthers flexible, effective and appropriate enforcement. The criticism, or doubts, that have been argued is that this wide range of orders and sanctions serves to provide more discretionary power to the administration. Therefore, the system is only being gradually introduced. It is also provided with safeguards in form of policy guidance that must be considered, and powers of direction from higher authorities, etc. When the civil sanctions order becomes more established, and these reservations are appropriately handled, the scope of the system will widen and profoundly change the UK administrative enforcement system. I can at this stage only produce a picture of this reform in its very early stages, and note that it will develop considerably in the years to come. This means that parallel enforcement procedures will be discussed.

All in all, one has to be able to navigate the different legislation to understand what the enforcers may do in different situations. I will present instruments described in the legislation and state in general terms the area of their application. Common to all the systems is the service of some kind of administrative order, or “notice” as is generally the term in the UK system. The content and purpose of the different kinds of orders vary. The rules also prescribe different kinds of sanctions for offences, including criminal sanctions for non-compliance with administrative orders. The context of institutional organisation and order of competences is important to keep in mind here. The administrative enforcer will, aside from issuing orders and administrative sanctions, also prosecute and determine permitting matters. This provides the administrative enforcers with an even wider range of enforcement instruments. In order to give a full and relevant picture of the powers of the administrative enforcers, some of these instruments will also be described. Instruments tied to the permit, criminal prosecution, and the alternative civil sanctions will be commented on separately, in order to follow the order of presentation from Chapter 3. The UK system does not separate these functions as clearly as the Swedish system. Some enforcement functions and tasks are therefore discussed under different subsections, to reflect their close connection. The idea is to keep the functional distinction from Chapter 3 throughout this presentation too.

4.5.2 Investigatory Powers

Consultation and soft steering is fundamental in the area of environmental regulation. This cooperative and communicative approach is emphasised in the above-described enforcement policies. The actors are expected to coop-

erate and generally to ensure that they have the ability to run the relevant operation.⁹³⁵ Their cooperation and voluntary efforts should according to enforcement policy result in less involvement from the enforcers, and lighter administrative burdens. However, compliance control and enforcement still relies widely on inspection by the authorities. They have duties to inspect generally their relevant area of jurisdiction,⁹³⁶ and powers and tools are prescribed to help them do this.

Investigative powers for authorised enforcement personnel are provided in different legislation. Section 108 of the Environment Act 1995 provides a long list of investigatory powers, for example in the context of integrated pollution control.⁹³⁷ The rules apply to the Secretary of State, the Environment Agency, or a local authority in the relevant areas of regulation, and provide powers of entry for different kinds of investigation, securing documentation, etc. The inspectors may demand assistance in these inspection measures, and require the production of records, and of information needed for the relevant investigations. They can require information from any person they have reasonable cause to believe to be able to provide it. Furthermore, the inspector can ask the questions they see fit and ask them to sign a declaration of truth of the answers. Refusal to do so is considered a failure to comply with the authority's order and an offence under Section 110. The same provision criminalises obstruction of the inspection and failure to provide assistance and information, or to prevent another person from answering the inspector's questions. Keeping in mind also that the authority can and do prosecute themselves, this provides strong authority for their inspectors. Authorisation of suitable personnel for the exercise of the listed powers is also prescribed in Section 108. Furthermore, Section 109 states powers in situations of imminent danger.

Inspection powers are also found in other legislation. In the context of water law there are specific rules stated in Sections 169–174 of the Water Resources Act 1991. Supervision and control regarding statutory nuisance is regulated under the Environmental Protection Act 1990, in which investigatory powers and powers of entry are provided in Sch. 3.

As administrative enforcers have criminal enforcement jurisdiction, they also have the power to conduct criminal investigations. The criminal investigation process is distinguished from administrative enforcement, and applies more qualified procedural rules in order to safeguard individual rights and fairness in the context of criminal prosecution.⁹³⁸ Such rules are found in the Police and Criminal Evidence Act 1984 (PACE), applicable through Section

⁹³⁵ Environmental Permitting Guidance. Core Guidance Chapter 9, and also Chapter 5 defining the operator and their role in the permitting procedure.

⁹³⁶ See for example: EP Regulations, Regulation 34(2).

⁹³⁷ Note the Environment Agency's operational direction to its staff on the matter in the National Investigations Manual, Doc. No. 353_03 Section 4.1.

⁹³⁸ Work Instruction: Investigation Manual, No 353_03, Version 7, 27/06/2006, Section 1.6.

67, and subsequent Codes of Practices,⁹³⁹ but will not be described in more detail here. The criminal investigatory procedure is only to be applied where the exercise of power depends on a suspicion that an offence has been committed, or that the officer concerned has reasonable grounds for suspecting the commission of an offence.⁹⁴⁰ The enforcement authorities will nevertheless in their exercise of administrative enforcement tasks have to be aware of their obligations in a criminal investigation, and when they apply. As they have both administrative and criminal powers, their investigations may include both kinds of procedures.

4.5.3 Enforcement Orders – “Notices”

4.5.3.1 Introduction

The primary enforcement measure of administrative enforcement is some kind of “notice”. As indicated above, this is an administrative decision stating a duty for the addressee to do something – or refrain from doing something. It has the same function as what has earlier been referred to as an administrative enforcement “order”. I will continue the general use of the term order, but refer to the term notice where the context so requires. Despite efforts to simplify and consolidate the enforcement system, there are still different kinds of orders, or notices, stemming from separate sectoral legislation. I will present different types of administrative enforcement orders and their functions, within their separate areas of regulation.

4.5.3.2 Environmental Permitting Regime – Enforcement and Suspension Notices

The regulating authorities under the EP Regulations 2010 are responsible for both permitting and compliance control. They have duties to monitor and review the permits as well as checking the regulated operators’ compliance with their permits and their conditions. They may to that end direct the responsible actor – the permitted operator – through different kinds of orders. Apart from measures directed at the status and contents of the environmental permit, which will be presented under Section 4.5.6, the regulatory authority may according to Regulation 36 issue an enforcement notice to an actor who is contravening permit conditions, is likely to, or has already done so. An enforcement notice orders the addressee to take steps to remedy the contra-

⁹³⁹ Work Instruction: National Investigations Manual, Operational Instruction Doc. No. 353_03, Issued 29/09/2010, states in Section 2 that all Agency enforcement staff should be familiar with PACE and the Codes, and that the provisions in the Codes must be respected in all investigations.

⁹⁴⁰ Codes of Practice, Code B. The environment agency mirror these rules in their National Investigations Manual, Doc. Section 4.1. A similar borderline should be applied also for local government health officers.

vention within a stated time period. The purpose is thus for the operator and operation to be brought in compliance with the notice. Non-compliance with the notice is an offence under Regulation 28(3).

The regulator's power to issue enforcement orders is limited to addressing breaches of permit conditions, but their powers to stay the operation are generally applicable in situations of serious pollution. The regulator may, according to Regulation 37 issue a suspension notice in relation to an activity that they find involves a risk of serious pollution. This applies whether the relevant manner of operation is regulated by, or contravenes a permit condition or not. A suspension notice is tied to the permit, but also functions as a kind of stop notice, and specifies steps to remedy the problem. It suspends the authorisation of the relevant part of the operation or activity until the stated risk is remedied as specified in the notice, and thus effectually stops and prohibits that activity in accordance with Regulation 12, which requires authorisation for the regulated operations or activities. Contravention of this prohibition is an offence under Regulation 38(1). The authority must withdraw such a notice when it is satisfied that the steps required by the notice have been taken (Regulation 37(8)(b)).

It should be noted that the coordinated environmental permitting regime also includes different kinds of enforcement measures for certain sectors of regulation, for example notices to close landfills facilities (EP Regulations Schedule 10 Section 10) and prohibition notices in relation to hazardous discharges into groundwater (Schedule 22 Section 9). These specific instruments will not be further investigated.

There are no mandatory statutory forms for these notices, but different kinds of standard forms are often used in practice and found in manuals.⁹⁴¹ There is, however, some regulation of the contents of the notices. Both enforcement and suspension notices must include specification of the relevant risk or breach of conditions leading the regulator to take action, the works to be taken by the addressee in response to the relevant contravention or pollution, and a time frame for compliance with the relevant duties (Regulations 36(2) and 37(4)). This is a common formal requirement for administrative enforcement notices. We can find provisions on enforcement powers in water law and planning law typically prescribing that the notice must state the relevant problem (the breach of law, the environment or other problem), and specify steps or works to be taken and a period of time period for this.⁹⁴² Notably, the wording of the stated regulations shows that both kinds of or-

⁹⁴¹ For example: Environmental Permitting; General Guidance Manual on Policy and Procedures for A2 and B Installations, Revised October 2010, provided by Defra, see especially Parts C and D, with specimen notices and consultation letters. The manual is accessible at: <http://www.defra.gov.uk/environment/quality/pollution/ppc/localauth/pubs/guidance/manuals.htm>.

⁹⁴² See for examples: Water Resources Act 1991 Section 161A, Town and Country Planning Act Section 173, Water Act 2003 Section 25A.

ders and the steps to be specified in them are tied to risk management. They respond to risks, and may aim at remedying already occurred contraventions, or preventing them occurring. It should be noted also that despite the limitation of the scope of enforcement notices to respond to breaches of permit conditions, the ordered works or steps may relate to remedying the effects of any pollution caused by the contravention, as well as to bring the operation in compliance with the conditions of the permit (Reg. 36(2)(c)). Moreover, in their double function of permitting and compliance control authority, the regulator may also take action to vary the permit conditions, according to Reg. 20, and thus make it possible eventually to enforce behaviour which was initially not covered by the existing permit. This expands the actual scope of the presented enforcement powers, and the regulator's options in response to the problem at hand.

4.5.3.3 Statutory Nuisance – Abatement Notices

The regulator for the Environmental Protection Act 1990 shall in response to any statutory nuisance make an abatement order. This is stated in Section 80(1). Statutory nuisance law has a somewhat special character as to extensive discretion as regards what the abatement orders should contain. The abatement notice may require the actor to take certain measures, or to refrain from doing something. There is also a discretionary choice for the enforcer as to whether to just simply require abatement of the nuisance and or prohibiting its occurrence or recurrence, or whether to require more specifically stated steps or works, or both.

An abatement order can, according to Section 80(1)(a) of the EPA, in the terms of negative obligations, simply prohibit or restrict the occurrence or reoccurrence of a nuisance which seems likely to occur. The order may also require abatement of the nuisance through negative obligations in specified steps, for example exercising proper care in certain industrial steps or use of substances or materials in the process, abstaining from using certain materials or methods, or through regulating the capacity of an industrial process, or the allowed emissions. Despite the prescription of these different contents of the abatement order, there is no prescribed form or content. Deciding on the content is within the discretion of the authority. They must state a time frame for compliance, but deciding on the appropriate time frame is also a discretionary decision. There is a statutory duty for the authorities' to take enforcement action, but discretion on how to do this.⁹⁴³

The addressee of an abatement order is according to Section 80(2) either the person responsible for the nuisance, or the owner of the premises in the

⁹⁴³ Administrative action may some time seem uncalled for, but it seems there is no discretion as to the duty to order abatement. This can be remedied through the formulation of the order within the discretion as to the extent and time frame of the remedial work that is required. See: *Nottingham City DC v. Newton* [1974] 2 All E.R. 760, [1974] 1 W.L.R. 923.

case where the responsible person may for different reasons not be found, or if the nuisance arises from a structural defect. Where more than one person is responsible for a statutory nuisance, action may according to section 81(1) be taken against each such person, regardless of whether or not the matters that each person is responsible for constitute a statutory nuisance.

4.5.3.4 Environmental Civil Sanctions – Compliance, Restoration, or Stop Notices, and More

As presented above, environmental civil sanctions arise from a recent wide reform of the administrative enforcement system. The civil sanctions rules of the RES Act 2008, and the Environmental Civil Sanctions Orders and Regulations 2010 cut across the distinctions between different areas and methods of enforcement. Civil sanctions are hence a widely used term which includes different kinds of administrative orders and sanctions functioning as alternatives or as complementary to criminal enforcement of offences.⁹⁴⁴ Their basis is in the criminal offences, but also provide for appropriate means to direct the actor more directly to change the actual criminal behavior, or to remedy the damage caused.⁹⁴⁵ These civil sanctions thus include orders requiring corrective measures with different purposes, which may therefore be issued by the enforcement authority in response to a listed environmental offence, instead of prosecuting the offender, or as a complement to such prosecution. The general requirement is that the regulator is satisfied beyond reasonable doubt that the offence has been committed. For all these kinds of enforcement orders, the regulator must follow a specifically regulated procedure of specified notices and the addressee can make objections and representations, and can appeal certain decisions. They can also take voluntary action to improve their situation in the context of enforcement of their non-compliance.

Based on the RES Act Sections 42 and 46, and the Environmental Civil Sanctions Order Schedules 2 and 3, regulators are given competence to issue compliance notices or restoration notices in response to environmental offences. A different set of instruments is prescribed for each offence listed in Schedule 5 of the Environmental Sanctions Order. A compliance notice aims to secure that an offence does not continue or recur, and thus targets the non-compliance itself. A restoration notice on the other hand, is aimed at the effects of non-compliance, and serves to make the addressee restore the position as far as possible to what it would have been if no offence had been committed. These notices can for example entail orders to install a maintenance system, to change or update a particular industrial process, or to re-

⁹⁴⁴ See RES Act Section 44. The orders directing the actors behaviour are different from pure sanctions, and therefore criminal enforcement in response to the same offence does not necessarily constitute double jeopardy, see p. 39 of the Guidance to the RES Act.

⁹⁴⁵ Environmental Civil Sanctions Guidance pp. 12–13.

move and treat contaminants to reduce impacts on nature and local communities.⁹⁴⁶

Apart from orders to take positive action, the regulator may also have the power to issue a stop notice (RES Act Section 46, and Environmental Civil Sanctions Order Schedule 3). Such a notice requires the addressee to cease carrying on an activity that is causing harm, or which presents significant risk of causing serious harm, until they have taken the steps specified in the notice. They can therefore have preventive purposes, as well as responding to an actual harm.⁹⁴⁷ The stop notice can be used when the operator is, or is likely to be, committing an offence for which the regulator has such powers. Consequently, in response to ongoing environmental harm, or serious risks, the requirement of “beyond reasonable doubt” is here exchanged for the much lower “likely to be”. The instrument is however only available in the cases of significant harm and serious risks. The stop notice will generally be combined with directions to take certainty steps to repair the harm, so that the activity can be taken up again. When these steps have been taken, the regulator will issue a completion certificate, on issue of which the notice ceases to have effect (RES Act Section 47, and Environmental Civil Sanctions Order Sch. 3 Para. 4). The actor under a stop notice may at any time apply for a completion certificate, on which the regulator must make an appealable decision. It should also be remembered that the stop notice may also be combined with additional civil sanctions or other enforcement instruments, in order to steer the activity to an acceptable situation. Non-compliance with a stop notice is a criminal offence, and punishable with fines and/or imprisonment for up to two years (Environmental Civil Sanctions Order Schedule 3 Para. 6).⁹⁴⁸

A notable feature of this new administrative sanctions system is that it also provides means for actor initiatives on environmental law compliance. Through an enforcement undertaking (RES Act Section 50, and Environmental Civil Sanctions Order Schedule 4), the actor suspected of having committed an offence can make undertakings to redress non-compliance and its effect. The benefit is that he or she will then avoid further enforcement through prosecution or further civil sanctions.⁹⁴⁹ The actor reasonably suspected of an offence for which enforcement undertakings are listed as applicable,⁹⁵⁰ may suggest an agreement with the regulator to the effect that he or she will take certain steps within a certain period. This may entail to return

⁹⁴⁶ Environmental Civil Sanctions Guidance p. 12.

⁹⁴⁷ Regulatory Enforcement and Sanctions Act 2008; Guidance to the Act p. 40; and Environmental Civil Sanctions Guidance p. 32.

⁹⁴⁸ Environmental Civil Sanctions Guidance p. 33.

⁹⁴⁹ Environmental Civil Sanctions Guidance p. 26.

⁹⁵⁰ At the time of writing enforcement undertaking has not be made applicable for that many offences. Examples of such offences are however found in the Water Resources Act rules offences related to licenses to abstract water, and in the context of draught orders etc., see: Sections 24(4)(a) and (b), and 80(1) and (2).

the activity into compliance with the relevant rules, or to restore or compensate for harm.⁹⁵¹ If the authority accepts the undertaking, they have an agreement with the actor, who then avoids prosecution or other civil sanctions from the enforcement authorities (Environmental Civil Sanctions Order Sch. 4 Para. 5). Moreover, when the actor has carried out the agreed steps, the regulator must issue a certificate to that effect (Environmental Civil Sanctions Order Sch. 4 Para. 5). The actor may at any time apply for such a certificate, and the regulator must respond with an appealable decision.

Furthermore, the “third party undertaking” solution enables a person who has received a regulator’s notice of intent to impose for example a variable monetary penalty (VMP)⁹⁵², to make a commitment to take steps to benefit a third party affected by the non-compliance (Environmental Civil Sanctions Order Sch. 2 Para. 4). The regulator will decide whether to accept the third party undertaking. If they do, they have to consider the undertaking in the decision on whether or not to serve a final notice, or on the amount of a VMP (Sch. 2 Para. 5(4)). The instrument of actor undertakings can be seen as a way to give the offender a chance to make things right with the offended third party. Such an undertaking will generally be an appropriate option where there is identifiable harm to local communities or people – some nuisance of specific effect, like dust or soot, or loss of amenities. The undertaking could include financial or actual compensation – making improvements to the local amenities or reducing the nuisance in some way.⁹⁵³

This presentation has shown that administrative orders and private law agreements are found in the context of environmental crime. They provide alternative ways to control the actor’s unacceptable behaviour; and make things “right”, instead of just punishing “wrongs”. The civil sanctions regime provides incitements for voluntary compliance, and more direct ways to bring the actor in compliance with the law, and to repair harm. This should improve the effectiveness and efficiency of the environmental control order, and result in a more cooperative and communicative enforcement procedure.

4.5.4 Enforcing Duties about Knowledge and Information

4.5.4.1 Regulation of Actor Responsibilities for Information – Mainly a Permit Matter

In English environmental law, the actor’s duties of monitoring, investigation, and reporting, etc., are primarily regulated in the permit procedure. There are no general statutory responsibilities for knowledge, investigation and proof,

⁹⁵¹ Environmental Civil Sanctions Guidance p. 27.

⁹⁵² On monetary penalties, see: Section 4.5.6.

⁹⁵³ Environmental Civil Sanctions Guidance p. 25.

as in the Swedish system. Information responsibilities are regulated more indirectly. A general presentation of actor responsibility for information is therefore not possible here. It can, however, first of all be noted that there is a standardised system for requiring information in the permit procedure. An applicant for environmental permit has to apply on a form provided by the regulator, and include all the information specified there.⁹⁵⁴ Permit conditions will as a rule also include monitoring and documentation requirements.⁹⁵⁵ The information so obtained and saved may be important in future enforcement against the thus authorised operator. Information provided or obtained pursuant to, or by virtue of a permit conditions is admissible as evidence in any proceedings against the person subject to the condition or any other person (Environment Act 1995 Section 111(2)). Knowingly or recklessly making false entries in records or giving misleading statements in permit applications, in response to requests for information, or when under duty to keep records, will amount to an offence (EP Regulations 2010, Reg. 38(4), but also the Environment Act Sch. 19).

4.5.4.2 Investigatory Powers Requiring Information from the Actor

Outside the requirements in the conditions of the permit, it is left to the responsibilities of the regulating authority to investigate and produce information, primarily through inspections. As noted above,⁹⁵⁶ the Environment Act 1995 Sections 108, etc., provides investigatory powers for administrative enforcers, including powers to require assistance from the operator, or other relevant persons. These powers are supported by the power to prosecute non-compliance. Some instruments that shift over the responsibilities for knowledge, investigation and proof to the addressees should be pointed out.

First of all, an authorised inspector may under Section 108(4) require any person whom he has reasonable cause to believe to be able to give any information necessary for the relevant examination and investigation to answer such question as the authorised person thinks fit, and to sign a declaration of the truth of his answers (Subsection (j)). Refusal to do so is seen as a failure to comply with the authority's order and is an offence under Section 110(1).

⁹⁵⁴ See for example the Environment Agency application forms at: <http://www.environment-agency.gov.uk/business/topics/permitting/32318.aspx>.

⁹⁵⁵ I have not investigated existing permit conditions on the matter. However, the Environment Agency generic permit template (available at http://www.environment-agency.gov.uk/static/documents/Business/EPRgeneric_permit_template.pdf), suggests conditions on extensive self-control duties. The Agency states that they use the permit template for all bespoke permit applications. It has generic conditions that apply to all applications and annexes that provide extra conditions depending on the activity. The template however does not include any of the schedules that would form part of the permits. These include emission limits, monitoring and reporting requirements and other site-specific information. The monitoring conditions of Section 3.3 are moreover described as optional. In my interviews with UK practitioners, I have also been told that permit conditions stating the operators duties for monitoring, documentation, reporting, etc., are very common.

⁹⁵⁶ Section 4.5.2.

The inspector may also, according to Section 108(4)(k) require the production of any records which are necessary for him to see for the purposes of the examination or investigation. He can also make copies of the records.

4.5.4.3 Further Orders to Provide Information

According to the Environmental Permitting Regulations 2010 Section 60, any of the competent regulatory authorities stated in the Regulations, may serve a notice requiring information. Failure to comply with the notice constitutes an offence, as does giving false or misleading information (Section 38(3)). The notice requiring information may be addressed to “any person”, and should specify the required form and time frame in which to provide the information. The scope of the regulator’s use of this enforcement instrument is widely prescribed as “for the purposes of discharging its functions under these Regulations”. These functions include duties under EU law and other international law, as well as making inventories of emissions (Subsections (3) and (4)). This suggests that the regulatory authority may require the actor to produce any information needed in different permit procedures and compliance control, as well as the relevant authorities’ general monitoring schemes.

Notably, Subsection (2) prescribes that the authority may, where reasonable, require information on emissions. This applies also when the actor does not at the time of such request possess the information, or could normally be expected to possess it. The notice could thus confer a duty to investigate and produce new information. The requirement however has to be reasonable.

4.5.4.4 Statutory Nuisance

The above-described powers involving the responsible actor in the investigation of matters of environmental regulation apply to the regulating authorities under the Environmental Permitting regime, but not local government authorities enforcing statutory nuisance law. The local health authorities are not to the same extent provided with explicitly conferred powers to require information and documentation. They only have more limited powers of powers of entry and may carry out their own inspection, prescribed in Schedule 3 of the EPA 1990. This suggests a more limited possibility for the enforcing authority to lay upon the actor any investigatory duties, compared to permitted operations. This may be argued as appropriate, in view of the fact that statutory nuisance cases will often – but not always – concern neighbour disturbances between private persons or small businesses.

Nevertheless, the statutory nuisance regulator can be argued to have other means to shift responsibilities for knowledge, investigation, and evidence, over to an addressed actor. They are quite free in their formulation of enforcement notices. This is to some extent particular to statutory nuisance. The regulator may, according to EPA Section 80 order works to be done, but they do not have to. In the other described kinds of administrative enforce-

ment orders, the necessary works have to be stated in the notice. The statutory nuisance regulator can through a blank order requiring abatement of a stated nuisance leave it to the actor to find out how they should appropriately go about remedying the stated problem.⁹⁵⁷ This could necessitate considerable expertise and investigation, and thus potentially shift these responsibilities over to the responsible actor. This indirect shift of information responsibilities will be discussed in Chapter 8.

4.5.5 Enforcing the Enforcement Measures

4.5.5.1 Introduction – Basis in Criminal Enforcement of Non-Compliance with Enforcement Measures

A special feature of the English system is that criminal law provides a main force behind administrative enforcement action. This feature provides the basis for enforcement of administrative enforcement. Traditionally, English environmental law relies heavily on enforcement through penal sanctions, or the threat thereof. There is an extensive and strict criminalisation of offences against the public control system. Crucially, in this context, non-compliance with different kinds enforcement order generally constitutes an offence, and the administrative enforcement authorities can and do prosecute these offences. Recently civil sanctions have been introduced as an alternative to penal sanctions. These include administrative penalties and measures directed more at directing the addressee to change their behaviour, and have been discussed earlier. These administrative enforcement measures – or civil sanctions – are, however, based on the criminal enforcement structure, as they apply as alternatives to the enforcement of criminal offences. Authoritative enforcement of non-compliance with administrative enforcement measures thus continues to be largely based on the criminalisation of non-adherence to administrative control measures.

Keeping in mind this essential criminal law feature of UK environmental law enforcement, the presentation will focus on some instruments which operate alongside that system. Such instruments include the possibilities for the authorities to carry out the works themselves and get compensation from the liable person, and going to court for an injunction to put more authority behind their enforcement order. Enforcement of such criminal offences will be further presented in Section 4.5.8.

4.5.5.2 Injunctions

A measure that is often available to the regulator is to initiate court proceedings for an injunction to ensure compliance with a notice. An injunction is a

⁹⁵⁷ *R. v. Falmouth and Truro Port Health Authority, ex p. South West Water Ltd* [2000] Env L.R. 658, p. 686.

court order directing a private or legal person. The directions can be negative or positive – either forbidding some unlawful action (sometimes called a prohibitory injunction) or demanding that the addressee do something – that they take certain action (mandatory injunction).⁹⁵⁸ Mandatory injunctions are the rarer kind. In fact prohibitory injunctions are sometimes regarded as the only injunction rewarded.⁹⁵⁹ Where mandatory injunctions are considered, cost benefit considerations are taken into account.⁹⁶⁰

The injunction is seen as a very potent instrument and a method to provide enforcement measures with more authority. An injunction can be obtained speedily and non-compliance may be met with fast impositions of a sentence for contempt of the court's order, which is an offence that is generally punished by heavier sanctions than the summary convictions involved in prosecuting non-compliance with administrative orders. Courts are perceived to be generally keen to uphold the legitimacy of their orders, thus dealing with breaches severely. An injunction may consequently serve as a useful tool, for example when an unlawful activity continues despite the authority's enforcement measures, perhaps including prosecution. This might be the case when the actor realises that the fines and costs involved in non-compliance with the authority's enforcement measures are less than the profits expected from continuing the activity;⁹⁶¹ a situation which has been noted as not that unusual in the environmental field.⁹⁶²

Another benefit of seeking an injunction instead of prosecuting an actor in breach of the authority's enforcement orders is that here the civil burden of proof of balance of probabilities applies, rather than the criminal law higher burden of "beyond reasonable doubt". There are on the other hand some legal difficulties and financial risks. Civil proceedings seeking an injunction are expensive, and the authority could be liable for damages if it is established later that the application for injunction was incorrect and that the relevant actor has suffered financially as a result of the application. Also, injunction can only be sought in justified cases – when prosecution would be an ineffective remedy.⁹⁶³ The statutory provisions providing recourse to seek an injunction will generally require that other enforcement measures – for example enforcement orders – be used first. The injunction route is only to be used in response to non-compliance. However, the possibility of a criminal prosecution does not, per se, prevent the recourse to an injunction.

⁹⁵⁸ Cane, P., *Administrative Law* p. 86; Wade, W., and Forsyth, C., *Administrative Law* p. 561.

⁹⁵⁹ Jones, B., and Parpworth, N., *Environmental Liabilities* p. 146.

⁹⁶⁰ Jones, B., and Parpworth, N., *Environmental Liabilities* p. 146; and *Redland Bricks Ltd v. Morris* [1970] A.C. 652.

⁹⁶¹ National Investigations Manual, 353_03 Section 7.

⁹⁶² See Section 4.4.1.

⁹⁶³ National Investigations Manual, 353_03 Section 7.

Recourse to injunctions is available, for example, in the EP Regulations, Reg. 42, and the EPA Section 81(5) where the regulator considers that proceedings for an offence would provide an ineffectual remedy.⁹⁶⁴ The statutory nuisance provision for seeking a court injunction is formulated slightly differently as to the purpose of this recourse, and whether or not prior non-compliance with a notice is explicitly required. While EP Regulation 42 states the purpose for taking proceedings as securing compliance with the notice, EPA Section 81(5) has a wider wording as to the purpose. The latter provision states that proceedings may be taken for the purpose of securing the abatement, prohibition or restriction of the nuisance. The recourse is available also when the local authority has itself suffered no damage from the nuisance.

The wider purpose of the statutory wording could just be due to the different time of drafting; the health law provisions are generally of an early origin. But it could be argued that this is quite logical as Section 81(5) also does not explicitly require the prior non-compliance with an abatement notice. Earlier this was interpreted as meaning that injunctions were an additional remedy to the service of an abatement notice, etc. An enforcing authority could thus take High Court proceedings even when the summary remedies had not been exhausted first.⁹⁶⁵

However, in the case of *The Barns (NE) Ltd v. Newcastle Upon Tyne CC*⁹⁶⁶ it was held that the different instruments in the Act were intended to be used as consecutive steps when addressing statutory nuisance. The first step was described as serving an abatement notice. The second and third steps subsequently were used to further enforce the order, addressing non-compliance with the notice. The second step was held to comprise prosecution of the non-compliance offence in s 80(4), or the authorities' taking of remedial steps themselves and recovering the costs thereof, supported by s 81(3) and (4). The third and final step, then, was held to be the seeking of a High Court injunction under s 81(5). This was to be used as last resort, only to be used where criminal proceedings were deemed ineffective, and the requirement to have served an abatement notice before further enforcement action was seen as equally necessary for the third step (which was seen as more drastic) as with the second step, where this was explicitly stated in the

⁹⁶⁴ An example of such a situation is where a previous conviction for a similar offence has not changed the relevant actor's actions. See for example: Hughes, D., et.al., *Environmental Law* p. 680.

⁹⁶⁵ *Hammersmith LBC v. Magnum Automated Forecourts* [1978] 1 W.L.R. 50. In this case the enforcer had served a notice which was appealed. Before the appeal came to Court the enforcer chose not to prosecute non-compliance with the notice, but instead initiate High Court proceedings. The appeal proceedings were stayed pending the decision of the High Court. The High Court refused the injunction on the grounds that the summary proceedings had not been exhausted, but the Court of Appeal deemed the action to seek injunction in the High Court fully justified and granted the injunction.

⁹⁶⁶ [2006] Env. L.R. 25.

statute. This judgment was largely founded on the fact that the enforcing authority does have a duty to serve an abatement notice, and that there was nothing in the law that would suggest otherwise. Parliament had intended that everyone should have the opportunity to comply with an abatement order.

The prerequisite for seeking an injunction, that prosecution is deemed to afford an ineffectual remedy to address the non-compliant actor, is a central requirement. The enforcing authority has to apply this test. In *Vale of White Horse DC v. Allen & Partners (Allen)*⁹⁶⁷ it was shown that these considerations had not been made by the authority. They were held not to have formed an opinion on the relevant prerequisites and thus had not made a valid decision to initiate High Court proceedings. Their reasons for seeking this remedy was instead based on expediency and the flexibility of the proceedings, etc., and was thus seen as *Wednesbury* unreasonable for not considering all the relevant factors.⁹⁶⁸

In conclusion, the High Court injunction is a potentially powerful tool for enforcing the regulator's enforcement measures. It is surrounded by limitations, which make them a sort of last resort measure. The High Court injunction is nevertheless a quite viable coercion instrument, also in practice.⁹⁶⁹

4.5.5.3 Administrative Coercion – Default Action by the Authority

The administrative enforcement authority will generally have powers to take action themselves to solve an environmental problem, if they for some reason cannot make a responsible actor to do it. Such action may often be taken at the expense of the responsible actor. It thus constitutes an instrument to ensure that action is taken, even in cases involving uncooperative actors who do not comply with orders. Central such default powers are found in water law, where river pollution control has traditionally been based on anti-pollution works and operations by the regulating authority itself (see *Water Resource Act 1991* Section 161). Later on this has been supplemented with the power to serve works notices on persons, now mainly as a first resort (Section 161A). Also in the areas of law investigated here do the regulators have powers to arrange for steps to be taken to remedy environmental problems at the expense of the responsible actor.

The regulatory authority under the EP regime may, according to EP Regulation 57(2) arrange for steps to be taken to remedy pollution from a regulated operation carried on without a permit, or in contravention of a permit condition or an enforcement notice. Notably, these acts constitute

⁹⁶⁷ [1997] Env. L.R. 212.

⁹⁶⁸ *Vale of White Horse DC v. Allen & Partners* [1997] Env. L.R. 212, p. 224.

⁹⁶⁹ For a recent example of the Agency's application and gain of a High Court injunction, see official Agency news at: <http://www.environment-agency.gov.uk/news/114289.aspx>. Note also the notice: *Agency resorts to injunctions to control unlicensed waste disposal*, in: ENDS Report 300, 1 January 2000, p. 48.

offences under Reg. 38 (1)-(3). The regulator may also take steps to remove risks of serious pollution, according to Reg. 57(1), whether or not such offences have been committed. This means that the administrative authority may step in and abate serious problems even when these are caused by an installation operating within its permit.

After the work is done the regulator may recover the costs of taking these steps from the concerned operator according to Reg. 57(4), unless – and to the extent that – the operator shows that the costs have been unnecessarily incurred by the regulator. In addition to this, costs cannot be recovered for steps taken to remove a risk under subsection (1) where the operator shows that there was no such risk of serious pollution. It may be noted that the burden of proof is on the operator. However, the standard of proof is the civil law balance of probabilities. This suggests that if the operator can show sufficiently well that this is the case, so the balance is in his favour, the burden shifts to the regulator to prove otherwise.

Also the regulators of statutory nuisances may take action themselves where an abatement notice has not been complied with, and recover their expenses (with interest). This power is prescribed in EPA 1990 Section 81(3)-(4), and Section 81A. It applies notwithstanding prosecution for the offence of non-compliance with enforcement measures. The expenses of abating and preventing recurrence of the nuisance are to be recovered from the person or persons by whose acts or default the nuisance was caused. The court has wide powers to distribute expenses between the responsible persons, in such a manner as it considers fair and reasonable.⁹⁷⁰

4.5.5.4 Lack of Administrative Coercion and Sanctions?

This presentation suggests that UK administrative law provides little coercive power to the enforcement authorities. They do not have administrative instruments of pressure such as the conditional fine to put some weight behind their enforcement orders. They can only respond to non-compliance by asking the court to make authoritative orders to back them up, and they can carry out the required measures themselves and try to recover expenses from a responsible actor. This however is an incomplete picture of the authority and power of the UK administrative enforcers in environmental law, as their competences are, in fact, much wider. They have powers in relation to a wide range of offences, such as non-compliance with enforcement orders, and they also have access to civil sanctions. Moreover, the administrative authority responsible for compliance control is generally also the permit authority, and will thus have access to instruments tied to the permit. To paint a more complete and relevant picture of administrative enforcement in the UK, these instruments will next be presented briefly.

⁹⁷⁰ Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990–2002* p. 386.

4.5.6 Administrative Sanctions – Monetary Penalties

4.5.6.1 Introduction

The new civil sanctions reform has introduced a kind of administrative sanction fee in the so called “fixed monetary penalties (FMP), and “variable monetary penalties” (VMP); two instruments of quite different character. The Environmental Civil Sanctions Order specifies the offences for which the regulator may use these sanctions in Schedule 5, and regulates their application in Schedules 1 and 2. A regulator may only decide on these monetary penalties in cases where they are satisfied beyond reasonable doubt that the person has committed the relevant offence (RES Act 2008 Sections 39(2), and 42(2), and Environmental Civil Sanctions Order Para. 1(2) of Schedules 1 and 2). This is a reminder of the fact that civil sanctions are sanctions for criminal offences, and function as alternatives to criminal enforcement.

Before imposing a monetary penalty a notice of intent has to be issued, stating mainly: the grounds for the penalty, the sum, possibilities to object, and the time periods for payment or objection. It must also explain the effect of discharge payment (for example that they need only pay half of the FMP amount if they do it before the prescribed time frame of 28 has run out). It must also refer to relevant defences and other grounds for the regulator not being allowed to impose the penalty. After the time period of 28 days has run out the regulator must decide whether or not to impose a final notice of a penalty. Such a notice must in addition to specifying the penalty amount, and when and how to pay it, state the grounds for imposing the penalty, the right to appeal, the process of agreement, and the consequences of non-compliance. The procedure is prescribed in the Regulatory Enforcement Act Sections 40 and 43, and the Environmental Civil Sanctions Order Schedules 1 and 2.⁹⁷¹

Having been made subject to such a penalty, or relevantly having discharged liability (or being given time to do so), protects them from conviction for the same offence (see RES Act Sections 42 and 44, and Environmental Civil Sanctions Order Schedule 1 Para 10, and Schedule 2 Para. 9). The penalties are awarded directly, without having to lodge claims in the courts for unpaid sums, and the regulator has several enforcement options in case of non-compliance of the penalty order, including a warrant of execution from a bailiff.⁹⁷²

4.5.6.2 Fixed Monetary Penalties (FMP)

FMP are fines of relatively low prescribed amounts that the regulator may impose for a specified minor offence, and thus replace criminal enforcement

⁹⁷¹ See, also Environmental Civil Sanctions Guidance pp. 22–24, and 30–31.

⁹⁷² Regulatory Enforcement and Sanctions Act 2008; Guidance to the Act pp. 33–34.

altogether. The VMPs cannot be used in conjunction with any other sanction.⁹⁷³ Guidance states that FMPs are appropriate for relatively minor offences, for example failures to meet requirements to monitor and document, when the regulator has tried to advise the actor, and wants to direct the actor towards compliance with a little more pressure. FMPs are not appropriate for serious cases of intentional, repeated or significant actions non-compliance, etc.⁹⁷⁴

The Environmental Civil Sanctions Order Schedule 1, Para 1(3) prescribes FMP amounts of £100 for an individual, and £300 for a body corporate. However, according to Schedule 1, voluntary acceptance of liability and paying penalties – “discharge payment” within a certain time period will give a 50% discount on the sum (Para. 3 and 7), and non-payment 56 days after final notice, or 28 days after an unsuccessful appeal, will increase the sum by 50% (Para. 9).⁹⁷⁵ The addressee is better off the more active they are. This provides incitements for voluntary compliance, and a faster and more efficient procedure. The potential for immediate response may suggest a more direct and effective steering function.

4.5.6.3 Variable Monetary Penalties (VMP)

A VMP is a proportionate monetary penalty which the regulator may impose for the more serious cases of non-compliance, but where the regulator decides that prosecution is not in the public interest. The specific function of the VMP is to remove financial benefits that may come from non-compliance with the relevant regulation, and adequately deter future such non-compliance. They should be used where other enforcement measures do not manage to do this.⁹⁷⁶ This, therefore, meets the earlier indicated criticism of the ineffective and expensive criminal enforcement measures, and also links to the polluter pays principle. However, enforcement measures aimed at bringing the actor into compliance with the law, and to repair damages will always take priority over penalties.

The VMP amount is determined by the enforcer to reflect the circumstances of the relevant offence. It is set at a level which is proportionate to the risks and type of offence involved, and to provide sufficient incitement to change behaviour. Some typical factors that could be weighed when setting the fine can be the environmental damage or risk involved, the economic gains made by the perpetrator – which should of course be delimited – and

⁹⁷³ Regulatory Enforcement and Sanctions Act 2008; Guidance to the Act p. 31; and Environmental Civil Sanctions Guidance, p. 29.

⁹⁷⁴ Environmental Civil Sanctions Guidance p. 29.

⁹⁷⁵ See: Environmental Civil Sanctions Guidance Section 2.83–2.84, and Regulatory Enforcement and Sanctions Act 2008; Guidance to the Act Section 38.

⁹⁷⁶ Environmental Civil Sanctions Guidance p. 14.

the sought after deterrent effect.⁹⁷⁷ The enforcement authority has duties under RES Act Section 63 to publish guidance as to how it will apply the civil sanctions, etc. This guidance includes information on the factors they are likely to take into account in this decision.⁹⁷⁸ The VMP can never be set at a higher amount than £250 000, according to the Environmental Civil Sanctions Order prescribed in Schedule 2 Para. 1. In relation to offences triable summarily only, where the offence is punishable by a fine, the VMP amount cannot exceed the maximum fine – normally 5 000.⁹⁷⁹

4.5.6.4 Concluding Remarks

These instruments have only recently been introduced in the UK enforcement order. The regulators are at the time of writing working on guidance on how to apply them. It is not possible here to analyse the matter further. Their introduction and the general reforms of enforcement mark a shift in the direction and approach of public compliance control, not only in the area of environmental law. It is part of a search for more effective enforcement, focused on bringing the actors towards compliance, but with access to appropriate and truly deterring sanctions. This is largely based on a wide range of enforcement options, so as to be able to tailor the approach to the situation, but also with the aim of making polluters bear their environmental costs.

4.5.7 Instruments Tied to the Permit

4.5.7.1 Introduction

The EP regulator, in its comprehensive administrative control function, will steer the actor and enforce environmental law in all aspects of enforcement. They will issue and review permits, as well as monitor compliance and enforce breaches of law. This comprehensive role is common in the UK order for administrative law. The role and function of the regulator, as well as its powers, are thus different from a legal order such as Sweden where these roles are separated. This touches upon questions about the legal status of the permit and of the permitting decision, which are very interesting and topical for the comparison of the enforcement of environmental law in the UK and Sweden. These questions are however not the topic of this thesis, but of another part of this research program.⁹⁸⁰ Suffice it to say in the context of this thesis, that the EP regulator in England and Wales has extensive enforcement instruments linked to their permitting functions. They can, for example,

⁹⁷⁷ Environmental Civil Sanctions Guidance pp. 14–22. See, also: Regulatory Enforcement and Sanctions Act 2008; Guidance to the Act p. 38, for generally stated examples of factors.

⁹⁷⁸ Regulatory Enforcement and Sanctions Act 2008 Section 63.

⁹⁷⁹ Regulatory Enforcement and Sanctions Act 2008, Guidance to the Act p. 38.

⁹⁸⁰ Darpö, J., *Rätt tillstånd för miljön*.

vary or revoke the permit, partly or in its entirety. This changes the context of the more supervisory administrative enforcement instruments. They are not so much confined by earlier regulatory decisions concerning the polluting activity. If enforcement notices and consultation is not enough to remedy a particular pollution problem, the same regulator can change the scope of the operation of the installation. These instruments mainly involve varying the permit conditions and revoking the permit. The suspension notices presented above should also be kept in mind. They are also directed at the permit, as it suspends the permit awaiting some environmental measures, even though they function as a kind of stop order.

4.5.7.2 Changing Permit Conditions – Variation Notices

Based on Regulation 20, of the EP Regulations, the regulator may vary the permit conditions, on its own initiative or on application by the permit holder. Typically for this thesis, the regulator – which is both permit authority and enforcement authority – has a duty to review permits (Reg. 34) and they have powers to change these through a variation process, and a resulting variation notice (see Schedule 5 of the Regulations). These powers are quite widely formulated and consequently provide the wide regulatory powers and discretion. However, as a main rule the variation must not result in reduction of the site of a regulated facility. Conditions that relate to water discharges are moreover protected for four years from the grant of the permit, from variation without consent from the operator, unless variation is needed mainly for compliance with EU law. It should be noted that standard rules regulation provides a new addition to this context, in that the conditions tied to standard rules will automatically be varied as the generally formulated standards rules are (see Chapter 4 of the EP Regulations). This means that the full permit procedures be fewer and more or less reserved for more complex or sensitive situations, where standard rules are not appropriate.

4.5.7.3 Revoking Permits

The authority may, according to EP Regulations, Reg. 22 revoke a permit, in whole or partially. They may also vary the permit conditions to take account of the revocation. When deciding to revoke a permit, the regulator must serve a notice on the operator specifying the reasons for revocation and the date on which it will take place. In the case of partial revocation the extent to which the permit is revoked must also be specified, as well as any variation to the remaining conditions. The regulator will also specify in the revocation notice the steps that need to be taken after the revocation takes place, to avoid pollution risks and restore the site. This is prescribed in Reg. 23(1) and (5). If the operator is already under duties to do these things under the permit, the regulator must state this fact in the notice, and that the relevant permit rules continue to have effect until the regulator issues a certificate to confirm that these measures have been taken (Subsections (3)-(4).

4.5.8 Relationship to the Criminal Enforcement System

4.5.8.1 A Close Connection

As earlier noted, the focus on criminal sanctions has traditionally been a central feature of English environmental law. In many ways it still is. Prosecution or threat thereof is the primary additional pressure behind administrative enforcement. Crucially also, the administrative enforcement authority, like the Environmental Agency⁹⁸¹ or the local authority, also have criminal enforcement powers. They will make criminal investigations and prosecute offences. Administrative enforcement of environmental law is to a great extent supported by criminal law, in that failure to meet the terms of the control system is extensively criminalised. Moreover, enforcement of offences against the control system has been a priority in prosecution policies, with reference to upholding the authority of the regulator. Penal sanctions will not be closely analysed in this thesis. This is the topic of another part of the ENFORCE research programme.⁹⁸² However, due to the close connection of the administrative enforcement system and the penal law enforcement system, it is necessary to describe shortly some aspects of the penal law instruments and their effect on, or meaning to the administrative enforcement system. Although, first of all, I will summarise some of the offences described above. Then the new alternative enforcement forms of civil sanctions will be discussed.

4.5.8.2 Some Topical Environmental Offences

As noted, there is a wide range of environmental crime. Above, I have noted a range of offences against the environmental control system, which are topical to this study. These include obstruction of the regulator's investigations, carrying out an activity without necessary authorisation, and non-adherence to regulatory orders.

First of all the regulator's investigatory powers under the Environment Act 1995 and the EPA 1990 are supported by the criminal system. Obstructing an Environment Agency officer in the exercise of his powers and functions constitutes an offence, as does failing to answer an inspector's questions or otherwise to assist him on inspection (Environment Act 1995 Section 110). It also constitutes an offence under EP Regulation 38(4), to fail to comply with a notice to provide information, without a reasonable excuse. According to the same section, knowingly or recklessly giving false or misleading information to the regulator is extensively criminalised. EPA Section

⁹⁸¹ See Environment Act 1995 Section 37(1). Acting as prosecutor for the Agency are Regional solicitors, with assisting legal teams under them, see the National Investigations Manual Doc. No. 353_03, Section 3.5.

⁹⁸² Jönsson, S., *Miljöstraffrätt – ett sätt att genomdriva lagstiftningens mål?*

110 states corresponding offences in the context of inspections in statutory nuisance control.

Next, it constitutes an offence under EP Regulation 38(1)–(2) to operate an installation or a process without the proper permit, or to contravene the conditions of the permit. These offences can be committed by both individual persons and legal persons (i.e. the company).

The most essential feature however of criminal law support of the studied administrative enforcement instruments, is the criminalisation of non-compliance with administrative enforcement orders. This is a general feature of UK administrative law. In the areas of law studied here, Regulation 38 of the EP Regulations 2010 states that it is an offence to fail to comply with, or to contravene, the requirements of an enforcement notice, a suspension notice, a notice requiring information, and more. EPA Section 80(4) moreover criminalises failure to comply with any prohibitions or requirements stated in an abatement order.

4.5.8.3 Some Notable Features of Environmental Crime; Corporate Crime and Strict Liability

A noteworthy aspect of the criminal enforcement of UK environmental law is that both individuals and corporations may be prosecuted. There are instruments within the penal system for attaching criminal liability to companies or officers thereof, through identifying a sort of directing mind and will, or intention, of the company in the acts, etc., of those exercising control over the company,⁹⁸³ or through so called vicarious liability, where the company is liable for the actions of its employees taken in the course of their employment.⁹⁸⁴ This is potentially a powerful instrument toward corporate environmental crime, especially in strict liability offences. A person who commits an offence can thus be either a legal person or a private one. Sometimes it can be both. If it is shown that the offence was committed with the consent or connivance, or has been attributable to any neglect on the part of any officer of that body corporate, he or she is also guilty of the offence. This is the case in the EP Regulations (see Section 41). The term “officer” here refers to a director, manager, secretary, etc. – a person in a leading or controlling capacity. If the affairs of a body corporate are managed by its members, they will be liable as if they were a director. These formulations are aimed at “tearing the corporate veil”, thus allocating personal liability (and stigma) to,

⁹⁸³ The introduction of the identification principle in criminal law happened through three cases decided in 1944: *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd* [1944] 1 K.B. 146; *R. v. ICR Haulage Ltd* [1944] K.B. 551, and *Moore v. Bresler* [1944] 2 All E.R. 515, but the origins of the idea can be seen also in civil law cases, see: *Lennard’s Carrying Co Ltd v. Asiatic Petroleum Co Ltd* [1915] A.C. 705, and *H.L. Bolton (Engineering) Co Ltd v. T J Graham & Sons Ltd* [1957] 1 Q.B. 159. See: Jones, B., and Parpworth, N., *Environmental Liabilities* pp. 227–231.

⁹⁸⁴ See Jones, B., and Parpworth, N., *Environmental Liabilities* p. 233.

but have been argued only very rarely to be successful.⁹⁸⁵ The Environment Agency's enforcement and prosecution policy states that where a company is involved, it will be usual practice to prosecute the company for offences resulting from its activities, but that action may also be taken against responsible officers.⁹⁸⁶

The focus on strict liability is another important aspect of criminal enforcement of environmental law. There is very often no requirement as to proof of *mens rea* on the part of the wrongdoer.⁹⁸⁷ Concerning corporate liability, it must only be shown that the prohibited actions can be viewed as the actions of the company. This solves problems with proof, and makes it harder for officers to escape criminal liability by delegating risky behaviour.⁹⁸⁸ This strict liability stands out in context of the UK's general doctrine of criminal liability, where intent or recklessness must be proved. Nevertheless, in the context of strong public interest in preventing the relevant events or actions, strict liability has been accepted by Parliament and the courts.⁹⁸⁹

An often referred to environmental case is *Alphacell Ltd v. Woodward* (*Alphacell*), a case of water pollution.⁹⁹⁰ Here it was held that relevant criminal provisions did not require the prosecution to establish that the defendants had knowingly, intentionally or negligently caused pollution. To require this would put a burden of proof on the prosecutor which could seldom be discharged. The Court also considered the environmental policy considerations behind these kind of offences important and as motivating this decision. The prohibited behaviour may thus be hit by penal sanctions, even in the absence of any real culpability. Consequently, the public interest of not only punishing but also preventing environmental harm legitimates requirements of extra caution when carrying out activities that may entail environmental risks.

Strict liability features in most environmental offences, for example in the provisions stating offences of non-compliance of enforcement measures in Regulation 38 of the EP Regulations and Section 80(4) of EPA. These rules do not expressly describe any intent or culpability to be proved, but only that

⁹⁸⁵ Hughes, D., et.al., *Environmental Law* pp. 511–512, and 539. Moreover, earlier convictions are, according to the Environmental Permitting. Core Guidance, Sections 9.14–19 at pp. 50–51, to be considered in the regulatory assessment of operator competence.

⁹⁸⁶ Enforcement and Prosecution Policy Doc. No. EAS/8001/1/1, Version 2, Issued 07/08/08, Section 25.

⁹⁸⁷ Hughes, D., et.al., *Environmental Law* p. 5.

⁹⁸⁸ Jones, B., and Parpworth, N., *Environmental Liabilities* p. 237.

⁹⁸⁹ For an authoritative case on strict criminal liability, see: *Sherras v. De Rutzen* [1895] 1 Q.B. 918 (p. 922), *Warner v. Metropolitan Police* [1969] 2 A.C. 256 (also in [1968] 2 All E.R. 365). In *Warner*, Lord Reid argued in terms of the actor bearing the risks for such situations in the areas of law where absolute offences/regulatory offences are regulated. This is argued to be in the public interest and thus outweighs the comparatively minor injustice of paying penalties for a non-culpable action. See, also Hughes, D., et.al., *Environmental Law* p. 5; Macrory, R., *Regulation, Enforcement and Governance in Environmental Law* p. 12; and Parpworth, N., *Unlicensed Tree Felling: A Further Example of a Regulatory Offence*.

⁹⁹⁰ *Alphacell v. Woodward* [1972] 2 All E.R. 475.

the addressee has failed to comply. This seems quite strict. On the other hand the relevant regulation will often list some defences. Defences are listed in EP Regulation 40, and EPA Section 80(7)-(9), for example the defence that the best practicable steps have been taken in the circumstances for minimising pollution, and the regulator has been informed of the particulars of the act (EP Reg. 40(1)). The offender can thus sometimes escape criminal prosecution if they have acted reasonably responsibly. The defence of “reasonable excuse” for non-compliance with a notice is also commonly available, and thus softens the impact of strict liability.

4.5.8.4 Civil Sanctions

Earlier in this chapter,⁹⁹¹ civil sanctions were presented as the UK enforcement order moving away from its strong focus on criminal enforcement. For environmental law enforcement they are found in the Environmental Civil Sanctions Order 2010, which lists environmental offences and the different sets of civil sanctions that are applicable. As has been presented earlier, these rules state a range of enforcement instruments, with the aim of providing more flexible, proportionate, and thus also more effective administrative measures to tackle non-compliance. The civil sanctions can also be used in different combinations, for best result.⁹⁹² They provide enforcement powers that can be tailored to the varying circumstances of different cases, and the regulators can distinguish between actors with a good general approach to compliance and those who tend to disregard the law.⁹⁹³

Civil sanctions are available as alternatives to criminal sanctions, as a response to a criminal offence. They can therefore be described as something in between criminal and administrative enforcement, and consequently meld together different enforcement approaches. Civil sanctions function as sanctions for criminal offences, and can therefore not be characterised entirely as administrative enforcement. However, they include measures of similar content and aim to more traditional administrative enforcement orders, which have been described under Section 4.5.3.4. These are compliance, restoration, and stop notices. The introduction of the power to serve such a notice instead of criminal enforcement means that enforcers can choose to respond to criminal offences through an administrative enforcement approach, thus more directly making the actor change his behaviour and thus avoid further breaches, or do something about the problematic effects thereof. There are also instruments that give an offender opportunity to put things right; to take on preventive or reparatory measures, generally, or to benefit an affected party. These are called enforcement undertakings and third party undertakings, and have also been described under Section 4.5.3.4.

⁹⁹¹ See: Sections 4.3.1.5 and 4.5.3.4.

⁹⁹² Environmental Civil Sanctions Guidance, at Section 2.19.

⁹⁹³ Regulatory Enforcement and Sanctions Act 2008, Guidance to the Act, pp. 35–37.

Environmental civil sanctions also include monetary penalties, which have been presented in 4.5.6. They can be more traditionally characterised as a penal sanction, but are designed more to direct the offender to act differently. There are both fixed monetary penalties (FMP) and variable monetary penalties (VMP). The level of the latter is determined by the enforcer to reflect the circumstances of the relevant offence. The enforcer can set a fine at a level which is proportionate to the risks and type of offence involved, and a sufficient incitement to change the behaviour. Factors to be weighed when setting the fine are the environmental damage or risk involved, the economic gains made by the perpetrator, as well as the sought after deterrent effect.⁹⁹⁴

Civil sanctions are argued to be more effective than prosecution, both functionally and financially, as criminal enforcement will often result in low penalties and costly court procedures, and do not focus on making the perpetrator change behaviour or improve the situation. Prosecution has an important function, but should be saved for such genuinely serious cases where there is a need to make a statement of disapproval – involving stigma and heavy penalties. These serious cases would typically be where there is evidence of intentional or reckless behaviour, or of repeated flouting of the law.⁹⁹⁵

These reforms are quite recent. There can hardly be found any evidence yet of the experiences and consequences of the application of the civil sanctions. The Environment Agency has been working on producing new enforcement policy documents, in which they will state when they think civil sanctions should be applied. However, for the purpose of this thesis, the topic will have to be left at short indications of things to come.

4.5.8.5 Concluding Remarks

A strict, extensive, and widely accessible criminal enforcement system has been presented above. Crucially, the administrative control order is supported by criminal law. It generally constitutes an offence not to adhere to enforcement measures. That fact, together with the criminal enforcement competences of the administrative enforcer, means that criminal enforcement functions directly as a coercive instrument, putting pressure on the addressee to comply, and generally to give the administrative enforcers authority. This also suggests a very extensive criminal enforcement system, especially in view of the strict liability of environmental offences. But there are mitigating factors. While the authorities have the competence to prosecute these offences, they are not bound by any statutory obligation to take such action.⁹⁹⁶ English law recognises a substantial prosecutorial discretion, not only for

⁹⁹⁴ Regulatory Enforcement and Sanctions Act 2008; Guidance to the Act, p. 38.

⁹⁹⁵ Macrory, R., *Regulatory Justice: Making Sanctions Effective* p. 38.

⁹⁹⁶ Hughes, D., et.al., *Environmental Law* p. 11

environmental offences, but also generally.⁹⁹⁷ In other systems prosecution is only a matter for the particular prosecuting authorities, and there is often a duty on the prosecutor to initiate criminal proceedings should certain prerequisites be at hand. In the UK this is a matter of discretion, assessed case by case, guided by prosecution policies.⁹⁹⁸

The Environment Agency policy documents and internal instructions show when they will prosecute, or take other enforcement measures. The Agency recognises that prosecution is a serious matter that should only be taken after full consideration of the implications and consequences. Prosecution decisions are made taking account of the Code for Crown Prosecutors. Consideration of the sufficiency of evidence and of the public interest is central. Despite this, it is stated that the Agency's prosecution policy is that enforcement action should normally be taken for every offence, and that they will not hesitate to use enforcement powers where necessary. They will consider criminal enforcement of offences, sometimes in conjunction with other enforcement tools.⁹⁹⁹ For the types of offences, where the exercise of enforcement functions of the Agency is hindered, or their order not complied with, there is even a presumption of prosecution where there is sufficient evidence. The Agency will thus normally prosecute in these cases.¹⁰⁰⁰ Maintaining the authority of the enforcement work is seen as of significant public interest. Not to prosecute would also be unfair to those actors who take action to comply and work with the regulator. Sometimes the Agency will – apart from prosecuting – also take other remedial measures – such as default action. They will consider measures tied to the permit in cases of breach of permit conditions. In cases of carrying out an activity without a permit, a range of different remedial enforcement steps are suggested, depending on the environmental risks involved, etc.¹⁰⁰¹

Recently, the focus on criminal enforcement has been criticised. Reforms of the enforcement system have introduced new alternative enforcement instruments – civil sanctions. Moreover, the Better Regulation agenda is infused with strong policy statements on proportional and targeted enforcement, focused on making things right rather than punishing wrongs. All this has been described earlier, mainly in Section 4.4.4. This will be reflected in future enforcement and prosecution policies, and will thus also steer administrative practice. It should be noted, however, that civil sanctions are generally not available for offences against the administrative control order (ex-

⁹⁹⁷ Jones, B., and Parpworth, N., *Environmental Liabilities* p. 219.

⁹⁹⁸ Jones, B., and Parpworth, N., *Environmental Liabilities* pp. 219 and 223–224. Note the Environmental Agency's prosecution policy, and the Code for Crown Prosecutors.

⁹⁹⁹ The Environment Agency Enforcement and Prosecution Policy Sections 8 and 20.

¹⁰⁰⁰ The Enforcement and Prosecution Policy, Doc. No. EAS/8001/1/1, Version 2, Issued 07/08/08, Section 29.

¹⁰⁰¹ The Guidance for the Enforcement and Prosecution Policy, Doc. No. 354_03, Version 24, 07/07/08, Sections 3.1–3.6.

cept for obstruction of an inspector in Section 110 of the Environment Act, see Environmental Civil Sanctions Order, Schedule 5) and draft policy documents show that criminal enforcement through prosecution, warnings and cautions are still perceived as a normal response to failure to comply with permit obligations or conditions, or with different kinds of enforcement orders.¹⁰⁰² Moreover, the Agency still holds that within this overall approach, where an offence has been committed and the delivery of advice and guidance is unsuccessful, they will normally consider issuing some form of sanction as well as taking any other preventative or remedial action necessary to protect the environment or people.¹⁰⁰³

This means that enforcement of environmental law in the UK is still very much based on criminalisation. An actor who does not comply with administrative orders of the UK administrative enforcement authorities can and will be prosecuted. They will generally be prosecuted by the same authority that made the order in the first place. In the criminal procedure, the authority will not have to prove intent or culpability in any strict sense. This gives them a very strong authority, and truly empowers them in their administrative enforcement work. It marks the importance of preventing environmental harm imposing a large measure of responsibility on the environmental actors.

4.6 Concluding Remarks

In this chapter the traditional characteristics of the UK legal order have briefly been described, as has the general background and features of the areas of administrative and environmental law. The UK legal order is a common law system; it is traditionally based on judge made law, developed in the courts in a case by case fashion. It has a particular terminology, and legal style. Today however, legislation has grown to be the central legal source. In environmental law, legislation dominates as a source of law. Different kinds of guidance and policy documents are also influential.

There is no written constitution in the UK. Seen from another side, Parliament is principally sovereign. It is presumed to always act within the rule of law in exercise of this sovereign power. They are unbound in the exercise of their legislative functions. This has come in a new light with the ECHR and EU law, which of course limit this independence.

Furthermore, UK administrative law has sometimes been described as non-existent. There are no special laws just for public bodies and their officials. The same law applies as for others. There is no separate administrative

¹⁰⁰² See Environment Agency draft Statement and Guidance on Enforcement and Sanctions, Doc. No. GEHO0910BSZJ-E-E, and Doc. No. GEHO0910BSZL-E-E Enforcement and Sanctions – Offence Response Options (ORO), Operational Instruction X, Doc GEHo0910BSZN-E-E.

¹⁰⁰³ Guidance on Enforcement and Sanctions, Doc. No. GEHO0910BSZJ-E-E, Section 1.

court system. The main expression of administrative law is found in the judicial review process, and the grounds thereof. The lawfulness of administrative decisions can be reviewed by the courts, under grounds of illegality, unreasonableness and procedural impropriety. These grounds have many similarities to the administrative principles of civil law systems, and with European law influences, the principles of European administrative law are starting to develop.

Rights to appeal against administrative decisions are regulated separately for each sector of law. Appeal to the courts is often not available. Environmental cases are commonly appealed to the Secretary of State, whose decision can then be challenged on judicial review, not on its merits but only on issues of legality. Notably, also, administrative tribunals are becoming more and more common in the UK, also in the area of environmental law.

Modern UK environmental law has set up permit systems, and many different sector regulations on environmental issues. In recent decades the main focus of the environmental law system has been to coordinate and also centralise environmental control, so as to provide a simpler, better, and more effective control system. The developments have recently joined forces with the Better Regulation agenda, which has led to considerable reform of the administrative control system, with consolidated permit regimes and different enforcement policy statements, focusing on proportionate and targeted enforcement.

Moreover, the sanction system is currently under reform. While enforcement in general and in environmental law specifically, has traditionally been much focused on criminalisation and prosecution, the system is now moving away from this. The new civil sanctions provide alternative enforcement approaches to environmental offences; a wide range of instruments which facilitate flexible, proportionate and thus efficient and effective enforcement. More result with less effort, for all involved parties.

The most striking feature of the UK system for enforcement of environmental law is that one and the same regulator will often have access to the full range of enforcement instruments. The Environment Agency, or the local authority which is stated as the regulator, is competent to issue administrative enforcement orders, or civil sanctions, as well as to prosecute. In legislation containing permit regimes, they also function as the permit authority with access to enforcement instruments related to the permit. Moreover, non-compliance with their control measures is generally criminalised, and because they can and will prosecute these offences, they possess real authority.¹⁰⁰⁴ This must influence their enforcement work.

¹⁰⁰⁴ See: Section 4.5.8.

5 The Netherlands

5.1 Introduction

This chapter introduces the Dutch legal order. Dutch administrative law will first be examined – its basic structure, institutional organisation, and some examples of its terminology. The presentation will then move on to the environmental law structure and its development. Finally, the enforcement order will be described.

The Dutch legal order falls under the wide characterisation of a “civil law” order, resting historically on the French legal tradition, with terminology and concepts borrowed from the Code Napoléon. Some influence of German law is also apparent and, of course, European law has had a great impact in recent history.¹⁰⁰⁵ Nevertheless, the Dutch legal style and tradition is often described as having a somewhat individual nature. A basic characteristic is an informal legal culture. A commonly noted feature of the Dutch tradition is its pragmatic and innovative style and approach, and informal and straightforward legal argumentation. Reference is sometimes made to a tradition of Dutch informal rule of law.¹⁰⁰⁶ The pragmatic legal approach is popularly illustrated by the doctrine of “gedogen” and the example of the enforcement of narcotics regulations and “coffee shops”, or in planning regulations – a pragmatic non-enforcement policy, strategically based upon reasoning in relation to effectiveness, proportionality, and the weighing of interests.¹⁰⁰⁷ The influence of the Dutch informal and pragmatic legal culture, however, should not be exaggerated. The expression of such an approach is debatable, and generally surrounded by limitations and safeguards of the rule of law and other fundamental legal principles, certainly within an international legal context. The characteristically informal and pragmatic Dutch

¹⁰⁰⁵ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* pp. 69–70, and 328. (Chapter on Classification written by Hondius, E.H., and Chapter on Constitutional Law written by Alkema, E.A.)

¹⁰⁰⁶ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 49. (Chapter on Dutch Legal Culture written by Blankenburg, E.)

¹⁰⁰⁷ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 8, and Chapter 2, especially pp. 14–15, 17–18, and 42 (Chapter on History written by Chorus, J.M.J., and Coppens, E.C.), Vermeer, F., *Gedogen door bestuursorganen*, see Chapter 5 for the example of the “coffee shops”.

legal culture, however, lies at the subsurface levels of law, and will often influence the legal practice.¹⁰⁰⁸

A further traditional characteristic of Dutch law is its openness to international influence. It was one of the original EU founding members responsible for establishing the European Community in the 1950s. The development of EU law and Dutch law over the past half century has thus advanced in parallel. Clear and directly effective international law will generally invalidate national law, and the legal system will generally give way to international law implementation, both in constitutional law and in ordinary statutes.¹⁰⁰⁹

The sources of Dutch law are commonly found only in the Dutch language – which is not one of that I master. Access to sources of law is therefore more challenging than that applying in the UK system. This has influenced the extent of the investigation and its presentation, as well as the choice and number of sources for this study. First of all, sources in English have received more attention than might otherwise be the case. Secondly, to access legislation without official translation,¹⁰¹⁰ I have to great extent used information on the Government's official web site to navigate, and then translated the relevant parts. I have, moreover, visited the Netherlands twice for interviews with Dutch scholars and government officials, and have then, and in the following contacts with these persons been able to check my understanding of the law, and help with some translation and navigation in the Dutch legal order. Parts of the text, in draft version, have also been read by Dutch colleagues. The end result is nevertheless cannot be laid anyone else.

This investigation has been generally limited to materials dating up to May, 2010. The Dutch order has undergone some important reforms in the environmental permitting regime, which entered into effect after that date. The presentation in this chapter has been supplemented with a description of the fundamentals of this reform, in order to provide sufficiently relevant and complete information.

Finally, the terminology used with reference to Dutch law must, for the sake of clarity, be commented upon. English translations of Dutch legislation use terms such as “Section”, “Subsection”, “Title”, “Chapter”, “Paragraph”, and so on, in a not very consistent manner. The one constant term is that used to refer to actual statutory rules, which are called Articles (Art.). I have chosen to keep this established terminology, even though it differs from the terminology in the other chapters. (In English law the corresponding term is “Section”, which I have also used for Swedish “paragraf” for the purposes of this study). Reference, furthermore, is made to “chapters” of the legislation

¹⁰⁰⁸ Chorus, J., et al., (Eds.), *Introduction to Dutch Law* pp. 49–54.

¹⁰⁰⁹ See, for example: *Wet algemene bepalingen omgevingsrecht (Wabo)* Art. 2.33.1.a.

¹⁰¹⁰ Awb can be found in recent English version from 2009 (including the vierde tranche), but for Wm there is only an English version from 2004, which is only helpful to a limited extent. Wabo and the relevant Ordinances have not been found in official English versions at all.

and “divisions for the different subsections of the chapters. It should be noted that these subdivisions take an independent numeration.

5.2 Administrative Law

5.2.1 Introduction to Dutch Public Law and its Development

5.2.1.1 Constitutional Basics and International Law Influence

The Netherlands has a written constitution – the Grondwet – setting down such things as fundamental rights and the basic structures and procedures of the state institutions, etc. It is sometimes argued that the Constitution is weak, perhaps especially in the sense that there is no constitutional court, and no authority for the ordinary courts to exercise in order to invalidate unconstitutional laws (Grondwet Art. 120).¹⁰¹¹ Notably, however, Dutch constitutional law affords international law a certain strength and influence, since the courts can test government decisions against provisions of international agreements, and of EU law, when these are considered to have self-executing – or binding – effect (Grondwet Art. 91 and 94). The Netherlands, therefore, is said to have a monistic tradition.¹⁰¹²

Its parliament is divided into the directly elected House of Representatives (Tweede kamer), and the Senate (Eerste kamer), with representatives from the provinces who assess legislator Bills. The House of Representatives functions as the legislature, but a Bill must be approved by the Senate.¹⁰¹³ Another central public body is the Council of State (Raad van State),¹⁰¹⁴ appointed by the Government. The Council of State has two divisions, with different functions. Those connected to the legislative process are handled within the advisory division (Afdeling advisering). They review Bills for the purposes of securing quality and consistency of legislation. Notably, the other branch functions at the highest judicial level with regard to administrative law, conducting judicial reviews of decisions and judgments in administrative law cases. This is the Administrative Jurisdiction Division (Afdeling

¹⁰¹¹ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 333. In the context of Art. 21 on environmental responsibilities, see Koeman, N., (Ed.), *Environmental Law in Europe* p. 429.

¹⁰¹² Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* pp. 47, and 326–327; Serdeen, R., and Heldeweg, M., *Public Environmental Law in the Netherlands* p. 342.

¹⁰¹³ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* pp. 310 and onward. For more information on the Dutch Parliament, go to: <http://www.houseofrepresentatives.nl/index.jsp>; and also http://www.houseofrepresentatives.nl/how_parliament_works/democracy/index.jsp; and http://www.eerstekamer.nl/begrip/english_2.

¹⁰¹⁴ See: <http://www.raadvanstate.nl/>.

Bestuursrechtspraak).¹⁰¹⁵ The executive branch, or the administration, will be described in Section 5.2.2.

5.2.1.2 The Development of Administrative Law and its Sources

The development of administrative law as an area of Dutch law began more than 100 years ago in a piecemeal regulation of state business. As with many other legal orders, the administration and its functions expanded enormously after the Second World War. The welfare state had new tasks in planning and providing services also, and the public law legislation is now an independent and substantial part of Dutch statutory law.¹⁰¹⁶ The administrative law area was largely regulated sector by sector, but in recent decades the system has been fundamentally reformed, resulting in codification and coordination of the system and a general administrative body of law. An important trigger of these developments was the landmark case of *Benthem v. the Netherlands* heard in the European Court of Human Rights in 1985.¹⁰¹⁷

The Court ruled that an administrative authority's grant of a permit, etc., regulated the civil rights of the applicant – a Mr. Benthem. The Court held that the Dutch system with administrative appeal to the Crown (including Ministers of Government) was not enough to grant Mr. Benthem recourse to appeal to a court or tribunal. The Dutch order accordingly contravened Art. 6 para. 1 of the European Convention on Human Rights (ECHR). It became clear that Dutch administrative law did not always guarantee independent legal review of a decision by an administrative authority.¹⁰¹⁸

Thus the ECHR, in its demand for independent judicial review of administrative decisions, activated a comprehensive administrative law reform in the Netherlands. As a result, the General Administrative Law Act (Awb¹⁰¹⁹) has been gradually introduced since 1994. The administrative appeal order has been reformed. As indicated above, it now has a separate Administrative Jurisdiction Division of the Council of State, dealing with judicial review.¹⁰²⁰ The Awb and case law from the Council of State now function as the main sources of administrative law.¹⁰²¹ The Council of State functions as a supreme administrative court. It should however be noted that this body tries a wide range of appeals, not just cases of precedential interest. This means that the caseload is large and precedents are not easily distinguishable.

The Awb has been developed gradually through reform steps called “tranche”. The first and second of them entered into effect on 1 January

¹⁰¹⁵ See: http://www.raadvanstate.nl/over_de_raad_van_state/raad_van_state_in_het_kort/.

¹⁰¹⁶ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 343 (Chapter on Administrative Law written by de Moor-van Vugt, A.J.C., and de Waard, B.W.N.); and Schwartz, J., *European Administrative Law* pp. 187–188. Compare, also: Section 2.2.1.2.

¹⁰¹⁷ *Benthem v. the Netherlands*, Judgment of 23 October 1985.

¹⁰¹⁸ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 55.

¹⁰¹⁹ Algemene wet Bestuursrecht 1.

¹⁰²⁰ Note further influence of the right to trial and the ECHR argued in Section 2.2.3.3.

¹⁰²¹ Chorus, J., et.al., (Eds.) *Introduction to Dutch Law* pp. 343–344.

1994. Some reforms relevant for the purposes of this study were made through the third and fourth tranches, which reorganised the interrelationship of the Awb and special legislation, for example the Environmental Management Act (Wm¹⁰²²).

Through the third tranche most of the enforcement measures were moved from Chapter 18 of the Wm to Chapter 5 of the Awb, and the rest were adjusted to the Awb rules. Thus Awb and Wm now have basically the same rules for the administrative enforcement.

The fourth step (vierde tranche) of the administrative law reform was implemented in 2009. It aimed at a full regulation of the administrative enforcement system through various changes and additions to Division 5 of the Awb. General principles of administrative enforcement are regulated in Art. 5:1. This step also made some changes in Art. 5:3 on reparative sanctions (herstelsancties) and introduced in Art. 5:4 a punitive instrument called administrative fines (bestuurlijke boete).¹⁰²³

The reform mainly meant codification and clarification of the use of enforcement instruments. The administrative law system now has a general administrative act where generally applicable rules, principles, and procedures are regulated and codified. The special regulation of sector legislation supplements the rules, as do different kinds of administrative guidelines. General enforcement competence, enforcement instruments and procedures are regulated in the Awb, while the more specific competence is found in special sector legislation. This denotes that situations where enforcers have the competence to take enforcement action are to be found in the environmental law regulations, for example, the Wm and in subordinate legislation such as ministerial decrees, etc. The Wm system provides substantive standards and requirements with which the actor must comply, as well as with Awb administrative powers and procedures for realising administrative tasks and controlling breaches of law. The sectoral regulation also prescribes special administrative law rules in the particular area, for instance, special rules on access to appeal, or the right to be heard, which are motivated by the specific circumstances of that regulatory area.

An example of this relationship can be observed in the administrative enforcement fines. The vierde tranche introduces a general regulation of the instrument of administrative penalties – or fines. This instrument has earlier been provided in certain sectoral legislation. Nevertheless, the introduction of the sanction does not mean that administrative enforcers are generally competent to use the instrument. They must possess the competence regulated in the sector legislation. In environmental law, such competence is only used in specific areas, namely, the enforcement of regulations on green

¹⁰²² Wet milieubeheer.

¹⁰²³ Eerste Kamer, vergaderjaar 2006–2007, 29 702, A, Sdu Uitgevers, 's-Gravenhage 2007 pp. 11–18.

house gases (EMA Art. 18:16a), and on biocides (Wet gewasbeschermingsmiddelen en biociden, Art. 90).

5.2.1.3 Some Basics of the General Administrative Law Act (Awb)

The Awb starts out by defining a number of important administrative law terms, thus implicitly stating the scope of the Act.¹⁰²⁴ In Dutch public law there exists a terminological difference between legal acts and factual acts of the administration. Public law focuses on the legal acts and, most importantly, Awb applies to juridical acts; to their authoritative statements of administrative actors, or decisions in a wider understanding.¹⁰²⁵ These juridical acts are defined in Awb 1:3. A “decision”¹⁰²⁶ (besluit) is a written decision of an administrative authority, constituting a public juridical act. This is a central term that comprises many kinds of decision by the authorities involved. Decisions can be made on the authority’s own initiative, or on application from the public, and they can be general or individual in character. The main rule – with several exceptions – is that all administrative (legal) acts can be appealed (Awb 8:1).¹⁰²⁷ The “individual decision” (beschikking) is a type of decision which is made in a concrete case, not a decision of a general nature. This definition also includes rejection of an application for such an order. It may be noted that the Awb prescribes a written administrative procedure (See: Awb 1:3, and procedural regulations in Chapters 3–4).

After some general rules on the means of communication, etc., between the administration and the individual in Chapter 2, Chapters 3 and 4 regulate administrative decision-making. This latter chapter departs from central principles of due care, legality, and a provision on abuse of power. Awb prescribes different categories of procedure for preparing an administrative decision. Such categories prescribe a different range of detail and extent of communication with different scopes of participants. The administrative case can thus be prepared in a “regular”, “public” procedure. The public procedure is regulated in Awb Division 3:4. It involves communication with a wider range of parties. The procedure includes making a draft decision known and available for inspection (Art. 3:11–3:14). Concerned parties may submit their views to the authority (Art. 3:15). The regular preparatory procedure is set out in Awb Chapter 4. This procedure is simpler, and the communication is mainly between the authority and the addressee. There are general rules on maximum time periods for these procedures, and failure to make a timely decision can be appealed (Awb Art. 6:2). In response to such

¹⁰²⁴ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 354.

¹⁰²⁵ Michiels, F.C.M.A., *Hoofdaken van het bestuursrecht* Section 2.5.

¹⁰²⁶ The English terminology is taken from the official translation: General Administrative Law Act, text as of 1 October 2009, posted on the home page of the Dutch Justice Department: http://english.justitie.nl/themes/General_administrative_law_act/index.aspx.

¹⁰²⁷ Michiels, F.C.M.A., *Hoofdaken van het bestuursrecht* p. 23.

an appeal, the court may order the authority to make a decision within a certain period, and impose sanctions for failure to do so (Awb Art. 8:55b–f).

Chapter 5 of Awb contains general rules on administrative enforcement. Here the enforcement competences and instruments are laid down generally for the entire Dutch administration. Special regulation in sector legislation should nevertheless always be kept in mind. After the rules on enforcement, Awb concludes with several chapters on appeal. These rules on enforcement and appeal will to some extent be elaborated on later.

5.2.2 The Administration

In the Netherlands decentralisation of public power is fundamental, and rooted in its constitutional history. In 1814 a confederal structure was replaced by a unitary state with a decentralised structure. The decentralised basis of state functions is still present today. It is laid down in the Constitution (Grondwet Chapter 7) and is emphasised by the Provinces Act (Provinciewet) and Municipalities Act (Gemeentewet). There are regional authorities known as provinces (provincies) and local authorities called municipalities (gemeenten), with powers to regulate in the interests of the province or municipality. These bodies, however, also exercise a wide range of administrative functions. There are, moreover, other kinds of decentralised authorities with public tasks, for example, the Water Boards (Waterschappen).¹⁰²⁸ These are independent, but by Parliamentary Acts provided with public tasks, or administrative functions (Grondwet Art. 124). The powers of all these authorities are provided in law. Generally, the decentralised bodies fall under the supervision of higher bodies in an administrative hierarchy. Different instruments and purposes of such supervision are provided in the law. Central government enjoys a general power to suspend or revoke decisions of lower bodies if they conflict with the public interest.¹⁰²⁹

At the other end it can be noted that there are no separate central administrative agencies. The ministries deal with the different administrative areas at national level. A central such function, apart from national policy tasks, is to supervise and guide the administration. However, apart from policy and guidance tasks, central government can also be involved in direct and operative regulation. This is the case in environmental law, which will be further described in Section 5.3.4. A main part of operative regulation and administration, however, is undertaken by local and regional authorities, and the trend is that such tasks are increasingly being decentralised.¹⁰³⁰

¹⁰²⁸ Chorus, J., et al., (Eds.), *Introduction to Dutch Law* pp. 335–342; Schwartz, J., *European Administrative Law* p. 193; Seerden, R., and Heldeweg, M., *Public Environmental Law in the Netherlands* p. 343. See, also: Koeman, N., (Ed.), *Environmental Law in Europe* p. 423.

¹⁰²⁹ Chorus, J., et al., (Eds.), *Introduction to Dutch Law* p. 336.

¹⁰³⁰ Chorus, J., et al., (Eds.), *Introduction to Dutch Law* pp. 335–336.

5.2.3 Administrative “Courts” and Appeal – or Review?

There has been an administrative law judiciary in the Netherlands since 1902. From the outset these were specialised tribunals, regulated by special rules. Since then, the administrative courts have become more integrated in the general courts system, in the sense that district courts also deal with administrative appeals. This development came about within the context of the comprehensive reforms to administrative law that occurred in the last decades of the 20th century, with the step by step development and regulation of Awb.¹⁰³¹ Now the basic administrative appeal route starts in a district court (Rechtsbank), as stated in Awb Chapter 8, with further appeal to the Administrative Jurisdiction Division of the Council of State¹⁰³² (Raad van State). Sectoral legislation may contain special rules on access to appeal, and the order of instances, etc.¹⁰³³ Certain decisions are appealed to the Council of State directly.

The Administrative Jurisdiction Division of the Council of State thus functions as the general and highest administrative court in the Netherlands. It hears all appeals against decisions made by authorities and from judgments of courts of first instance. It reviews administrative decisions to determine whether the administrative authorities have acted in accordance with the law. The central question here is whether or not the decision is formally and substantially compatible with the law and with principles of good administration.¹⁰³⁴ Judicial review is sometimes made in the Council of State as first and final instance, and sometimes on appeal from a district court. The courts are not defined as administrative authorities, as can be read in Awb 1:1. Different rules therefore apply; generally Chapters 6 and 8 regulate court procedure, while the rules in Chapters 2 and 3 regulate procedure on the administrative authorities’ decision-making.

The main rule is that any administrative decision (besluit) can be appealed (Awb 6:2 and 8:1), but there are exceptions (Awb 8:2-5), such as those on decisions to issue general regulation.¹⁰³⁵ Notably, an authority’s passivity may also be subject to a kind of appeal. As described above, failure to make a decision within the prescribed time can also be appealed and subsequently enforced by the court. (Awb Art. 8:55b–f). This construction can be seen as a possibility open to an individual to administrative action such as, for example, enforcement measures.

¹⁰³¹ Chorus, J., et al., (Eds.), *Introduction to Dutch Law* pp. 60 and 362 (the Chapter on Judicial Organization is written by Brenninkmeier, A.F.M.).

¹⁰³² Afdeling Bestuursrecht Raad van State.

¹⁰³³ See Section 5.3.5., and Chorus, J., et al., (Eds.), *Introduction to Dutch Law* pp. 362–363; and Seerden, R., and Heldeweg, M., *Public Environmental Law in the Netherlands* p. 345.

¹⁰³⁴ Chorus, J., et al., (Eds.), *Introduction to Dutch Law* p. 344. See, also: Schwartz, J., *European Administrative Law* p. 190, for a discussion on earlier case law.

¹⁰³⁵ Chorus, J., et al., (Eds.), *Introduction to Dutch Law* p. 363.

Significantly, a concerned party can appeal a decision directly if it has been prepared in the more extensive public procedure regulated in Awb Division 3.4. If the decision in question is prepared in the simpler normal procedure, the appellant must first lodge an objection (Awb Art. 7:1). The administrative authority must then reconsider its decision, and make a motivated decision of objection (Awb Art. 7:10-12). These preliminary proceedings allow the concerned public into the procedure after the decision is made, but before an appeal. This provides the decision-making authority with the opportunity of correcting mistakes and reconsidering its decision. It also filters out unnecessary court proceedings and may contribute to better preparation of appeal cases.¹⁰³⁶

The decision of an administrative body of appeal is, according to Art. 8:72 of the Awb, not limited to cassation. The decision of the administrative court can do more than just annul the appealed decision; it can direct the administrative authority to make a new decision, or otherwise take action in accordance with the judgment. It can also replace the order of the administrative authority. The court could thus issue the administrative order that the original administrative authorities should have made. Theoretically, there is some room for reformatory process. However, there is a strong sense of appropriate restriction or carefulness here. The function of the courts' review is fundamentally to control the legality of the administrative authorities' discretionary use of their public law competence. The fundamental idea is that the courts should not encroach on administrative discretion unless there is no other possible outcome of the case, for example, in refusing a permit that the authority should not have granted.¹⁰³⁷

Procedural rights are generally extensive and much used in the Dutch system. The Awb prescribes general rules for procedural access in the administrative decision-making procedure. Art. 3:4–3:5 regulate the more extensive public preparatory procedure, which includes availability of information and broad participation on the part of the public. The Awb also regulates access to appealing administrative decisions. The general rule gives standing to the “concerned public” (Awb 8:1). This suggests that a person must demonstrate a factual interest to be allowed access to court.

5.2.4 Administrative Law Principles

Fundamental principles of Dutch law are expressed in principles of proper administration (*algemene beginsel van behoorlijk bestuur*). These principles are perceived as standards that delimit the exercise of often wide discretionary public powers. These principles include standards that can be paralleled

¹⁰³⁶ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 361.

¹⁰³⁷ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* pp. 365–366; Darpö, J., *Rätt tillstånd för miljön* p. 106; Koeman, N., (Ed.), *Environmental Law in Europe* p. 446.

to the above argued principles of due procedural care and good government, including the concept of natural justice; duties to state reasons; non-arbitrariness, and so forth. These principles are often not drawn directly from the written constitution, but developed by the courts as unwritten constitutional principles.¹⁰³⁸ However, the principle of equality, or equal treatment, is clearly stated in the opening article of the Constitution.¹⁰³⁹ The principle of legality is also expressed in the *nulla poene* rules in Art. 16 and 104 of the constitution, but only in relation to criminal penalties and taxation.

Important influences and sources of administrative law, including the concept of good administration and the safeguarding of individual rights, are found in European Law, under both the EU and the European Council. The fair trial right of the ECHR Art. 6, and the above mentioned Bentham case, together have had a vast impact on administrative law, its structures and concepts. Apart from the reform of the appeal system to provide access to justice, this European law influence has brought about a new approach to the use of administrative authority and sanctions, influenced by the concept of “criminal charge”.¹⁰⁴⁰ The protection of the individual has become more emphasised in administrative law.

The administrative law principles have to some degree been codified in the Awb, especially in Chapter 3, Division 3.2. The Division applies to administrative decisions¹⁰⁴¹ but also, according to Art. 3:1, *mutatis mutandi* to other acts of administrative authorities, if their natures so allow. Art. 3:2 regulates an investigatory principle. This principle involves a duty for the authority, in its decision-making procedures, to gather the necessary information concerning relevant facts and interests to be weighed.¹⁰⁴² This can be read as a general duty of due procedural care and the balancing of interests.

The Awb also states in Art. 3:3–4, the fundamental administrative principles of the weighing of interests and proportionality, and the central regulation on the prohibition on abuse of power. These principles state that the authority shall consider the interests affected by a decision subject to limitations in law and the nature of the relevant exercise of power. Adverse effects may not be disproportionate to the object of the decision. The authority concerned must also keep within the limits of its public assignment, including the purpose for which the authority has been conferred. This regulation against the abuse of power thus expresses a principle of legality, objectivity, and of the purposive exercise of administrative authority. The exercise of

¹⁰³⁸ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 344. See, also: Schwartze, J., *European Administrative Law* p. 190, for a discussion on earlier case law.

¹⁰³⁹ Grondwet (Grw).

¹⁰⁴⁰ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 344.

¹⁰⁴¹ For definition, see Awb 1:3 and above in Section on the terminology.

¹⁰⁴² This investigatory principle has a content and application reminiscent of the Swedish inquisitorial principle (officialprincipen). This will be further addressed in Chapter 8, in the analysis of the distribution between the administrative authority and the individual actor, of responsibilities for decision-making materials in the enforcement procedure.

objectivity and equal treatment is also safeguarded through the general statement in Awb Art. 2:4 that the authority concerned must undertake its duties without bias. It should furthermore take measures to ensure that those with a personal interest in a particular case do not influence the decision-making.

5.3 Environmental Law

5.3.1 Introduction to Dutch Environmental Law and its Sources

5.3.1.1 Introductory Remarks

This section introduces the reader to the fundamental structure and development of environmental law in the Netherlands, and its regulatory approach. I will discuss certain fundamental rights and principles of the Dutch environmental law system. The institutional organisation of the involved administration and courts will then briefly be presented before describing in more detail the enforcement order. The Dutch system for environmental law regulation has undergone considerable reform recently before publication of this work – some of it after the time limitations set out for the investigation. The significance of these most recent changes have nevertheless warranted some investigation. The new legislation will therefore be discussed in this chapter.

5.3.1.2 Early Developments

The Netherlands has a long industrial past, and thus a quite long history of environmental law. The country is small and heavily populated. Large rivers reach the North Sea in the Netherlands, after flowing through several heavily polluting areas in different European countries. Furthermore, the Netherlands has a large and strong industrial base. The land is also subject to intense agriculture. All this means that it is a country under significant environmental strain. Consequently, environmental law, with public law pollution control of industrial facilities, has long been a legislative area of significance. The first environmental law legislation appeared in 1875 and contained a simple permitting regime for installations. It regulated noise, smell, and other nuisances affecting neighbours.¹⁰⁴³ During the 1960s, however, the extent and complexity of environmental problems had become more obvious. Dutch policy makers and legislators started regulating the

¹⁰⁴³ Darpö, J., *Rätt tillstånd för miljön* p. 96; Velthoen, D., *Miljörätten i Nederländerna* p. 330.

different areas of environmental law through a systematic sector by sector approach. Since the 1980s, however, there has been a movement towards integrating environmental regulation and taking an overall approach to environmental problems.

5.3.1.3 Modern Environmental Law – Integration, Deregulation, and Coordination

Big environmental incidents have driven environmental law developments forwards on the political and legislative agenda, with the Government's environmental responsibilities being afforded constitutional status in 1983. Based upon these developments the reform of environmental legislation continued, and was further strengthened by investigations and the debate following the Bruntland Report of 1987. Dutch environmental legislation was thus reformed and coordinated to make possible the handling of environmental problems in a comprehensive and integrated manner. New instruments were created in an integrating legislative step. The result was the 1993 Environmental Management Act (Wm),¹⁰⁴⁴ which is still the central environmental legislation,¹⁰⁴⁵ with rules on environmental planning and zoning, quality norms, EIA, as well as on substances and waste. It also contains rules on permitting, reporting, and administrative compliance control, and procedural matters such as rules on appeal. It should perhaps be noted that the Environmental Management Act is basically a framework law, supplemented mostly by lower level legislation.¹⁰⁴⁶

Besides the agenda of coordinating and consolidating environmental law in a comprehensive environmental act, there are some exceptions. Most importantly, water law is regulated separately, as is planning law.¹⁰⁴⁷ Furthermore, some sector law still lies outside the Wm, for example: the Soil Protection Act, the Noise Abatement Act, and nature conservation legislation. But on regulation of establishments and protection against pollution, the Wm is the main piece of environmental legislation. Nevertheless, the environmental order has still been considered to be complex, burdensome and ineffective. Different mechanisms have therefore been included to coordinate sector regulation, for instance, in the permitting procedure of the Wm (from Art. 8.28 and onwards, under the heading of Special Cases).¹⁰⁴⁸ More recently, the whole regulatory system has been reformed. Wabo regulation has

¹⁰⁴⁴ In Dutch: Wet milieubeheer (Wm).

¹⁰⁴⁵ Chorus, J., et al., (Eds.), *Introduction to Dutch Law* pp. 374 and 376–377 (Chapter on Environmental Law written by Verschuuren, J.); and Velthoen, D., *Miljörätten i Nederländerna* pp. 330–335.

¹⁰⁴⁶ Velthoen, D., *Miljörätten i Nederländerna* p. 343.

¹⁰⁴⁷ This was decided after much debate, basing the system upon the Water Framework directive (which in turn is said to be very much influenced by the Dutch system), see: Chorus, J., et al., (Eds.), *Introduction to Dutch Law* p. 379.

¹⁰⁴⁸ See further in: Chorus, J., et al., (Eds.), *Introduction to Dutch Law* pp. 379–380.

now replaced much of the Wm permitting rules, with a new and even further coordinated permit regime (Chapter 2).

The unifying and coordinating reform efforts have more recently been related to deregulation and Better Regulation policies. Since 1994 all national governments have devised programmes seeking to reduce and simplify environmental regulation. Projects aimed at cost-effective regulation, deregulation, and generally better quality of regulation, have been set out. A general goal has been to reduce the burdens on private industry. This has led to deregulation of permit obligations, coordination and shortening of the regulatory procedures, and replacing individual actor control by general regulation.¹⁰⁴⁹ Fewer installations need environmental permits and those are regulated in a single consolidated permit procedure, established in the Environmental Permitting (General Provisions) Act (Wet algemene bepalingen omgevingsrecht – Wabo). These developments will be described next.

5.3.1.4 Deregulation; from Individual Authorisation to General Regulation

As in most legal orders environmental regulation in the Netherlands has traditionally been based upon extensive permitting, thus individually regulating most activities of some environmental significance.¹⁰⁵⁰ Since the 1980s, however, the focus of environmental law has increasingly shifted from permitting towards that of general regulation. This shift is moreover supported by the more recent Better Regulation agenda. A main objective of this deregulation movement has been to reduce and simplify environmental legislation and regulatory procedures, to facilitate business. Another objective has been to achieve more equal treatment. The reform has altered the structure and character of the environmental control system. In this new structure, the permit regime is paralleled with the power to draw up general rules – see Wm Art 8.40 and onwards.¹⁰⁵¹ The main regulation of general rules is the Ministerial Decree of General Rules for Environmental Regulation – the so-called Activities Decree, or in short: Barim.¹⁰⁵²

Today, the general rules have become a dominant part of environmental law regulation. More and more permit obligations have been deregulated. Interviews with Dutch practitioners have revealed a discourse indicating experiences that most permitting procedures result in identical or almost identical permit conditions. The argument has been that the time (and resources) spent on individual assessments in a permit procedure is often not warranted. Many categories of business and industry could just as well be regulated by general rules. Consequently, a radical cut has been made in the

¹⁰⁴⁹ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 375.

¹⁰⁵⁰ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 377.

¹⁰⁵¹ Seerden, R., and Heldeweg, M., *Public Environmental Law in the Netherlands* pp. 363–365.

¹⁰⁵² Besluit algemene regels voor inrichtingen milieubeheer (or “Activiteitsbesluit”).

list of activities under permit obligation. It is reported that some 75% of installations formerly under permit obligations will now be regulated by general rules instead.¹⁰⁵³

Establishments covered by general rules rather than permit obligations are often required to report to the regulatory authority – like a notification of the activity (Barim Art. 1.10). This gives the authority notice that it should monitor compliance with general rules, and also to consider the possibility of steering the activity beyond general regulation. Barim distinguishes three different types of companies in Art. 1.4 (definitions in Art. 1:2): Type A includes activities with low environmental impact, such as offices, or health care facilities. They are bound by relevant general rules but need not report their activities. Type C activities have the greatest environmental effect. They will generally need environmental permits, but are also bound by certain general rules. Type B comprises the middle group of companies, with significant environmental effects, but not as serious as Type C installations. Type B activities are regulated by the general rules of Barim, and they must be reported to the regulator. Most operations fall under this category.

In a functional sense, the general rules have thus replaced permit conditions for different categories of activities, and they are of similar character to permit provisions. The general rules (mainly in Barim) fill out the framework set down in Wm. The rules are addressed at large groups of businesses (for example, dairy farms, hotels, etc.), or at specific environmental problems and are regulated by lower level legislation. Different environmental activities are regulated under different subdivisions in Barim Chapter 3 – for instance, waste water management (Subdivision 3:1), and wind turbines (Art. 3.13–3.15). In Chapter 2 there are general rules for all activities, starting with a general duty of care, and then proceeding to set down various standards and requirements relating to different environmental effects or recipients, such as discharges of substances to the air or soil (Art. 2.4–2.11), or noise nuisance (Art. 2.17–2.22).

It is noteworthy that the prescribed regulating authority is often provided with powers to customise regulation for an individual activity, thus achieving some compromise with the need for individual regulation, and mitigating the negative consequences of having the same rules for all activities (Barim Art. 3.1 Para 7). The general rules thus lay down environmental standards and the required precautionary steps and measures demanded generally, or for specific types of installation. The rules are often somewhat detailed and contain limit values and time spans, with some room for customised regulation beyond the general rules. In that sense, the activities outside the permit regime are not any less subject to environmental regulation. The activities under general regulation, however, should be under less administrative duties as they are regulated collectively. One implication, however, is that the

¹⁰⁵³ Chorus, et.al., (Eds.), *Introduction to Dutch Law* p. 375.

possibilities for public participation in the extensive permit procedure for individual projects are lost. Interested parties will instead have to take recourse to the enforcement authorities and demand action from them.¹⁰⁵⁴

5.3.1.5 Wabo – A One Stop Shop for Environmental Permitting

Wabo entered into force in October 2010. It establishes a kind of coordinating permit procedure for about 25 different permit regimes, including the Wm regime and IPPC regulation.¹⁰⁵⁵ Chapter 2 of Wabo lays down the permitting obligations. The rules must be read together with sector legislation such as Wm. Categorisation, detailed regulations, and listing of the activities under permitting duties, are found in lower level legislation, essentially in the Environmental Law Ordinance (Besluit omgevingsrecht) with rules on the application of Wabo.¹⁰⁵⁶ The substantive rules and standards to be applied in the permitting regime are also found in sector law such as Wm, and in lower level legislation. The idea is that environmental regulation is to be conducted at a “one stop shop”. Businesses or persons seeking permission for carrying on activities that affect the physical environment will meet one single, straightforward procedure and one single competent authority, usually the municipal authority. That authority will then guide the permitting procedure forward, and see to it that all relevant authorisation obligations are tried.¹⁰⁵⁷ Moreover, compliance control and enforcement is also to be coordinated in different strategic, programmatic, and coordinated efforts, etc., generally headed by the provincial executive.¹⁰⁵⁸

Notably, water law is regulated outside the Wabo and Wm, keeping water discharge consents and the regulation and management of water a separate system. These consents are granted by the water boards or the state. This system has also been integrated and simplified, moving from several thematic laws and permits to a coordinated system in a consolidated Water Act, which was introduced in December 2009.¹⁰⁵⁹ This system falls outside the scope of this thesis.

¹⁰⁵⁴ See discussion in Darpö, J., *Rätt tillstånd för miljön* p. 112.

¹⁰⁵⁵ See information on the reform at the official Website of the Senate: <http://www.eerstekamer.nl/9370000/1/j9vvhwtbnzpbztc/vhq8kxsrhexu>.

¹⁰⁵⁶ Besluit omgevingsrecht, 25 maart 2010, houdende regels ter uitvoering van de Wet algemene bepalingen omgevingsrecht (Besluit omgevingsrecht).

¹⁰⁵⁷ VROM 8049/January 2008; Environmental Licensing (General Provisions) Bill: Summary, at <http://omgevingsvergunning.vrom.nl/>.

¹⁰⁵⁸ See: Wabo Art. 5:3 and onwards, under the heading of Harmonisation and coordination in the interest of effective enforcement.

¹⁰⁵⁹ In Dutch: Waterwet. See, further: Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 379, and official information and documents at: http://www.rijkswaterstaat.nl/water/wetten_en_regelgeving/waterwet/, and <http://www.helpdeskwater.nl/onderwerpen/wetgeving-beleid/waterwet>.

5.3.2 Environmental Rights or Duties

Environmental policy has since 1983 a foundation in the Grondwet – the Dutch constitution.¹⁰⁶⁰ The constitutional regulation of environmental policy is not formulated as a right to a good environment for the individual directly, but as a duty or a responsibility for the state, declaring:

It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.¹⁰⁶¹

The meaning and significance of the constitutional protection of the environment, is perhaps debatable. It can be argued to provide a duty for the state rather than a right for the individual.¹⁰⁶² Even so, there may have been indirect pressure on the state to pay attention to environmental issues, taking an integrated approach and setting demands for a high protection level. The Government has mainly fulfilled its duties under Art. 21 by legislating within the environmental area by applying different kinds of regulatory and stimulating instruments.¹⁰⁶³ The procedural rights in the field of environmental law have been well developed in Dutch law, and the competent authorities are obligated to take environmental interests into account¹⁰⁶⁴ and as a rule, the also a duty to enforce¹⁰⁶⁵ This will be explained further down.

Art. 21 of the Constitution may also be applied and developed in court proceedings. It can be used by citizens and environmental organisations in proceeding against authorities, and can be applied by judges to interpret legal or constitutional standards in light of the right, or the value or interest, that such right represents. The constitutional statement of the state's environmental responsibilities has been used to motivate their access to civil procedure to further those interests.¹⁰⁶⁶ However, the courts seldom expressly apply the constitutional rule, and when they do it is mainly in interpreting procedural rules widely enough to ensure environmental protection.¹⁰⁶⁷ It is

¹⁰⁶⁰ The Dutch Constitution(Grondwet) also acknowledges, as most constitutions, the right to physical integrity, but while protection of the environment has had quite some significance in Dutch law and practice, this right has (Verschuuren 1993 Section III) not traditionally had much significance in the area of protecting environmental rights or intrinsic environmental values, as has been the case in some other jurisdictions. It only takes effect when state actions are clearly seen to damage human health.

¹⁰⁶¹ Grondwet Art. 21: "De zorg van de overheid is gericht op de bewoonbaarheid van het land en de bescherming en verbetering van het leefmilieu."

¹⁰⁶² Seerden, R., and Heldeweg, M., *Public Environmental Law in the Netherlands* p. 347.

¹⁰⁶³ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 372.

¹⁰⁶⁴ Verschuuren, J., *The Constitutional Right to Environmental Protection* Sections I and IV.

¹⁰⁶⁵ This is based upon the duty of care and has been developed in case law. The duty to enforce will be described later in this chapter.

¹⁰⁶⁶ See: Hoge Raad 14 April 1989, NJ 1990, 712; Hoge Raad 9 February 1990 [1990] Administratiefrechtelijke Beslissingen 409. See, also: Darpö, J, *Eftertanke och förutseende* p. 110; and Seerden, R., and Heldeweg, M., *Public Environmental Law in the Netherlands* p. 347.

¹⁰⁶⁷ Verschuuren, J., *The Constitutional Right to Environmental Protection* Section IV.

argued that Art. 21 is there mostly to serve as guidance for the legislature, and some commentators even deny any independent legal status of social rights to which the article is ascribed.¹⁰⁶⁸ Furthermore, there is generally little case law on constitutional issues, as the courts have no competence to review the constitutionality of Acts of Parliament, and legislation deemed in conflict with an amendment of the Constitution remains in force until parliament changes it.¹⁰⁶⁹

5.3.3 Environmental Principles

Specific environmental principles, as described under Chapter 2, are not explicitly codified in Dutch law, neither in the Constitution nor in the Environmental Management Act (Wm) or other environmental legislation. More indirect statements of, or implicit reliance on, such principles can be detected here and there; for example, in referring to the elements of sustainable development as principal concerns of the national environmental policy. These elements would thus be reflected in the environmental policy plans that the competent ministers are to draw up (see Wm 4:3).¹⁰⁷⁰

A fundamental and general duty of care is stated in Wm.¹⁰⁷¹ “Duty of care” is a concept that can be found in different areas of law, and also in the Awb (administrative due care).¹⁰⁷² This kind of general administrative care works as a useful complement to more specific regulation – as a safeguard against manifest failure to take adequate care in different legal contexts. A “duty of care” is more a principle than a rule. It does not state very clear grounds for public regulation. The concept has, however, become a common feature of Dutch law.¹⁰⁷³ In environmental law, the general duty of care is central. It may be viewed as expressing a fundamental principle of environmental law; or rather as embodying environmental law principles of precaution, prevention, and polluter responsibilities. The environmental duty of care principle is found in Wm 1:1a,¹⁰⁷⁴ which states, in its relevant parts:¹⁰⁷⁵

1. Every person shall treat the environment with due care.

¹⁰⁶⁸ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 307, Koeman, N., (Ed.) *Environmental Law in Europe* p. 428.

¹⁰⁶⁹ Grondwet Art. 140, and Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 307.

¹⁰⁷⁰ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 372; Koeman, N., (Ed.) *Environmental Law in Europe* p. 431. Compare: Seerden, R., and Heldeweg, M., *Public Environmental Law in the Netherlands* p. 354.

¹⁰⁷¹ See, also: generally on duty of care under Section 5.2.4.

¹⁰⁷² See Section 5.2.4.

¹⁰⁷³ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* pp. 380–381. Compare: Velthoen, D., *Miljörätten i Nederländerna* p. 343.

¹⁰⁷⁴ There is also a reference to the duty of care in waste issues in the special rules on waste in Wm Chapter 10.

¹⁰⁷⁵ In the English translation by VROM, in their: Text of the Environmental Management Act, dated 1 March 2004.

2. The care referred to in subsection one shall at any rate mean that any person who knows or may reasonably suspect that his acts or omissions may have damaging effects for the environment shall be obliged to refrain from such acts in so far as this can reasonably be demanded of him, or to take every possible measure which may reasonably be demanded of him to prevent these effects or, in so far as these effects cannot be prevented, to minimise or rectify them.

The wording thus seems to embody environmental principles, such as the precautionary principle. The general principle of due care, however, is materialised, or specified in substantive rules for the environmental activities, either in the permit, or in general rules. The Activities Decree (Barim¹⁰⁷⁶), formulates due care rules for specific categories of activities, but there is also, in Art. 2.1, a general duty to take reasonable measures beyond the specific rules in order to prevent or mitigate harmful environmental effects. These guarantee due care when the specific rules do not cover the relevant environmental problems, or prove insufficient to meet them. There are also some duties for environmental actors to report, register and measure their environmental activities, which can be seen as an expression of the actors' duty of care, which might be equated to a principle of actor responsibility, and more specifically a part of the polluter pays principle. These rules are often found in lower level legislation, such as Barim, with their basis in Wm Chapter 8 rules on permits.

The general duty of care functions as a counterbalance - for example to administrative law principles, in the exercise of enforcement powers. Its use, however, has been debated in the Netherlands. Even though the formulation of Wm Art. 1.1a can be seen as expressing environmental principles applicable for each and everyone, it has been held that the unspecific nature of such a general duty is problematic in view of the rule of law.¹⁰⁷⁷ Interviews with Dutch jurists in the scope of this study have also indicated a general perception of environmental law principles as directed to the authorities and not individual persons. Case law on the principle of due care suggests that the principle will normally have to be translated into more specific rules and duties for the individual actor. In the so-called Benegas case of 2003, the regulating authority had taken action to close down an operation. Basically, the undertaking complied with their valid permit, but not with a new EU directive. The regulator could therefore not enforce the permit requirements, but instead rested on the general duty of care. The Council of State did not accept this application of the duty of care provision. If the activity was regulated through a permit, the regulatory authority should have changed the permit conditions to improve it, and then enforce the thus regulated require-

¹⁰⁷⁶ Besluit algemene regels voor inrichtingen milieubeheer (or "Activiteitsbesluit").

¹⁰⁷⁷ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 380. Compare: Seerden, R., and Heldeweg, M., *Public Environmental Law in the Netherlands* pp. 354–355.

ments.¹⁰⁷⁸ The permit thus functions as a translation, and a specification of the principal duty of due care for that activity, and enforcement of permit requirements is the proper way to enforce the principle.

The Council of State expressed similar views in the relationship of the principle of due care and regulation through general rules in Wm or lower level legislation.¹⁰⁷⁹ The general rules specify the duty of care and if the relevant situation is thus regulated in the general rules, the enforcement authority cannot come up with new and other requirements. Notably, however, the central general rules prescribe a further duty of care when the special regulation is insufficient, which might suggest some flexibility. The enforcement authorities, moreover, have some powers to supplement the general rules by specifically regulating individual activities. Nevertheless, the general regulatory approach is through specific rules of substantive requirements, or permit conditions. These rules and regulations are based on the basic principle of duty of due care, but as a rule enforcers cannot intervene based solely upon that principle. It requires a further regulatory step. In a clear and very serious case of environmental risk or harm, enforcement action may rest on duty of care, if it is not regulated through a permit or general rules, or if the particular situation is urgent. This opening is generally provided in the case law statements. But such situations are somewhat limited. Moreover, in order to enforce the principle of due care independently, the regulator will have to show sufficient proof of such imminent risk, and the connection to insufficient care by the relevant actor.¹⁰⁸⁰

Environmental principles may come into Dutch law directly from international law. This can be a powerful tool, since international and European law take priority over national law in Dutch constitutional law. The courts will therefore test administrative decisions, and so on, against provisions of international law that are considered to have direct effect.¹⁰⁸¹ This has led to increased awareness of duties arising from these international sources, both for public authorities and the general public. In court proceedings the plaintiffs (often environmental NGOs) will refer to international and European environmental law and its principles. In that way environmental law principles are often made part of Dutch law. Similarly, as all over the EU, environmental law and policy are both very much influenced and steered through EU law and therefore this is truly a relevant link to EU environmental principles. The principles within EU treaties will arise in court if an EU directive is involved. This has been seen in nature conservation issues, when the habi-

¹⁰⁷⁸ ABRvS 3 September 2003, Case No 200106186/1, AB 2003, 388. See, also: ABRvS 8 December 2004, No. 200401808/1, AB 2005, 44; and ABRvS 31 August 2005, Gst. 2005, 175.

¹⁰⁷⁹ ABRvS 10 June 2009, Case no. 200806812/1/M1, see at para. 2.3.

¹⁰⁸⁰ See: ABRvS 8 December 2005, Case no. 200401808/1, AB 2005, 44, para. 2.3.7, where it was found that the enforcement authority had not succeeded to prove its case.

¹⁰⁸¹ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 371.

tats directive has been topical.¹⁰⁸² Here the court made thorough analyses of the precautionary principle, significantly influencing the use of precaution in nature conservation cases. The precautionary principle is otherwise argued to be part of the general duty of care¹⁰⁸³ in Wm 1:1a, and also more indirectly, for example, in 5.1.2.d.

5.3.4 The Institutional Organisation

5.3.4.1 Central Government and Operative Regulatory Authorities

Generally speaking, central government tasks and function mainly comprise of legislation, policy making, and guiding the lower authorities. The bulk of execution of environmental law and policy is carried out at local and regional levels.¹⁰⁸⁴ The primary Dutch environmental authority at national level is the Ministry of Infrastructure and the Environment.¹⁰⁸⁵ Up until after the election of 2010, these issues were covered by the former Ministry of Housing Spatial Planning and the Environment (VROM),¹⁰⁸⁶ and the former Ministry of Transport, Public Works and Water Management. Traditional pollution control matters have generally been dealt with under VROM. As observed above, the Netherlands has no separate central administrative agencies. The Ministry handles policy and guidance tasks. It has considerable competences to direct the lower authorities in the exercise of tasks under environmental law regulations. Two examples from many are provided in Wabo Arts. 2.34 and 5.24, where the Minister is empowered to direct the authority in the exercise of its enforcement functions. The Ministry also issues policy documents and plans, for example: the Nature Policy Plan and the Policy Document on National Spatial Strategy (regarding spatial planning). In the development of environmental policy towards a holistic integrated approach the competent ministers together issue the National Environmental Policy Plan (Wm Chapter 4, Division 4.2). The first¹⁰⁸⁷ was issued in 1989 and has since been followed up several times with new plans, but the

¹⁰⁸² Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 393.

¹⁰⁸³ In Dutch: “Zorgplicht”.

¹⁰⁸⁴ Koeman, N., (Ed.), *Environmental Law in Europe* p. 430.

¹⁰⁸⁵ See: <http://www.rijksoverheid.nl/ministeries/ienm>. English information on the Dutch government and its organisation can be found at: <http://www.rijksoverheid.nl/international#anker-english>. Notably, the international information on the Ministry for Environment and Infrastructure is directed to the web-sites of the former ministries: <http://english.verkeerenwaterstaat.nl/english/>, and <http://international.vrom.nl/>. As the thesis investigation has generally been limited to materials until May 2010, the information has since been changed. The basic structural idea of the system for environmental regulation should nevertheless still be valid.

¹⁰⁸⁶ Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (VROM).

¹⁰⁸⁷ National Environmental Policy Plan: to choose or lose. Kamerstukken II (Parliamentary Documents, Second Chamber) 1988-1989, 21 137, no 1–2.

objectives set down in the first NEPP have remained valid.¹⁰⁸⁸ The NEPP is the central part of a system of plans, regulated in Wm Chapter 4, including provisional and municipal plans.

To some extent the Ministry of Infrastructure and the Environment is also involved in the direct and operative regulation of larger environmental activities. Such tasks are carried out through a separate inspectorate. Enforcement is thus distinct from policy. The VROM Inspectorate¹⁰⁸⁹ was created in 2002 as a coordinated (and thus clearer) unitary, and effective enforcement authority for housing, spatial planning and the environment. As noted earlier, it takes on the regulatory functions of both permitting and compliance control, including administrative enforcement. It enforces legislation in order to guarantee a safe, healthy and sustainable living environment in the Netherlands. The VROM Inspectorate works in five regional offices headed by an Inspector-General who reports directly to the minister.¹⁰⁹⁰ This is a central part of the Dutch administration. However, most of the environmental law regulation – permitting, compliance control, and enforcement – lies within the competence of the provinces and municipalities.

As a point of departure, the different regulatory bodies work independently of the central authorities in the exercise of their administrative tasks and powers within the area of environmental law. They are nevertheless always under the internal control of a higher authority, with the competent ministry representing the highest. As noted earlier, the ministry can take over the regulation of an activity according to Wabo Art. 2.4 para. 4. A further basis for internal administrative control is provided in the rules for harmonisation and coordination of enforcement in Division 5.2 of Wabo – for instance, in Article 5.7 where the province in question is granted power to direct municipal authorities in the exercise of their enforcement efforts.

5.3.4.2 The Organisation and Designation of Regulatory Powers

The regulator or administrative enforcer in Dutch law called the “competent authority” will as a rule both permit and control compliance of the relevant activities (see, for example: Wm Chapters 8 and 18 and Wabo Chapters 2 and 5). Compliance control, through supervision, inspection, and enforcement, is interrelated with permitting functions and is in the hands of the same regulator. As indicated earlier, Dutch environmental law has focused on permitting and enforcing permit regulations, with most administrative enforcement being tied to permit regulation.¹⁰⁹¹ Planning, housing, and in particular noise legislation, have been regulated separately. Except for the special water law

¹⁰⁸⁸ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 371.

¹⁰⁸⁹ At the time of writing, the Inspectorate still went under the name of the former ministry in official information.

¹⁰⁹⁰ See: <http://international.vrom.nl/pagina.html?id=37364>.

¹⁰⁹¹ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* pp. 182–183.

regulation order, much of the public control outside the environmental permitting regime has been regulated in these separate sector regulations. Today, however, Wabo coordinates several different regulatory orders.

Designation of competent authorities has been based in Wm (essentially in Chapters 8 and 18), with lower level legislation prescribing some additional or further competences (for example, in Barim). The relevant rules in Wm on regulation through the permit regime were revoked and replaced by rules in Wabo (Chapters 2 and 5). The central permit obligations are now stated in Wabo 2.1. subpara. 1.e refers to Wm 1.1.3, which serve as grounds for regulation by way of lower level legislation. In the Environmental Law Decree we find the categorisation of different installations under permit obligation. Beyond the permit regime the main part of environmental activities are regulated directly through the earlier discussed widening system of general rules under Wm. The competent authorities thus receive notice of activities under general regulation and control compliance with an even wider range of activities, as specified in Wm and Barim. These authorities also decide on certain customised requirements outside the general rules, thus assuming a function which is a kind of mixture of, or a compromise between the regulatory, authorising, and enforcing character.¹⁰⁹²

Wabo designates different regulatory competences (chiefly set out in Art. 2.4). Most often the municipality acts as the regulator. It will thus deal with most environmental permitting and compliance control. For some activities, generally the more environmentally hazardous ones, the province will have competences and functions. IPPC installations are generally regulated by the province. As stated above, the VROM Inspectorate handles some of the largest and most hazardous activities – those of national interest – and they can take over the functions of municipalities and provinces in selected cases where the public interest so demands (see Wabo Art. 2.4 para. 3–4).

The most important feature of the recent reform is the institutional and procedural coordination and consolidation within the permitting regime, as described in Section 5.3.1.5. With the introduction of Wabo, environmental permitting is coordinated and streamlined so that the applicant turns to one competent authority for all the necessary environmental authorisations covered by the regime. The subsequent compliance control, and possible enforcement action, is also coordinated between the different regulatory bodies. The actor should then meet one coordinated regulating direction. Wabo sets up a system of coordination in Chapter 5.

For water law regulation, which is kept separate from Wabo, there are special Water Boards (Waterschappen), responsible for maintaining the quality of surface water and the regulation of water pollution.

¹⁰⁹² See Section 5.3.1.4.

5.3.5 The Environmental Appeal Route

There are no special environmental courts in the Netherlands. Administrative decisions in environmental law cases are subject to appeal, according to the general rules in Awb Art. 8:1, together with Art. 6:2. As indicated above, the Administrative Jurisdiction Division of the Council of State is the general and highest administrative court in the Netherlands and hears appeals from courts of first instance, mainly from district courts. One of the chambers of the Council of State deals specifically with cases concerning environmental law.¹⁰⁹³ Sometimes, administrative decisions will be appealed directly to the Council of State, as first and only instance. Up until October 2010 that was the case in environmental law with regard to both environmental permitting and most enforcement decisions.¹⁰⁹⁴ After the introduction of Wabo the situation was reversed. Enforcement of non-compliance with permit conditions and general rules, permit variation and revocation decisions, as well as original permit decisions, now proceed in the general administrative appeal route – to the District Court first, and further to the Raad van State. These decisions are excluded from the special appeal regulation of Wm 20.1, and therefore fall back to the general rules in Awb (see esp. Art. 8:1).

5.3.6 Appeal and Procedural Access

Dutch environmental law is known for its extensive procedural rights. As described earlier,¹⁰⁹⁵ the administrative decision-making procedure drawn up in Awb generally provides access to the administrative decision-making procedure in respect of concerned parties (defined in Art. 1:2) but also, in certain cases, for the wider public. Environmental procedure will often provide such wider access. This is regulated more specifically in Wm and Wabo. Wabo prescribes two types of procedure for preparing regulatory decisions: the “regular preparatory procedure” and the “public preparatory procedure”. The latter can be described as an elaboration on the general administrative procedural rules stated in Awb. The extensive preparation procedure is based upon the detailed procedure stated in Awb Subdivision 3:4 on public preparatory procedure, requiring the making of a draft decision accessible for inspection, with possibilities for concerned parties to state their views. Wabo adds certain other rules - for example, in Article 3.12. The extended public procedure of Wabo involves a wider communication with the public. In this respect, anyone can submit their views on the case in question. Application for a permit is processed in such an extended procedure.

¹⁰⁹³ See: <http://www.raadvanstate.nl/werkenbij/bestuursrechtspraak>.

¹⁰⁹⁴ This was regulated in the now expired wording of Wm 20:1. See: de Sadeleer, N., et.al., (Eds.), *Access to Justice in Environmental Matters and the Role of NGOs* p. 98. (The country report on the Netherlands is written by Jonathan Verschuuren.)

¹⁰⁹⁵ See: Section 5.2.1.3.

Another aspect of procedural access is the EIA procedure, regulated in Wm. This procedure includes the inspection and submission of views by the public (Wm 7:10–11 and 7:32, with further reference to the procedural rules of Awb). As earlier observed, the permit regime has been deregulated, and comparatively fewer installations are today involved in permit procedures. Similarly, the EIA is only required for those activities involving the most serious environmental risks. Fewer activities will therefore be handled in these more extensive procedures that allow a wider range of persons to participate in the decision making preparations.¹⁰⁹⁶ The regular preparatory procedure, on the other hand, does not have the wide reach of the public procedure. It is regulated in Awb Chapter 4 and in Wabo (for example, in Art. 3:8–9). The regular procedure is used in enforcement, and variation of permit conditions, and is mostly a procedure between the regulator and the operator.

Awb, Wm and Wabo similarly provide access to further proceedings in court. Traditionally, in environmental cases, every citizen had such extensive rights of access to court that basically anyone could bring an action against administrative decisions. This principle of *actio popularis*,¹⁰⁹⁷ was regulated in the now expired Article 20.1 of Wm. This was changed in a much debated reform of 2005. A main motive was to reduce the possibilities open for obstructing government decisions.¹⁰⁹⁸ The general rule today is standing for the public concerned (Awb Act 8:1), which entails that one has to show a factual interest to be allowed access to court. If the decision in question was reached after an extended public procedure, the appellant must also have taken the opportunity to object there as well. The scope of concerned persons is normally broad in environmental matters. Concerned public authorities, such as the VROM Inspectorate or concerned local authorities have standing, as well as private individuals and a wide variety of associations. NGOs have often been described as very active in environmental procedures. They are gener-

¹⁰⁹⁶ See: Darpö, J., *Rätt tillstånd till miljön* p. (Section 5.4).

¹⁰⁹⁷ Tolsma, H., et.al., *The Rise and Fall of Access to Justice in The Netherlands* p. 311.

¹⁰⁹⁸ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 373; de Sadeleer, N., et.al., (Eds.), *Access to Justice in Environmental Matters and the Role of NGOs* Section 2.2.2. The idea behind *actio popularis* was that everyone should be able to prevent the environment (as a common interest) from being affected negatively. This was changed in an attempt to lessen the burden on industry in its administrative duties and time consumed. A further argument was that environmental organisations, being non-governmental and therefore not democratically representative, should not be able to change a decision taken by a democratically elected governmental authority chosen to represent the people's interests. I disagree. There is a distinct difference between the situation of a non-governmental organisation just changing the decision of a governmental and one where a non-governmental organisation can challenge the decision as to its application of the law under which they are bound. In the latter case, it functions as a form of judicial control of governmental discretionary administration and decision-making. That, in my view, is to be commended, though it might be time consuming. These matters must be balanced in the interests of effectiveness – but it cannot be said to be undemocratic.

ally considered to be concerned parties as they represent environmental interests.¹⁰⁹⁹ This is founded on case law, including the landmark *De Nieuwe Meer* case,¹¹⁰⁰ which has enjoyed continued authority also after the repeal of the *actio popularis* provision. In practice the 2005 changes seem to have had little effect. Wide access to justice in environmental cases continues as before. However, the debate is still active, proposals continue for legislation to curtail procedural access and to stop obstruction from so-called “professional complainants”.¹¹⁰¹ Some indication of a more restrictive approach to standing can also be detected in case law.¹¹⁰²

Another instrument of procedural access should be mentioned in the context of administrative enforcement of environmental law. Under the Dutch system, if an authority takes no action against a breach of law, or the protected interests in question have not been adequately considered, the environmental organisations or concerned individuals can apply to the administration to make a certain decision, thus triggering enforcement action. This is rooted in Awb 4:1 which states that the authority in question must make a decision in response to an application, which can be made by a concerned party (Awb 1:3 Para 3). Moreover, the applicant (the concerned person) may ask for administrative coercive action (Awb 5:31a), that is, a factual reparative act by the authority. Wm 18.2 provides a similar task in the context of regulation through general rules.

Both a written refusal to make a decision and failure to make a timely decision may, according to Awb 6:2, form the subject of an appeal. Dutch administrative law will generally state maximum time periods for different kinds of decision-making procedures. Failure to make a decision within this period is remedied through a court procedure aimed at attaining an administrative decision. The passive enforcement authority may thus be required by the court to take action. Should the enforcement decision be one of not taking enforcement action, that decision can later be challenged in accordance with the ordinary rules of appeal. In addition to this triggering instrument, case law on civil liability has provided some (though limited) access to procedural review of the competent authorities’ quality of enforcement.¹¹⁰³

¹⁰⁹⁹ Compare: Darpö, J., *Rätt tillstånd för miljön* p. 107; de Sadeleer, N., et al., (Eds.), *Access to Justice in Environmental Matters and the Role of NGOs*.

¹¹⁰⁰ HR 17 June 1987, AB 1987, 173.

¹¹⁰¹ Tolsma, H., et al., *The Rise and Fall of Access to Justice in the Netherlands* pp. 310 and 315–319.

¹¹⁰² See: ABRvS on 1 October 2008, Case no. 200801150/1, where the Court scrutinised the stated objectives of the appellant NGO and found they were too wide to justify standing in the particular case. Tolsma and others criticised the case, arguing that the Court had restricted access to justice for NGOs without an express mandate from the legislature, and furthermore without stating valid arguments in the context of the former case law arising from the *Nieuwe Meer* case.

¹¹⁰³ HR 13 October 2006, Case no. C04/281HR (*Vie D’Or*), about poor supervision and control over an insurance company that went bankrupt, causing loss to many people; Hoge Raad 7 May 2004, Case no. C02/310HR (*Linda*) about a barge that capsized and the question of

Weak enforcement can thus be seen as non-fulfilment of their duties as enforcers.

In conclusion, Dutch environmental law order has a tradition of considerable procedural access in environmental law cases. In recent years legal procedural developments have delimited the scope of such access, but the possibilities open for a wide range of the concerned public remain extensive. The addressee of an environmental decision, and third parties such as neighbours or a wider range of the concerned general public, all have considerable procedural access. The position of a third party under environmental law enforcement is quite favourable, even though it has been subject to considerable delimitation. Typical within the context of this thesis is that the concerned public can trigger enforcement action by way of application for a decision and subsequently appealing the authority's non-enforcement or under-enforcement. However, apart from changes in legislation and case law on standing, the structural changes of the environmental law regulation order have deregulated regulatory procedures for environmental actors, and have entailed less procedural access for concerned parties and the public. This could lead to the enforcement triggers becoming more important instruments for the concerned public to gain access to environmental control procedures.

5.4 Administrative Enforcement

5.4.1 General Remarks on Enforcement

Environmental law enforcement has been a central issue in Dutch legal and political discourse for some time. As is often the case, the development of the area has largely followed serious environmental incidents. The legal discourse has changed in the aftermath of these incidents, both through case law and in the different public investigations and recommendations that followed. The focus of the changes has often been on the responsibilities of

whether the enforcement authorities should have done more to protect the victims. Rb. 's-Gravenhage 23 December 2003, Case no. 01-2529, about a disastrous accident at a fireworks factory, causing the deaths of 22 people, and enormous monetary loss, and the poor enforcement of the noted breaches of relevant permits; and Rb. Rotterdam 26 May 2004, Case no. 154527/HA ZA 01-197 (Caldic Chemie/Rotterdam) about a fire at a chemicals factory, and similar claims for damages for poor enforcement. For an introduction to the tort law discourse on supervisors' liability, see van Boom, Willem H., and Pinna, A., *Liability for Failure to Regulate Health and Safety Risks. Second-Guessing Policy Choice or Showing Judicial Restraint?*; Tison, M., *Do not attack the watchdog! Banking supervisor's liability after Peter Paul, 2005*; Giesen, I., *Regulating regulators through liability. The case for applying normal tort rules to supervisors*, and Kozoil, H., and Steininger, B., (Eds.), *European Tort Law 2007* pp. 416–439, esp. p. 420.

administrative enforcement authorities, perhaps losing sight of the responsibilities of the actual perpetrator.¹¹⁰⁴

The administrative authorities are the main enforcers of environmental law in the Netherlands, and their administrative enforcement instruments are considered to be quite efficient and extensive.¹¹⁰⁵ The designated enforcement authority will generally have comprehensive functions, including both permitting and compliance control. This competent enforcement authority is usually the municipality. Traditionally, environmental law regulation has revolved around different permit regimes, and coordination thereof. However, the earlier described reforms of the administrative control order have entailed considerable changes in the area of environmental law enforcement. Consequently, the regulatory focus has shifted from a system based upon permit regime, to regulation through general rules. The general rules involve regulation through legislation containing rather detailed substantive environmental law requirements for different categories of activities, and subsequent compliance control and enforcement of those rules. Most activities under general regulation will still have to be reported to the competent authority, but none has to go through the permit procedure. The regulatory initiative thus lies more with the enforcement authority. The activities that still require a permit will be regulated in a coordinated permit regime where most environmental permits are tried in one procedure. Another consequence of the lessening of administrative procedures is a reduced possibility of involvement of the public in controlling environmentally hazardous activities. Procedural access for third parties has generally become more limited. In total, the responsibility and systematic function of administrative enforcement authorities has grown in scope and importance. Public control in the context of environmental law and policy will to a considerable extent be left only to the administrative enforcers – most often the municipalities – to supervise and steer the actors, and to decide on sanctions for non-compliance.

It has been argued that while Dutch administrative authorities have a good set of instruments for enforcement, their application can be improved. Arguments on the necessity of professionalization of enforcement have led to some initiatives to realise effective enforcement, both in theory and practice.¹¹⁰⁶ Such initiatives involve cooperation between enforcers, enforcement on the basis of protocols and step-by-step procedures, as well as knowledge management. The administrative enforcement order has also been subject to public policy statements and review, such as the Action Programme Elevating Enforcement (*Handhaven op niveau*), and the Steering Committee of the same name, set up by the Government in 2001 to implement the programme

¹¹⁰⁴ Michiels, F.C.M.A., *Houdbaar handhavingsrecht* pp. 1, and 5–6.

¹¹⁰⁵ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* pp. 182 and 185.

¹¹⁰⁶ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 185.

of this work. They reported an evaluation of the work in 2006.¹¹⁰⁷ The Action Programme aimed at strengthening the matter of enforcement on the political agenda, stimulating professionalism and collaboration in enforcement, and increasing the legitimacy of enforcement action. This was to be done, for example, through development of best practices and programmatic enforcement approaches, and supporting research and conferences. The results of the Action Programme were mixed, but increased professionalization and establishment of programmatic enforcement tools was noted. The committee also noted a development towards more repressive enforcement action.

This thesis concentrates on administrative enforcement, which is generally carried out through the issuing of so-called “sanctions” – orders coupled with the threat of a coercive measure or a monetary sanction. These sanctions are generally aimed at directing the addressee. Penal sanctions have traditionally been left to criminal law enforcement. Criminal law, however, is generally enforced separately from administrative enforcement measures, and by the Public Prosecutions Department.¹¹⁰⁸ Administrative enforcement authorities thus have no powers of prosecution, and until recently no authority for imposing punitive sanctions at all.¹¹⁰⁹ Lately, however, administrative monetary penalties have started to be introduced. Thus the punishment of offences is also being placed on administrative enforcement authorities.

Civil law enforcement has played a significant part in the development of environmental law in the Netherlands. The main instrument here is the general tort law provision, found in Art. 162 of Book 6 of the Civil Code (*Burgelijk Wetboek*).¹¹¹⁰ The administration may also use tort action as an instrument for protecting the environment. However, this is still very much an exception.¹¹¹¹ Case law states that the administration should employ its available administrative legal instruments whenever possible rather than resorting to the civil courts.¹¹¹² But general tort law provisions and grounds for liability are equally applicable for private persons and public authorities.¹¹¹³ This has led to the above mentioned discourse on civil liability for failure of the authorities to carry out their enforcement duties. Enforcement duties will be considered next.

¹¹⁰⁷ Go to: <http://www.wodc.nl/onderzoeksdatabase/evaluatie-handhaven-op-niveau.aspx>, for information and final report of the committee.

¹¹⁰⁸ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 182.

¹¹⁰⁹ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 183.

¹¹¹⁰ de Graaf, K., and Jans, J., *Liability of Public Authorities in Cases of Non-Enforcement of Environmental Standards* p. 388.

¹¹¹¹ Chorus, J., et al., (Eds.), *Introduction to Dutch Law* p. 395. See, also: Velthoen, D., *Miljö-rätten i Nederländerna* pp. 336–337.

¹¹¹² HR 26 Jan 1990, NJ 1991 393.

¹¹¹³ de Graaf, K., and Jans, J., *Liability of Public Authorities in Cases of Non-Enforcement of Environmental Standards* p. 388.

5.4.2 Enforcement Tasks and Duties

5.4.2.1 Tasks and Functions of the Competent Authority

The Wm and Wabo together draw up the fundamental institutional organisation for administrative enforcement functions, and thus state which the competent authority is.¹¹¹⁴ These specific environmental law rules must always be read together with the general administrative law regulations in Awb, and the competence rules in the Municipality Law Act and the Provincial Law Act. In practice, much of the regulation of administrative enforcement of environmental law, at least for the purposes of this thesis, is located in the general administrative rules of Awb. More specific environmental law tasks and aims of the competent authority, however, are found in sectoral legislation. Wm regulates enforcement in Chapter 18. However, since October 2010 many of these rules have been replaced by Wabo regulations, and with many references between the acts. As observed earlier, Wabo coordinates and consolidates the regulatory system for many separate sector regulations tied to environmental law. Wabo 5.2 states generally that the competent authority shall ensure administrative enforcement pursuant to the provisions of this legislation, including Wm (See Art. 5.1 for the application of Chapter 5). Wm will mainly refer to the regulatory order of Wabo, and state some further specific competences. Essentially, Wm 18.2 states enforcement tasks in the context of general regulation in or tied to Wm. It states competences for the authority that receives notification of an activity regulated through general rules, or otherwise for the municipality. The authority has the task of ensuring administrative enforcement of these requirements on the operator of the establishment in question, based upon Wm and also certain EU law. Consequently, any violation to the provisions of, or pursuant to, the Wm can be subject to administrative enforcement. In addition, Wabo Division 2.6 regulates the enforcement functions tied to the permit, which are mainly prescribing tasks involving review (Art. 2.30), variation (Art. 2.31), and revocation (Art. 2.32) of a permit and its provisions.

Wabo 5.2 and Wm 18.2 both state that the competent authorities are responsible for dealing with complaints relating to compliance with relevant law, and they must investigate, which means gathering and recording information relevant for carrying out their tasks. This can be tied to the general principle of due procedural care and which also form an investigatory duty. The stated task of handling complaints should also be seen in light of the earlier described opportunity for a concerned person to apply to the competent authority for an enforcement order – a sanction, etc.¹¹¹⁵ By applying for an enforcement decision, the concerned person thus triggers a duty to make an enforcement decision. Notably, this is not a duty to enforce, or a duty to

¹¹¹⁴ See: Section 5.3.4.

¹¹¹⁵ See: Section 5.3.6.

enforce sufficiently powerfully. Rather, it is a duty to make a decision on whether or not to enforce – a decision which may be appealed and thus subject to some review by the courts.

As mentioned previously, Dutch administrative regulation of environmental law is often carried out by one and the same authority with comprehensive functions. The designated competent authority will permit, modify and enforce permit conditions. Often the same authority will enforce compliance with both general rules and permit regulations. This means that the same enforcement authority will have access to a wide range of enforcement instruments. Such instruments will shortly be described. Before that, however, administrative duties for carrying out the here stated enforcement tasks will be discussed.

5.4.2.2 Duty of Care and Duty to Enforce

In Dutch law administrative enforcement is basically a discretionary power.¹¹¹⁶ This discretion is limited, first of all through general administrative law requirements on the authorities, primarily stated in Awb, and further developed in case law. For a topical example, Awb states a duty to balance interests that will influence the decision of whether or not to impose administrative sanctions, and also with respect to what the order should require. However, the administrative duty of care has to some extent been developed into a principle of enforcement duty. There are, moreover, some statutory statements indicating a duty to supervise, and perhaps implying a duty to enforce. These are often based upon EU law requirements of effective enforcement.¹¹¹⁷

According to the legal tradition and on the face of the law in the legislation, there is no absolute duty to enforce environmental law. There is a general duty of administrative care and a widely formulated enforcement duty in the above presented statements (Wabo 5.2 and Wm 18.2) of the competent authority's administrative functions and tasks. The statements assert that the authority shall ensure legal compliance, the gathering of data, and handling complaints. In the context of permit regulation, Wabo 2:30 prescribes that the authority shall review the permit conditions regularly, to ensure that they are adequate in view of environmental quality and technical development, and so forth. The rules on powers to change or revoke permits distinguish between situations where the authority may take such measures, and when they must ("will") do so. This suggests that there exists an enforcement duty in some specifically described – and more serious – situations. In conclusion, these rules can be interpreted to involve a duty to monitor and supervise, to

¹¹¹⁶ de Graaf, K., and Jans, J., *Liability of Public Authorities in Cases of Non-Enforcement of Environmental Standards* p. 379; Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 189.

¹¹¹⁷ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 189.

inspect and otherwise investigate (which can be tied to the general principle of due care in administrative procedure, which has been codified in Awb Art. 3:2), and a duty to enforce breaches of law. There is sometimes also a duty to intervene in legal authorisation activities. But the above described wide enforcement competence has not always led to much enforcement action in practise, and environmental law compliance has been argued to be at risk. The courts have responded to the argued under-enforcement of environmental law in a discourse on enforcement duties, and to some extent developing the administrative duty of care into a principle of duty to enforce.¹¹¹⁸

In case law the Council of State, since the 1990s, has started to reflect a narrowing of the discretionary powers of the competent authorities, based upon the general interest of enforcement. Subsequently the discourse has come to confirm that there is a duty to enforce, which “in principle” delimits administrative discretion, but with certain stated exceptions. This principle still applies. Essentially, the general rule has shifted from being based on discretion to a duty to enforce, and passivity appears as the exception to the rule. From 1994 onwards a new line developed through different kinds of cases in different areas, including environmental law. With this a new legal standard on enforcement duty has developed, which is still today reiterated in the decisions of the Raad van State. This standard holds that in principle the authority must enforce non-compliance with, for example, environmental law standards or permit conditions. The authority must make use of its enforcement competences. However, in extraordinary circumstances (and only then) can they abstain. Some such circumstances are explicitly stated as: a) when it is likely that it will be legalised; for example, if there is no obligatory permit but in fact the permit procedure is in progress (that is, the operator has made an application), b) reasonableness, meaning that when enforcement action is so unreasonable that no sensible public authority could ever have come to it.¹¹¹⁹ An example of this can be insignificant breaches of law, or where there is no reason to suspect that the problem will continue (isolated cases). This legal reasoning can be compared with the *Wednesbury*

¹¹¹⁸ de Graaf, K., and Jans, J., *Liability of Public Authorities in Cases of Non-Enforcement of Environmental Standards* pp. 378–379.

¹¹¹⁹ In Dutch, the reiterated standard states: “Gelet op het algemeen belang dat gediend is met handhaving, zal in geval van overtreding van een wettelijk voorschrift het bestuursorgaan dat bevoegd is om met bestuursdwang of een last onder dwangsom op de treden, in de regel van deze bevoegdheid gebruik moeten maken. Slechts onder bijzondere omstandigheden mag van het bestuursorgaan worden gevegd, dit niet te doen. Dit kan zich voordoen indien concrete uitzicht op legalisatie bestaat. Voorts kan handhavend optreden zodanig onevenredig zijn in verhouding tot de daarmee te dienen belangen dat van optreden in die concrete situatie behoort te worden afgezien.” (ABRvS 11 August 2004, Case no. 200400185/1, AB 2004, 370, Section 2.3.2.)

reasonableness standard in English law,¹¹²⁰ according to which the court's investigation focused on what no reasonable authority could do, rather than deciding what the reasonable authority would do. It is therefore more of a principle of unreasonableness than one of reasonableness. The applicability of the exception from the duty to enforce is thus narrower. In summary, there has been a change from discretion to enforcement duty.

5.4.2.3 Civil Liability Discourse on Regulatory Duties

The duty to enforce could be paralleled to the above mentioned discourse on administrative bodies' civil liability in cases of under-enforcement. The argument is that the enforcement authority can become liable for failure to exercise its enforcement duties, at least in very serious cases. This was argued after a fireworks disaster in Enschede in 2000, which involved a fire and explosions in a fireworks storage area causing enormous damage, and human casualties. The enforcement authority had known of shortcomings in health and safety arrangements, and breaches of environmental regulations, but had only met this with measures of offering more informal advice and information. The injured parties sued both local and national authorities for damages for their failure to regulate, but were unsuccessful. The court (Rechtbank Den Haag) pointed to the wide administrative discretion of the national regulatory authority, and that the claimants had not proved a specific failure to enforce. It seems difficult to indicate precisely what the regulatory authority had done wrong, possessed as it was of such wide discretionary competence. In general terms it was nevertheless clear that the regulation of the installation had failed, and the regulating authorities had not done their work particularly well. The Court, however, did dismiss the potential of civil liability for under-enforcement in general.¹¹²¹ Similarly, in the case of the barge Linda,¹¹²² the Supreme Court was open to such liability, but held in this specific case that the relevant individual claimants' losses were not interests that the authority was liable to protect. Its administrative tasks and duties related mainly to public interests.¹¹²³

A parallel can be drawn with the area of financial law and the *Vie d'or* case,¹¹²⁴ where an insurance company went bankrupt causing financial loss for many people. A group of victims sued the regulatory authorities for damages. The argument was that the damage would not have happened if the regulator had taken more care in its supervision of the company. The Su-

¹¹²⁰ *Associated Provincial Picture Houses v. Wednesbury Corp.* (1948) 1 K.B. 223. See, also: de Graaf, K., and Jans, J., *Liability of Public Authorities in Cases of Non-Enforcement of Environmental Standards* p. 380. See above: Section 4.2.5.4.

¹¹²¹ See further: van Boom, W., and Pinna, A., *Liability for Failure to Regulate Health and Safety Risks*, esp. pp. 5–6.

¹¹²² HR 7 May 2004, No. C02/310HR, EvdW 2004, 67.

¹¹²³ See further: van Boom, W., and Pinna, A., *Liability for Failure to Regulate Health and Safety Risks*, esp. p. 8

¹¹²⁴ Hof den Haag 27 May 2004, NJ 2004, 470.

preme Court did find that the regulator should have done more to ensure effective enforcement, but stated that at the same time the authority had a wide margin of administrative discretion.¹¹²⁵ The judgment suggests that the enforcement authority may become liable for under-enforcement, but this seems a rather limited prospect.¹¹²⁶

The arguments in these cases build on the duty of authorities to enforce, making non-enforcement an unlawful act and grounds for liability on the part of the public authority. The main argument for public liability is the legitimate trust that the general public must be able to have in the supervising and enforcing authorities.¹¹²⁷ On the other hand, the contention is that a more relevant allocation of liability and blame is to be placed on the actors who in fact caused the damage – the fireworks company, the café owner, as they were the prime wrongdoers. The regulator's role is more to defend environmental interests as a whole, and not to protect individuals. Based upon the Supreme Court judgment in the barge Linda case, this could represent a technical problem in a tort law case.¹¹²⁸ Other often related problems can be met in proving the liability and the loss.¹¹²⁹ Nevertheless, Dutch law does include the possibility of public authorities being liable for non- or under-enforcement, which further accentuates administrative enforcement duties.

It should be made clear that the discussion above mainly concerns situations where the enforcement authorities have knowledge of breaches of law (statutes, permit conditions, and so on) and about the risks involved. The case of an enforcer not having such knowledge, but perhaps ought to have discovered it, is not clear. Criteria developed in general tort law precedents should be used to decide on public liability in such cases. This entails looking at the severity and scale of any potential damage, and the probability of its occurring. The greater the danger, the greater becomes the duty of care, according to these criteria.¹¹³⁰ In summary, there is a potential for civil liability for under-enforcement, but in practice there are so many legal obstacles that that potential is probably only realistically attainable in the most clear-cut and serious cases.

¹¹²⁵ See, also: Kozoil, H., and Steining, B., (Eds.), *European Tort Law 2007* pp. 420–421. The Country Report on the Netherlands is written by Michael Faure and Ton Hartlief.

¹¹²⁶ See, however arguments against the reluctance to state supervisory liability in: Giesen, I., *Regulating regulators through liability – the case for applying normal tort rules to supervisors* pp. 17–20; and on potential future development of the matter in: van Boom, W., and Pinna, A., *Liability for Failure to Regulate Health and Safety Risks*.

¹¹²⁷ Giesen, I., *Regulating regulators through liability – the case for applying normal tort rules to supervisors* p. 16; and de Graaf, K., and Jans, J., *Liability of Public Authorities in Cases of Non-Enforcement of Environmental Standards* pp. 389–390.

¹¹²⁸ De Graaf, K., and Jans, J., *Liability of Public Authorities in Cases of Non-Enforcement of Environmental Standards* p. 390, and Michiels, F.C.M.A., *Houdbaar handhavingsrecht* p. 1.

¹¹²⁹ De Graaf, K., and Jans, J., *Liability of Public Authorities in Cases of Non-Enforcement of Environmental Standards* pp. 391–392.

¹¹³⁰ De Graaf, K., and Jans, J., *Liability of Public Authorities in Cases of Non-Enforcement of Environmental Standards* p. 389.

5.4.2.4 Pragmatic Non-enforcement Practice – “Gedogen”

From time to time, administrative authorities will probably under-enforce in any enforcement system; often through lack of different kinds of resources, but sometimes for reasons of efficiency and effectivity. As indicated at the beginning of this chapter, the Dutch legal tradition is characterised by a pragmatic approach to legal steering, in particular in respect of enforcement. There is an established legal practice for enforcers’ tolerance, or refraining from enforcing breaches of law, which is expressed in the concept of “gedogen” – or tolerance. This is where the enforcing authority does not exercise its enforcement functions, even though it is (or should be) aware of a contravention of the law. The gedogen practice is founded on the “dilemma” of the constitutional state on the one hand requiring administrative authorities to supervise and enforce compliance with the law, and on the other, stating a principle that no enforcement measures need be taken in specific cases. Moreover, the decision on how to resolve the dilemma is basically one of administrative discretion.¹¹³¹

The gedogen practice is developed in case law, and can generally be described as there being an enforcement obligation “in principle”, but that certain circumstances will motivate gedogen – that is, tolerance rather than enforcement. Such circumstances concern transitional situations, or other situations where enforcement is deemed meaningless, and also where there are important opposing interests; or where enforcement would conflict with general principles of administrative law.¹¹³² This will then illustrate the other side of the above-discussed enforcement duties – that is, when there is no such duty. A typical situation for gedogen is where enforcement is seen to be disproportionate, or inappropriate, to the aims and purposes of the enforced legislation. An argument in the environmental law case can be that the environmental law goals may be more effectively realised with a pragmatic and appropriately targeted enforcement strategy. Generally, direction on gedogen policy is published at different levels of the administration, for instance, in the “beliedsnota” of the relevant ministry.¹¹³³ These documents promote legal certainty.

The gedogen practice provides the enforcing authority with a range of enforcement strategies. They can to some extent target the most crucial enforcement cases, and be flexible in the nature of their enforcement approach. Nevertheless, in the environmental area, the practice of tolerance may be problematic in view of the imperative and changing character of environmental problems and knowledge about them. Disadvantages for enforcement

¹¹³¹ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* Chapter 2, esp. pp. 17–18, and at pp. 358–359; and Vermeer, F., *Gedogen door bestuursorganen* pp. 19–21 (for an English summary, see: pp. 455–466).

¹¹³² Vermeer, F., *Gedogen door bestuursorganen* pp. 123–124; Seerden, R., and Heldeweg, M., *Public Environmental Law in the Netherlands* p. 383.

¹¹³³ See: Vermeer, F., *Gedogen door bestuursorganen* Section 3.2. and p. 458.

authorities exercising *gedogen* is that considerations of legitimate expectations and legal certainty can make it hard for them to change their minds and start enforcing an earlier tolerated situation. The decision to tolerate should be a conscious and well based decision, and not just being passive, or pressed for time and resources. The enforcement authorities may also, as recent case law has shown, be liable for damages to injured parties arguing their duty to enforce. Moreover, the *gedogen* practice may well conflict with European law on effective enforcement, which has been described in Section 1.2.4. This would entail, for example, that this practice should not be followed in the application of EU law¹¹³⁴ which is, of course, often involved where there is environmental law enforcement.

5.5 Administrative Enforcement Instruments

5.5.1 Introduction

Having thus established the wide competence of the environmental law regulators, and discussed the legal status of their administrative responsibilities, the instruments and procedures for realising these tasks will now be considered. Fundamentally, any infringement of provisions laid down by, or pursuant to, the Wm can thus lead to enforcement measures. Awb Chapter 5 provides instruments and procedures for the exercise of the regulatory tasks and duties of the enforcement authorities. The main instruments are administrative coercion (*bestuursdwang*) and the conditional fine order (*last onder dwangsom*). Enforcement instruments are generally called “sanctions”.¹¹³⁵ Enforcement orders are always coupled with some sort of sanction. They are therefore always coercive. A recent addition to the instruments of the administrative enforcement authorities are administrative fines, or penalties (*bestuurlijke boeten*). These are punitive sanctions in response to specified breaches of law. In addition to the stated administrative sanctions, the authority’s permitting powers should also be borne in mind. The same enforcement authority will often have the power to revoke or revise a permit and its provisions.¹¹³⁶ All of these instruments will shortly be further described, after some general remarks on enforcement sanctions.

¹¹³⁴ Vermeer, F., *Gedogen door bestuursorganen*, Chapter 4, esp. pp. 151–155.

¹¹³⁵ In Dutch legal terminology “sanction” is used generally to refer to each formal reaction from the administrative authorities to violations that entail obligation for the actor. See: Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 182. Note, also, the definitions in Awb. 5:2.

¹¹³⁶ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 183.

An administrative sanction is an individual administrative decision,¹¹³⁷ which can be given by the competent authority on its own initiative, or in response to an application. Administrative decisions are directly applicable when published (See Wabo 6.1, and also Awb 3:40). Pending an appeals procedure, the order is not revoked, but there is a possibility to ask for provisional remedies, stated in Awb 8:81 (See also Wabo 6:1).

The sanction can be reparative or punitive in its purpose but more often, and most appropriately in environmental law, it is reparative. Its purpose is to direct the actor towards a change in behaviour, and to bring the illegal environmental situation in compliance with the law. This reference to reparative purpose should be noted. Significantly, the enforcement rules do not refer to preventive or precautionary measures. In Dutch law enforcement will only be used to repair (or punish) breaches of law. Orders with the purpose of preventing future breaches of law may sometimes be issued, but that requires the enforcer to show that there is a strong probability (bordering on certainty) that a future violation of a specific legal rule will occur.¹¹³⁸ Enforcement competence appears to be more centred on remedying problems and legal violations already realised, rather than avoiding such problems through precautionary measures. Such precautionary measures will generally have to be formulated in a legal rule, so that the enforcement authority can deal with failures to take such measures. This explains the Dutch formulation of “reparative”, rather than “preventive” or “precautionary” orders or measures. The terminology is based upon the general administrative law principle that a sanction can only be issued after a breach of the law has occurred. This is motivated by reasons of legal certainty, demanding clear grounds for administrative orders against an individual.¹¹³⁹

As indicated earlier, punitive sanctions (*bestuurlijke boete*) are also being introduced, thus blurring the line between administrative and criminal law, and the aims and purposes of administrative enforcement. The introduction of such punitive sanctions, however, is only to be complementary to the steering and reparative administrative orders, and is thought to be applied only when those are insufficient or at all relevant.¹¹⁴⁰

The Dutch administrative enforcers are generally thought to have wide competence and effective instruments for enforcement. The original enforcement instruments were those of administrative coercion and the revoca-

¹¹³⁷ The definition of the enforcement measure as an order entails that Awb is applicable and that the measures are enforceable through administrative court procedures.

¹¹³⁸ ABRvS 20 August 2008, Case no. 200709122/1, AB 2008, 290, with Case Comment (Noot) by Michiels; ABRvS 30 March 2005, Case no. 200501676/1, AB 2005, 176; and ABRvS 11 January 2006, Case no. 200502967, AB 2006, 240.

¹¹³⁹ Damen, L.J.A., et al., *Bestuursrecht 1* p. 656. See, also: Blomberg, A., *Integrale handhaving van milieurecht* pp. 90–91, and 99–100.

¹¹⁴⁰ Michiels, F.C.M.A., *Houdbaar handhavingsrecht* pp. 12–13; and Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* pp. 183–184.

tion of different kinds of permits, but the system has since moved more towards those of prevention and financial coercion.¹¹⁴¹ This can be seen as a more purposive enforcement strategy. The use of the conditional fine also places responsibility for taking physical measures on the actor instead of the authority. Moreover, the authority can enforce environmental law easier, expending less effort and resources, thereby reducing financial risk as well. One could argue that this entails that the actor has to make more efforts, both economically and practically, but this is in line with the principle of PPP. The conditional fine, however, is the prominent instrument, which is generally found to be most effective.¹¹⁴² Finally, the enforcement authorities' "toolbox" of enforcement instruments has also been equipped with a punitive sanction, which has further extended their arsenal for environmental control.

An interesting observation is that some administrative authorities have been using public information of the administrative enforcement measures as a further sanction.¹¹⁴³ In this way publicity of a breach of the law and administrative orders in newspapers or on the internet, is employed as a sanction through "naming and shaming".¹¹⁴⁴ Such measures focus on the goodwill of the actor and supposedly initiate public debate and consumer pressure at the same time. Such measures have been the subject of comment in a Council of State judgment against the background of the right to privacy and the principle of openness and transparency in public administration. The Council argued – also ex officio – the need for weighing these different interests. It maintained that the interests of transparent governance and openness in administrative decision-making weighed heavily and were relevant. In this case they dismissed the appeal based upon the right to privacy.¹¹⁴⁵

As indicated earlier, the formal legal act always involves a coercive or punitive sanction. Simple orders to do or to refrain from doing something are not referred to at all. This suggests that the argued wide range of enforcement instruments does not reach that far in the direction of "soft steering". It should, however, be remembered that soft steering in a pre-enforcement phase is generally central to the administrative authorities' environmental steering. While the administrative procedural rules do not regulate this phase, there is nothing to suggest otherwise for the Dutch order. It is, how-

¹¹⁴¹ Michiels, F.C.M.A., *Houdbaar handhavingsrecht* pp. 11–12.

¹¹⁴² Michiels, F.C.M.A., *Houdbaar handhavingsrecht* pp. 11–12, and Awb 5:32-36.

¹¹⁴³ For example, the province of Limburg's policy is to publish enforcement information (Handhavingsbeleid; Gedragslijn openbaarheid handhavingsinformatie). This involves publishing the identity of the addressed company, results of measurements and control reports, enforcement decisions, and the relevant breaches of law. The policy is based upon constitutional rules (Grondwet Section 110), the Aarhus convention, and their environmental enforcement responsibilities. The policy document is accessible at the province's official website, at: http://www.limburg.nl/upload/handhaving/gedragslijn_handhavingsinformatie.pdf.

¹¹⁴⁴ Michiels, F.C.M.A., *Houdbaar handhavingsrecht* p. 12, and Section 4.5.

¹¹⁴⁵ ABRvS 31 May 2006, Case no. 200505388/1.

ever, interesting to note the lack in the legal provisions of formal administrative statements without the coercive or punitive feature.

5.5.2 The Pre-Enforcement Stage – Supervision and Investigatory Powers

The pre-enforcement stage involves supervision, investigation and communication with the enforcement addressees. Within the pre-enforcement stages, when conducting supervision and communicating with the actor without issuing legally binding individual enforcement decisions, the authority concerned may communicate non-coercive statements. But as soon as the authority proceeds to the enforcement stage and makes a juridical act, through issuing an enforcement order, this is coupled with a threat of some kind of sanction – a fine or physical coercion. The approach is either one of soft and informal, or that of a formal sanction regulated in law.

Supervision is accomplished in various ways, through inspections, assessing communication from the actor in reports and applications, as well as supervising the actors' own supervisory systems – system control (*systemtoezicht*).¹¹⁴⁶ System control has become increasingly important as a supplement to the fundamental system of inspections and other supervisory measures driven by the enforcement authority. System control can be based upon a study of reports that the different operators must produce in accordance with the general rules or permit conditions – self-control (*Zelfcontrole*). It can also be tied to private certification schemes, voluntary management schemes such as EMAS, or private agreements between the administrative authority and the actor.¹¹⁴⁷ There is, however, no general self supervisory duty, such as in the Swedish environmental law system. The choice of relying on system control seems to some extent to depend on the individual situation – the character of the operation, environmental risks, the experience of the relevant operator, and so forth. There is some scepticism on the scope of this enforcement approach, based upon the risks involved in giving up control of the supervision.¹¹⁴⁸ The focus of the environmental supervision system, however, is on investigation by the authority itself, or initiated by it.

For the purposes of the authority's supervision, Awb states the investigatory powers in Chapter 5, Subdivision 5.2 "Supervision" (Wm 18.4 also refers to these powers). According to these rules a supervising authority retains powers of entry in Awb Art. 5:15 and can be accompanied by other persons or necessary equipment. If required, it can be assisted by police.

¹¹⁴⁶ Michiels, F.C.M.A, *Houdbaar handhavingsrecht* p. 9.

¹¹⁴⁷ Chorus, J., et.al., (Eds.) *Introduction to Dutch Law* pp. 366–367, and 375–376. See, also: Velthoen, D., *Miljörätten i Nederländerna* pp. 338–341, for an earlier discussion.

¹¹⁴⁸ For example: Michiels, F.C.M.A, *Houdbaar handhavingsrecht* pp. 23–24. Such views were also stated by VROM Senior Adjunct Inspecteur Karin Reijnders, in an interview on 9 June 2010.

Officials can inspect the property, vehicles, open packages and take samples (5:18–19). They can also inspect and copy data and documents, as well as demand information (5:16–17). These powers, however, are limited by a general rule of reason, or proportionality in Article 5:13, which states that they may only be used to the extent reasonably necessary for the proper execution of the supervisor's duty.

Appropriate supervision by administrative authorities is not regulated in the same way as the actual enforcement, but is very much left to administrative discretion. Jurisprudence does not concern itself with the quantity and quality of supervision. Instead, it concentrates on regulating the enforcement orders of the administrative authority when it has become aware of a problem.¹¹⁴⁹ General principles of investigatory duties are to be found in the general principle of due care, and the investigatory principle of Awb Art. 3:2, and more specifically in the statement of enforcement tasks set down in Wm Art. 18:2 and Wabo 5:2 on ensuring compliance, the gathering of information, and dealing with complaints. How this work is done is, of course, very much a discretionary matter, and only clear disregard of information and complaints will be the subject of control.

5.5.3 Environmental Reporting

Apart from inspection, and asking for information, the supervisory and enforcing authorities can initiate and prepare their action based upon reports provided by actors (for example, in annual environmental reports). Until 2009, annual environmental reporting duties for larger installations were prescribed in Wm Chapter 12, and the Decree on Environmental Reporting (Besluit milieueverslaglegging). The operators of such installations had to every year publish one report for the competent authority, and one report for the general public, and to make them available to all who wished to inspect them.¹¹⁵⁰ These annual environmental reports (milieujaarsverslag, MJV) were to report widely on any environment impacts, and the measures taken to reduce them, and provide several other more specific pieces of information.¹¹⁵¹ These reporting duties were repealed in 2009, and now the so-called PRTR report is the essential environmental report.¹¹⁵² This reporting scheme focuses on data on polluting substances, and despite the extensive tasks involved, it is nevertheless a more narrow scope of reporting obligation. The duties derive from EU law on PRTR (Pollutant Release and Transfer Regis-

¹¹⁴⁹ Michiels, F.C.M.A, *Houdbaar handhavingsrecht* p. 11.

¹¹⁵⁰ Wm Art. 12.2 and 12.4, now repealed.

¹¹⁵¹ Chorus, J., et al., (Eds.), *Introduction to Dutch Law* p. 387.

¹¹⁵² More information can be found on the official website of the Dutch government, see: <http://www.e-mjv.nl/documenten/leidraad>. On changes to reporting duties, see official fact sheet from the Ministry of Infrastructure and Environment: Milieueverslaglegging en PRTR: veranderingen vanaf het verslagjaar 2009, October 2009.

ter),¹¹⁵³ which in turn is based upon the international UNECE Protocol on PRTR¹¹⁵⁴ and goes beyond earlier regulation on reporting duties.¹¹⁵⁵ One of the main purposes of these provisions is to provide access to environmental information for the concerned public.

Apart from these reporting duties there are some specific duties founded on sector legislation and agreements – for example, for nuclear activities, oil and gas operations, within the emissions trading scheme, and voluntary agreements on energy efficiency.¹¹⁵⁶ But there is no longer a general and comprehensive reporting duty for environmentally hazardous installations. This entails fewer administrative burdens for the actor, but potentially more investigatory and monitoring duties for the enforcement authorities. This is thus part of the supervisory stage. Next, the actual enforcement instruments will be described.

5.5.4 Administrative Coercion – Bestuursdwang

The original instrument of Dutch administrative enforcement – outside revoking authorisations – is administrative coercion (bestuursdwang).¹¹⁵⁷ This is the administrations' physical enforcement of the public norm, a factual act. This factual action is referred to in the Awb as “enforcement action”, or “reparation sanctions” (in different translations). Such action, in itself, does not constitute an administrative law decision. The administrative coercion instrument grants authorities the competence – in Awb Art. 5:21, and 5:27–30 – to actually abate the problem themselves – that is, to intervene in an unlawful situation directly. This factual action entails entering the relevant site and physically putting an end to the illegal situation created by the breach of environmental rules. This can involve sealing off sites, razing buildings, removing goods, cleaning up illegally dumped substances, and such alike. An authority can also commission a third party to take the necessary action on its behalf. As a rule, the authority cannot enter and start such action without serving at least 48 hours notice in writing, and specifying the manner and place of entry. One main type of administrative coercion case is that of: stopping and suspending (or closing down) an operation. The other is that of undoing the damage (for instance taking reparative measures to remedy pollution).¹¹⁵⁸ There is, as stated earlier,¹¹⁵⁹ limited room for preventive

¹¹⁵³ Regulation (EC) No. 166/2006 of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC.

¹¹⁵⁴ Protocol on Pollutant Release and Transfer Registers, Kiev, 21 May 2003.

¹¹⁵⁵ Regulation 166/2006, para. 5 and 6 of the preamble.

¹¹⁵⁶ See, for example: <http://www.e-mjv.nl/documenten/leidraad/algemeen/wet-regelgeving/>, <http://regelingen.agentschapnl.nl/content/meerjarenafspraken-energie-efficiency>, the Radiation Protection Decree Chapter 10, and in Wm Chapter 16, Division 16.2.2.2, etc.

¹¹⁵⁷ Michiels, F.C.M.A, *Houdbaar handhavingsrecht* pp. 11–12.

¹¹⁵⁸ Blomberg, A., *Integrale handhaving van milieurecht* p. 90.

sanctions, and by its nature administrative coercion mainly centres on making good existing problems. However, administrative coercion can, according to Awb 5:7, be imposed as soon as a clear threat of contravention of a relevant law becomes evident.

In general, the authority in question must give warning of its intentions in an order (last onder bestuursdwang), clearly and unambiguously stating the regulation breached and specifying the measures to be taken and how the addressee can respond to avoid such action by the authority, stating a time limit for such prevention (Awb Art. 5:24).¹¹⁶⁰ By means of such an order, the instrument gains a function of directing the actions of relevant actors. The order must also state the extent to which the violator will be charged for the costs of the remedial action (Art. 5:25.2). The violator, the applicant, and those persons entitled to use the relevant property must be notified of the order. When this time has expired the authorities may take coercive enforcement action. Enforcement action may normally only be taken after the prescribed time period providing room for the addressee's own action (Art. 5:21(b)). In urgent cases, however, enforcement action can be taken immediately and without previous order, even without a formal decision. In such a case the written decision must be made as soon as possible afterwards, and be notified to concerned persons as stated above – without, of course, specifying a time period (Art. 5:31).

The costs incurred when taking enforcement action are owed, according to Awb Art. 5:25, by the offender, unless considered to be unreasonable. The administrative authority determines the amount of costs payable. These include preparing the action, compensation for damage, and removal of financial gains accumulated by the offender, as well as the cost of enforcement. Such costs can subsequently be recovered from the responsible actor in a procedure prescribed in Awb Chapter 4, Subdivision 4.4. In the end the authority may enforce therein under issued decisions and payment orders to the violator. This is done by proceeding to execution in the scope of the Code of Civil Procedure (Awb 4:116).¹¹⁶¹

This instrument, of course, is effective in the sense of remedying damage and bringing an end to non-compliance, but it relies on the initiatives and actions of the public authorities. Though it warns the addressee of the planned action, it is not focused on compelling the actor to take action to remedy a problem or to start complying with the law. When this and permit withdrawal were the only enforcement measures, the enforcement order was lacking as an instrument of pressure on actors, or of convincing them to take action themselves. This was introduced with the conditional fine order,¹¹⁶²

¹¹⁵⁹ See: Section 5.5.1.

¹¹⁶⁰ Blomberg, A., *Integrale handhaving van milieurecht* pp. 92–93.

¹¹⁶¹ Damen, L.J.A., et.al., *Bestuursrecht 1* pp. 665–666.

¹¹⁶² Damen, L.J.A., et.al., *Bestuursrecht 1* pp. 654 and 660.

which is now the most common enforcement sanction. Bestuursdwang is nevertheless still used. It will be appropriately used in cases where authorities do not think the conditional fine order would be successful, or where there is an urgent need for reparative action.

5.5.5 The Conditional Fine Order – Last Onder Dwangsom

The administrative conditional fine order (last onder dwangsom) was introduced to provide a way to persuade actors to act themselves, before the authority stepped in and take over.¹¹⁶³ The administrative conditional fine order is a corrective administrative one backed up with a periodic penalty fee. This administrative decision is by definition in Awb 5:31d aimed at reparation and confers a duty backed up by a conditional fine. It may confer positive duties (to take a certain action), or negative duties (to stop or refrain from doing something) to the addressee. The order can have a preventive purpose, in the sense that it can order the addressee to take action to see to it that a breach does not reoccur (Awb Art. 5:32a).¹¹⁶⁴ The idea is that if the addressee fails to comply with the order, then the party concerned is liable to pay a sum of money. The amount should not be unreasonable. It must be proportionate, which means in reasonable relation to the damage done to the relevant interests and the intended effect of the sanction. The fee is thus reparative, and does not allow for additional punitive fees. The aim of the order is to persuade the addressee to change their behaviour.¹¹⁶⁵ It is a legal act by the Government to bring about a factual act by the addressee.¹¹⁶⁶

The form of the conditional fine order is prescribed in Awb. An order must first of all be written, according to Awb Art. 1:3. It must state the violation, and the rule violated, and – if necessary – an indication of where and when the violation is found, according to Awb Art. 5:9. Furthermore, Awb Art. 5:32a demands that the order defines the required remedial measures, as well as a time period during which such measures should be taken to avoid paying the conditional fine. Based upon the demands of legal certainty, these demands have to be clearly and unambiguously formulated.¹¹⁶⁷

¹¹⁶³ In that sense it can be seen as not really entailing direct enforcement, but instead an indirect steering through persuasion, or providing incentives for voluntary compliance, see: Blomberg, A., *Integrale handhaving van milieurecht* p. 99.

¹¹⁶⁴ Notably, this was not the case earlier, see Blomberg, A., *Integrale handhaving van milieurecht* pp. 99–101. As noted earlier, the Dutch enforcement order does not really involve enforcement of preventive measures – to avoid non-compliance. Enforcement can only react to non-compliance. Thus the preventive measure has to be demanded specifically by law, so that failure to comply can be enforced. In later reforms of Awb, the opportunity of ordering measures to prevent further non-compliance has been introduced, thus providing a kind of compromise.

¹¹⁶⁵ Blomberg, A., *Integrale handhaving van milieurecht* p. 99.

¹¹⁶⁶ See: ABRvS (Voorzitter), 24 July 2001, Case no. 200100468/3, AB 2002, 1, Case Comment by Michiels, at note 3.

¹¹⁶⁷ Damen, L.J.A., et.al., *Bestuursrecht 1* p. 657.

The conditional fine can, according to Awb Art. 5:31d, and 5:32b, be tied to a time period or a stated violation; either demanding payment of the sum of money for each violation (generally stated in the case of repeated but separate violations), or after a stated time period has run out (in the case of continuing violations). The choice of appropriate approach is at the discretion of the enforcement authority. An administrative conditional fine order, according to Article 5:32a, includes a set time limit. Unlike administrative coercion, the conditional fine can only be imposed on wrongdoers who are able to bring the illegal situation to an end. Otherwise the addressee cannot prevent forfeiture, and the penalty would in actuality be a penalty fine; a punitive sanction.¹¹⁶⁸

The conditional fine must be paid within six weeks after it has become forfeit. The fine is subsequently collected by giving notice of a decision to collect, and further enforced in the procedure for demanding monetary debts arising from administrative law, as prescribed in Awb Division 4.4.

The conditional fine order is now the most common administrative sanction and has proved a very effective device for the enforcing authorities. It is a key element of Dutch administrative enforcement law. In practice most addressees are sensitive to such financial pressure, and thus adhere to the order and end the illegal situation. The instrument of last order dwangsom is consequently considered very effective. This, together with reduced financial risk for the authorities, is the reason for the conditional fine being the most popular enforcement instrument.¹¹⁶⁹

5.5.6 Instruments Connected to Permitting Powers

5.5.6.1 Introduction

As established earlier, the enforcement authority and the permit authority are one and the same; the instruments tied to the permitting powers are closely linked to the role of enforcer. They are tools in the same toolbox, so to speak, and to make a complete presentation of the administrative enforcers' powers and instruments, relevant permit authority enforcement functions need also to be mentioned. As the permitting authority has the power to permit, so it also has the power to withdraw and to change the permit. Before October 2010 the relevant enforcement functions were stated in Wm Chapter 8, esp. Art 8:22–26. After the reform of the environmental permit regime, the enforcement tied to the new permit regime is found in Wabo.

¹¹⁶⁸ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 183. See, also: Blomberg, A., *Integrale handhaving van milieurecht* p. 101; and Damen, L.J.A., et.al., *Bestuursrecht 1* p. 666.

¹¹⁶⁹ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 183.

There are different ways that a permit review procedure may be initiated. A permit can be granted and altered etc., on the initiative of the operator, to meet their desires of expansion and to safeguard the operation of the business. However, permitting functions in focus in this presentation are those used by the authority to control and direct the actor in view of legal and/or environmental demands – *ex officio*, or in response to an application. These permitting powers may to some extent be used as enforcement instruments. They are used as a reaction in regulating the operation of an installation or in response to non-compliance with the permit conditions (but also in view of changed circumstances, such as legal or technological developments) or environmental problems. Because the permit and compliance control competences are taken by the same authority, these functions become more interrelated. The instruments tied to the permitting powers are basically to make amendments to the provisions of the permit, or to revoke it.

5.5.6.2 Reviewing and Changing Permit Conditions

The power to change environmental permit conditions is fundamentally prescribed in Wabo Art. 2.31. The rule distinguishes between situations where the authority *may* amend the permit provision (Subsection 2) and when the authority *must* amend (“*amends*”) these provisions (Subsection 1). For example, it *may amend* the conditions of a Wm permit where this is in the interests of the environment, or on grounds referring to the authorisation requirement (Art. 2.31.2.b and e). It *amends* the permit when this is motivated by developments of BAT and environmental quality, or when needed to prevent or mitigate serious environmental effects (Art 2.31.1.b and c). The formulation suggests a duty to amend in some situations, and a discretionary power in other circumstances. There is also a general duty to review environmental permits. The competent authority shall, according to Wabo Art. 2.30, review the environmental permit conditions regularly, in order to keep such regulation updated. These general duties are specified in the Environmental Law Decree (Besluit omgevingsrecht). Together these rules suggest a somewhat variable duty to enforce (in the sense that the term is used here) when it comes to permit regulations.¹¹⁷⁰

According to Wabo Art 2.30, the requirements of the permit conditions are to be kept adequate in view of the qualitative status of the environment, and the development of environmental protection technology. This statement echoes the principle of Best Available Technology (BAT), which is based on EU law (primarily the Industrial Emissions Directive (IED))¹¹⁷¹. There is also a subsequent duty, stated in Wabo Art. 2.31.1.b, to review the permit provi-

¹¹⁷⁰ Compare earlier regulation in Wm 8.22, see: Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 383.

¹¹⁷¹ Directive 2010/75/EU on industrial emissions (EIA).

sions for an installation with harmful environmental effects in view of such developments.

The Environmental Law Decree (Besluit omgevingsrecht) further states, under the heading “Update Duty” (Art. 5.10), that the Wabo 2.30 provisions do in any case apply if the pollution situation is such that the emission limit values should be changed; that major changes in BAT provisions are, or that other techniques are needed to prevent accidents and to limit their environment consequences. Also here is BAT a central yardstick for regulation, and a trigger for reviewing obligations. The Decree rule demands that the authority concerned will apply the review powers in the context of major changes in BAT that entail significant reduction of emissions without imposing excessive costs. This suggests a level of ground-breaking environmental technology. It should be noted, however, that this yardstick is supplemented with obligations to safeguard environmental quality, and to protect against accidents. These obligations are not limited by statements of economic cost considerations.

5.5.6.3 Revoking Permit Regulations

Fundamentally, an authority that authorises an activity can also withdraw that authorisation. Typical grounds for such measures are when an installation produces unacceptably adverse environmental effects, which cannot be reasonably rectified through amendment of the permit condition. Revoking a permit has traditionally been a fundamental enforcement instrument, together with administrative coercion where the authority itself steps in to remedy the unlawful situation in question and the damage caused. This sanction is the most radical one and normally only used as a last resort and as a way of terminating a situation where the actor has neither the will nor the ability to comply with environmental regulations and permit conditions.¹¹⁷² The revocation and closing of the establishment is then the only alternative.

The power to withdraw permit regulations is laid down in Wabo Art. 2.33. As with the rule on amending permit conditions, it distinguishes between obligations to revoke and discretionary powers to revoke. The obligation concerns the whole permit, not parts of it, and generally relates to situations where there is hardly any other option than to revoke the permit. The competent authority *withdraws* the environmental permit if this is required by binding international law (Art. 2.33.1.a), or when necessary environmental and safety requirements cannot be resolved – for example, when the BAT requirements (Art. 2.31.1b) demanding amendment of the permit regulations cannot be met (Art. 2.33.1.b).

The discretionary revocation power may concern both partial and complete withdrawal, and has a wider scope than the above-discussed duty. The

¹¹⁷² Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 183.

competent authority *may* thus withdraw *all or part of* an environmental permit, on the grounds stated in Art. 2.33.2, including circumstances when this is required in the interests of efficient waste management, or when the permitted activity has not begun within a certain time. There are also somewhat general grounds with reference to substantive requirements for authorising the particular activity (Art. 2.33.2.e with reference to Art. 2:19). Since withdrawal can be partial, and the scope of the grounds wide, such discretionary competence takes the more flexible and steering approach. The authority can change the preconditions of the still authorised activity, thus forcing a change in the operation of activities – and perhaps even applying for a new permit on its own initiative. The authority may also withdraw a permit, at the request of the permit holder, in part or in its entirety. Partial withdrawal can thus lower the environmental demands on the operator. Nevertheless, such a request cannot be met if the interests of environmental protection do not allow it (Art 2.33.2.b, and 2.32.3).

5.5.6.4 Review and Enforcement Triggers

As stated above, the competent authority will to some extent be obliged to review permits according to Wabo 2.30 etc., and to change or revoke them, in certain situations specified in Wabo Art 2.31 and 2.33. It is, however, left to the discretion of the competent authority to decide precisely when to review (and therefore to some extent whether to review).¹¹⁷³ Review and enforcement action, however, can to a certain degree be triggered by other persons and public bodies. First, there is the general possibility open to a concerned person to apply for an enforcement decision from the authority (Awb 4:1 etc) He or she can thus cause the authority to make an appealable enforcement decision.¹¹⁷⁴ Furthermore, on application for alteration and revocation of an environmental permit, Wabo 2:29 provides rights to demand changes for the inspector – that is, supervisory and enforcement bodies at national level, as well as the different public advisory bodies involved in the permit procedure. This request, called a “verklaring van geen bedenking” (vvgb), cannot (should not) be refused. This article can thus be considered as complementing the powers and duties set down in Art. 2.30 2.31 to review change and to revoke permits.¹¹⁷⁵ Art. 2.31.1.a prescribes that the authority concerned must amend permit conditions to implement an application referred to in 29.2.1.a. According to Art. 2.33.1.c, the authority must also revoke the permit if this is requested. It should also be noted that the appropriate minister may, in accordance with Art. 2.34, also direct the competent authority regarding its permit regulation. Similarly, as with 29.2 requests,

¹¹⁷³ See above: Section 5.4.2.

¹¹⁷⁴ See: Section 5.3.6.

¹¹⁷⁵ Barendregt, H., et.al., *Handboek Wabo* pp. 148–149.

such ministerial direction prompts a duty to amend or revoke the permit as instructed.

In conclusion, concerned parties and involved public bodies, or the minister, may trigger review, amendment, as well as partial or complete withdrawal of environmental permits. While the public can trigger the authority to take certain action, which can be challenged, the public bodies and the minister can actually demand such action. This adds significantly to the enforcement authorities' responsibilities and duties.

5.5.7 Individual Regulation under General Rules

Having described certain enforcement instruments tied to the permitting functions of the competent authority, it should be remembered that the permit regime has been radically deregulated in favour of general regulation. Most environmental activities are regulated by general rules, mainly in the Wm and the Activiteitsbesluit (Barim). The competent authorities control compliance with these rules through the administrative sanctions of conditional fines or administrative coercion orders. As a rule, however, general regulation removes the possibilities open to the regulator for 'customising' the control of an individual activity in accordance with surrounding circumstances that are relevant and appropriate. This is the obvious disadvantage of general rules, and it raises concern in the context of environmental law steering, which is to be focused on the state of the environment. Two similar industries can be set in areas of different character, and cause different environmental effects and risks. Flexibility, adaptivity, and purposiveness are generally needed to ensure appropriate regulation, both in view of environmental interests and the reasonableness of environmental demands on an individual actor. But there is room for customised regulation of the activities under general regulation in Dutch environmental law too. Even though the general rules provide requirements of specified environmental standards and precautionary measures, these are commonly supplemented with a rule providing the enforcer with competence to make customised regulation where the general rules do not suffice. Examples include: Barim Art. 2.2–2.2a, 2.14, 2.20, 3.2.6, and 3.5.4. This therefore provides a sort of supplementary individual regulatory power, which meets the potential problems of deregulation of individual permitting procedures. It establishes an administrative enforcement function that appears to show a compromise between individual pre-regulation through permits, and general regulation through specified standards and conditions for all activities of similar type.

5.5.8 Administrative Penalties – Bestuurlijke Boete

Criminal and administrative enforcement are traditionally clearly separated. Though the conditional fine (dwangsom) might be viewed as a kind of pen-

alty fee, it is legally characterised as an administrative instrument of pressure, having a directing or persuading character, with reparative rather than penal aims.¹¹⁷⁶ The idea is that the financial gain of not adhering to the order is taken away through the conditional fine order. Penal sanctions, on the other hand, are traditionally, theoretically and systematically ascribed to criminal law. Criminal law sanctions are normally reserved for the Department of Justice and the Public Prosecutors. Dutch administrative authorities generally do not have the power to impose punitive sanctions such as fines or penalties, and their sanctions are thus described as being merely reparative by nature.¹¹⁷⁷ There is, however, a noticeable development in progressively including punitive sanctions in the administrative enforcement authorities' competence and arsenal of enforcement instruments. This new instrument is called an administrative penalty (*bestuurlijke boete*). It is defined as a punitive sanction in the form of an unconditional obligation to pay a sum of money (Awb Art. 5:40). This punitive administrative sanction is not meant to replace the more restorative administrative sanctions, but only to complement them in those cases where restorative action is not effective, or even possible.¹¹⁷⁸

For some time administrative penalties have been applied in different sectors of administrative law, for instance, in matters of labour law. These enforcement instruments were then regulated in the specific sector legislation. In 2009 these administrative penalty sanctions were introduced in the “vierde tranche” changes of the Awb. Now the general framework for the form and procedure of the administrative penalty instruments is regulated in the general rules for administrative enforcement in Awb Chapter 5, Division 5.4. However, the actual competence for administrative enforcers to impose penalties is still regulated in sector legislation, for example, in Wm Chapter 18. Sector legislation can also provide specific provision on the procedure or the content of the sanction decision.

Awb Division 5.4 provides provisions on safeguards for the protection of the rights of the individual, as well as procedural rules. For example, the general provisions provide means for avoiding double jeopardy, and coordination with the criminal prosecution authorities (Awb Art. 5:44 and 5:47).

The procedure for imposing administrative penalties involves a violation report, communication, a decision to impose a sanction, and a decision on the amount of penalty fine. Unless a report has been drawn up in a criminal investigation, a violation report shall, according to Awb Art 5:48, instead be drawn up by the administrative enforcement authority. This report states information about the violation and the alleged violator. To safeguard the

¹¹⁷⁶ See, however: Chorus, J., et al., (Eds.), *Introduction to Dutch Law* pp. 355–356, referring to a discussion on the penal quality of reparative sanctions, esp. in a European law context.

¹¹⁷⁷ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 183.

¹¹⁷⁸ Michiels, F.C.M.A., *Houdbaar Handhavingsrecht* pp. 12–13.

rights to be heard and with regard to defence, the accused must be allowed to inspect the case materials, and the authority must communicate the report and any other information necessary for the defence (Awb Art. 5:48.3, and 5:49–50). The decision must state the name of the supposed violator and the amount of the penalty. The authority will subsequently decide whether or not to impose a penalty, and the sum of the penalty, but only after the accused has been given the opportunity to express his or her views. If the violation is punishable with a higher sum (over € 340) it is, according to Art 5:53, generally subject to stricter requirements on reporting and communication. (Wm Art. 18.16 distinguishes between different cases in which stricter procedural requirements apply.) A maximum penalty sum is determined by statute; see, for example, in Wm Art. 18.16e. The exact amount, however, can be determined in advance by law, but can also be left for the decision-making authority to fix in the individual case. In this decision they should consider the gravity of the violation, the extent to which can be held responsible for it, and other circumstances of the violation. This is stated in Awb Art. 5:46. It is to be noted that an administrative penalty cannot be imposed if the violator cannot be held responsible for the act. This, of course, falls under the fundamental principles of criminal law, and of penal sanctions in general, but it also implies that the administrative procedure for punishing breaches of law is not that straightforward. It includes some assessments of the culpability of the offender. The extent of this task depends on the formulation of the relevant offences.

The general introduction of administrative penalties was much debated. It has been argued to be a useful and much needed instrument for effective enforcement, such as in situations where reparative measures are not possible. There are, however, issues of legal certainty and general constitutional principles of the Rechtsstaat to consider.¹¹⁷⁹ One objection is that penalising powers are not the task of the administration. Secondly, and perhaps related to that traditional view, the introduction of such penalties in the administrative system will require procedural regulations safeguarding demands of legal certainty through protection of the rights of the individual in national and international law. Because of this added procedural consideration, the authorities fear many lengthy procedures, and that the new instrument will not add much to the efficiency of the enforcement.¹¹⁸⁰ Looking at the prescribed content and use of the administrative penalty sanction, and the procedure for its imposition, there seems to be some valid concern about procedural burdens and effectiveness. This resistance and scepticism might slow down the introduction of competences to issue these administrative penalty

¹¹⁷⁹ Blomberg, A., *Integrale handhaving van milieurecht* p. 450.

¹¹⁸⁰ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 184. See, also: Michels, F.C.M.A, *Houdbaar Handhavingsrecht* pp. 30–31.

sanctions. Environmental law does not yet include very wide competences for this. In Wm Chapter 18 competence to impose penalty sanctions has only been introduced for breaches against specifically regulated rules of Chapter 16 (on the emissions trading scheme). For example, the competent authority may, according to Wm Art. 18.16a.3 and 18.18, impose an administrative penalty for breach of any provision of a Chapter 16 authorisation. The development of these enforcement competences, however, is just getting started. It remains to be seen whether or not administrative penalties will become progressively used in the field of environmental law.

5.5.9 Relationship to the Criminal Enforcement System

Breach of environmental law can, of course, also lead to criminal prosecution. Criminal prosecution usually comes under the exclusive competence of the Public Prosecutions Department.¹¹⁸¹ Administrative enforcement authorities generally have no powers of prosecution, and neither do they have the right to impose punitive sanctions.¹¹⁸² As indicated, enforcement law is developing more opportunities for administrative authorities to impose penal sanctions. Such competences are coordinated with the criminal enforcement system, so that double jeopardy is avoided. The rules on administrative penal sanctions (Awb Art. 5:44) will generally give way to criminal enforcement measures so that administrative authorities are compelled to report a suspected criminal offence, and cannot impose administrative penalties if such proceedings have been, or will be, brought. Art. 5:47 prescribes similar priority at a later stage of the administrative procedure, where the court of appeal can order that the suspected offender must be prosecuted.

An interesting feature of the Dutch enforcement order is that the prosecuting authorities have criminal enforcement instruments in the Economic Offences Act, which more resemble administrative enforcement functions than penal sanctions, for example, imposing sanctions in the form of restorative orders. Most environmental offences are seen as economic crimes and can thus be found in the Economic Offences Act Art. 1 and 1a.¹¹⁸³ This part of criminal law entails wide competences and different sanctions, which serve reparatory as well as punitive purposes. They are prescribed in Art. 6–8. Besides fines and imprisonment sanctions, one finds here different sanctions that are not normally considered to be criminal enforcement instruments, but administrative enforcement, or even private law enforcement. They may include ordering a party to refrain from doing something, such as the halting

¹¹⁸¹ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 182.

¹¹⁸² Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 183; Seerden, R., and Heldweg, M., *Public Environmental Law in the Netherlands* p. 389.

¹¹⁸³ Wet op de economische delicten, Act of 22 June 1950, Stb, K258.

of relevant activities, placing the actor under the supervision of an administrator, or imposing obligations to take positive measures; that is, to do what was illegally omitted or to undo what was illegally committed. These measures can accordingly have both reparatory and preventive purposes. The offender can also be forced to pay damages, and to publish the judgment.¹¹⁸⁴ These sanctions are not only aimed at punishing the offender, but also at directing behaviour, and are therefore well suited to environmental offences. This variation of criminal sanctions means that there is considerable potential for making criminal enforcement effective in achieving compliance with environmental law, thus realising environmental objectives. It should be borne in mind that the ordinary administrative enforcers of environmental law do not have access to these sanctions. Criminal enforcement is only available to criminal prosecutors, who rarely use the reparatory sanctions. It has been maintained that prosecutors do possess the competence to use such instruments, and need to cooperate with the administrative enforcers who are the experts in the field.¹¹⁸⁵

Apart from reporting situations that lead to suspicion of a criminal offence by the prosecuting authorities, there have been some experiments to grant administrative enforcement authorities the competence to handle out-of-court settlements in response to criminal offences. This generally concerns less serious criminal offences, in which they can negotiate such a penalty, or rather offer a monetary transaction to the suspected offender in order to avoid prosecution. In cases where that procedure fails, the matter is simply transferred to the prosecutor. This is known as an administrative transaction. The system has proved so successful that there have been arguments for it to be made general and permanent. The advantages, as suggested earlier, are that the administrative authorities, in cooperation with the criminal prosecution system, can respond to those individual cases where restorative action is simply ineffective or impossible. With this softer, negotiating approach, the problems of lengthy and costly procedures can be avoided.¹¹⁸⁶

In summary, criminal enforcement and administrative enforcement orders are principally and traditionally separated – while one has penal functions, the other is concerned with reparative functions and directing the actor to comply with the law. Nevertheless, the distinction between these systems is blurred in more than one sense. Apart from reporting suspected criminal offences, and cooperative and coordinating measures, the administrative

¹¹⁸⁴ Blomberg, A., *Integrale handhaving vanmilieu recht* Section 5.4; Chorus, J., et al., (Eds.), *Introduction to Dutch Law* p. 395; and Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 185.

¹¹⁸⁵ Blomberg, A., *Integrale handhaving van milieurecht* pp. 182–184, and in the English summary at pp. 517–518.

¹¹⁸⁶ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 184.

authorities have punitive sanction functions, and the prosecuting authorities have access to reparative functions.

5.6 Concluding Remarks

The Dutch order for environmental law regulation has in recent years been subject to considerable reform. This reform is generally guided by deregulation and Better Regulation agendas, aimed at simplifying and coordinating the regulatory order. First of all, environmental permitting obligations have been extensively deregulated, leaving about 75% of the relevant activities regulated through general rules under the Environmental Management Act (Wm) and the Activities Decree (Barim). Furthermore, a new Environmental Permitting Act (Wabo) has established a coordinated regulatory order, with a one-stop-shop for environmental permitting, including permits demanded in the Wm system, and 24 other laws, but excluding permitting under the Water Act. The actors that need an environmental permit will now only meet one regulatory authority and a single consolidated permit procedure regulating provisions under all the 25 different regulatory regimes.

As for administrative enforcement powers and the institutional organisation thereof, the notable feature is that under the Wabo order the competent authority has both permitting functions and compliance control functions. The same authority will decide on permit application, changes and withdrawal of permits, and administrative enforcement of non-compliance with permit conditions. The new regime means that the same authority will have both these functions for all the coordinated sector law regimes.

The competent authority is most often the municipality. The provinces and the national VROM Inspectorate are to regulate the most hazardous activities and IPPC installations. Similarly, the municipality will most often be the authority competent to receive notifications, and supervise and enforce non-compliance with general rules under Wm. In these functions the enforcement authorities will have access to a wide range of instruments to control and steer environmental activities. There are instruments tied to the permitting functions – that is, changing and revoking the permit, partly or completely. The authority thus has a normative regulatory role, deciding what the actor must comply with, or making it unlawful to operate the installation. There are reparative sanctions aimed more or less at making actors bring their activity in compliance with the law, or repair any damage they have caused. These instruments are administrative orders, and are always coupled with sanctions, either a monetary sanction (*dwangsom*), or the coercive action (*bestuursdwang*) of the enforcer itself, repairing the stated problem at the expense of the actor. Both these instruments are frequently utilised. The administrative enforcement authority can also have access to punitive sanctions, through administrative penalties (*bestuurlijke boete*). This is a new

instrument that does not provide for that many environmental offences. As most activities today are not regulated by a permit, but rather by general rules, the instruments tied to the permit are not available. This leaves controlling compliance with the general rules. Nevertheless, the competent authority also has competences to supplement the general regulation with customised rules for an individual situation. In this respect they will keep some of the individually normative function that a permit procedure entailed previously. This involves an interesting compromise in the scope of deregulation of the permit regime, just as the Wabo regime makes for an interesting way of simplifying the regulatory burdens for business in a coordinated permit procedure led by one authority. This approach is rather a constructive Better Regulation approach. On the other hand, the slimmed down procedures are paralleled by reduced opportunities for procedural access for persons other than directly concerned parties. Furthermore, the reporting duties of the environmental operators have also been reduced and specified. I would suggest that this provides the operators of environmentally hazardous businesses with less work and more legal security. But it also suggests reduced sources of information on environmental problems and non-compliance, as well as publicity on environmental offenders, and public control over under-enforcing authorities. The constructive and active reform efforts of the Dutch system for environmental law regulation are nevertheless most interesting to observe.

6 Comparative Remarks

6.1 Introduction

6.1.1 Comparative Description; or Descriptive Comparison

The comparative description of Part II will now be summarised and concluded in with some comparative observations. In this part, the legal orders of the study and their environmental law enforcement systems have been represented in a rather descriptive manner. Describing three different systems one after another will necessarily always involve a comparative perspective. The presentation is made through the eyes of the comparatist, and her interpretation and systematisation choices will entail comparison. Nevertheless, the summarising comparative observations and concluding discussion of this chapter will emphasise such comparison.¹¹⁸⁷

The objective of Part II has been to make a fundamental comparison of the different, and similar, approaches to juridical environmental steering. Some interesting comparative observations can be made of more recent development of the regulatory systems within environmental law, especially in connection with deregulation and Better Regulation agendas. In this chapter, certain fundamentals of the enforcement systems, their enforcement instruments and principal characteristics will be summarised and compared. Some fundamentals of administrative law and environmental law systems and traditions will also be noted by way of comparison. The discussion will proceed with references to the presentations of the legal orders.

The first purpose of this comparison is to reach a better understanding of the different functions and components of administrative enforcement, and its role in the regulatory system. The comparative description provides a cultural and structural context for the exercise of administrative enforcement powers. This is important for the forthcoming analysis in Part III, where specific matters concerning the actor's responsibility for information will be afforded closer study. The second purpose of the comparative description in Part II is thus to provide such a context.

¹¹⁸⁷ Compare: Zweigert, K, and Kötz, H., *Introduction to Comparative Law* p. 43.

6.1.2 Background Features of the Different Legal Cultures

The studied legal orders are all part of the EU. They are members of the Council of Europe and have ratified the European Convention on Human Rights (ECHR). They are part of a European context within environmental law, and belong to the growing sense of European administrative law in the concept of good administration. They are nevertheless rooted in different traditions of European law; the UK in the common law tradition, and the Netherlands and Sweden in different branches of the civil law tradition. The Swedish system is part of the Nordic branch with German roots, the Dutch system is to a great extent derived from the French tradition, but German and international law influences it with its very own character. The significance of these categorisations, however, is not always clear – at least beyond a simplistic comparison.

One thing that has been noted in the presentations is the repute of the practical or pragmatic legal approach in the English and Dutch systems. In the English system, this perspective is based upon a tradition of judge-made law; resolving legal problems from case to case, and inducing legal rules out of practical situations, instead of deducing rules and remedies for legal problems from theory and principles.¹¹⁸⁸ The Dutch system, moreover, is known for its informal and pragmatic legal approach, or tradition. This is reflected in the noted concept of an informal rule of law, and a pragmatic approach to regulation, expressed in policies and doctrine of legitimate legal toleration, and of reasonable application of law with the focus on desirability of resolving the problem at hand and reaching the involved legal and political aims and purposes.¹¹⁸⁹ It is not possible to state with certainty how this compares with the Swedish order, nor what such comparison would lead to. Comparative notes on the differences in legal cultures are interesting but there is always a risk that the differences are exaggerated.¹¹⁹⁰ As noted above, there are balancing influences within the systems. In the English system statutory law has grown to become an important source of law, and a more active role for the legislator. This is certainly true in the area of environmental law where statutory law is a primary source of law, and where the regulations are often detailed. In the Dutch system, the pragmatic policy approach is criticised from the perspective of Rechtsstaat principles, and the toleration doctrine is limited in policy statements and case law, etc.¹¹⁹¹ Nevertheless, these observations of informal, pragmatic, and practical, inductive legal cultural features have been noted. It will be of interest to detect in the following comparative analyses in Part III, whether legal cultural differences can be observed at the surface of the law. This could possibly influence the way the

¹¹⁸⁸ See: Section 4.1.

¹¹⁸⁹ See: Section 5.1.

¹¹⁹⁰ Compare: Section 1.5.6.3.

¹¹⁹¹ See: Section 5.4.2.4.

chosen legal problems are resolved, how they are described, what considerations are made and how they are valued within the legal discourse.

The other cultural influence, which can be noted in all the compared legal orders, is the common European law influence. This runs through the whole study. Apart from demands for legal structures to safeguard such things as the right to fair trial, the whole legal discourse is affected by its European context, and the demand for effective and loyal implementation of substantive EU law, and for safeguards of individual rights and freedoms. This means developing legal concepts and principles, governed by the influence through a concept of good administration and environmental law principles.¹¹⁹² Another important European influence is the Better Regulation trend, which has entailed massive reform efforts in all involved countries.

6.2 Administrative Law and Structure

6.2.1 Administrative Law Fundamentals

6.2.1.1 Fundamental Principles and Procedural Safeguards

All of the legal orders examined have a strong tradition of administrative law standards or principles. These have generally been developed in case law as expressions of a rule of law – or *Rechtsstaat* – doctrine in order to exercise control over the exercise of governmental power. This is an expression of a fundamental balance of public power, and a constitutional basis for administrative law in all the studied legal orders. The administrative law principles are characterised and categorised differently, especially in the English terminology.¹¹⁹³ They will nevertheless be based upon common fundamentals, as described in Chapter 2. This departs from fundamental legality in demanding legal support for the exercise of administrative power. More specifically, the administration may exercise powers only for the purpose intended. This links to principles of objectivity and purposiveness, or the other way around: not to misuse such powers – *détournement de pouvoir*. This also connects to principles of equal treatment and non-discrimination. Moreover, the administration must, within these legal limits, only exert its powers to an appropriate extent. This is expressed in principles of reasonableness and proportionality. Administrative law, furthermore, will essentially prescribe procedural safeguards for guaranteeing all of those principles, as well as providing the opportunity for individuals to defend themselves against the unlawful exercise of power. Safeguards are expressed in principles of communication,

¹¹⁹² See, for example discussion in: Sections 2.2.1.4, 2.2.3.3 4.2.1.2, 4.2.5.4.

¹¹⁹³ See: Section 4.2.5.

transparency, the right to be heard, the right to defence, due procedural care, investigatory or inquisitorial principles, and fair trial rights. The powers of the state basically are delimited to protect the Rechtsstaat and the individual.

Gradually and only to a limited extent, have the fundamental principles of administrative law been codified. Some statements of legality, objectivity and equal treatment are to be found in the Swedish and Dutch constitutions. The general Dutch administrative law provisions of Awb also states general rules on procedural care, investigation, proportionality, and the abuse of power.¹¹⁹⁴ These are, however, general statements of principle that are further developed in practice, especially in case law. In the English order, the principles of administrative law are chiefly founded on the grounds of judicial review. These are based upon grounds of procedural impropriety, illegality and irrationality, including unreasonableness.¹¹⁹⁵ The basis for administrative procedures are in Sweden and the Netherlands regulated in general administrative law acts (Awb and FL, etc). More specific procedural rules are prescribed in sectoral legislation of various kinds.

The UK has a vastly different tradition than the other studied countries. The English order has no written constitution, no general administrative procedural statute, and no administrative court. The fundamental administrative law principles described in Chapter 2 are quite foreign to the common law system. It has even been said that there is no administrative law in the common law system.¹¹⁹⁶ This is not a fair description of contemporary English law. In a modern legal tradition of the welfare state, public law has grown and developed as an independent area of law in all the studied legal orders. Within the context of European law the fundamental structures of administrative law have, moreover, been subject to parallel structural and substantive reform, with the building of administrative law systems centred on the clear division of public power, and the safeguarding of individual rights and Rechtsstaat values.

6.2.1.2 European Administrative Law

Over the past few decades European law has become a major factor in the development of law and policy generally. It now influences the fundamental structures and principles of administrative control in diverse ways. It demands the effective enforcement of substantive law as well as respect for fundamental principles of law.¹¹⁹⁷ European law sources of legal principles and fundamental rights influence the formulations, application and theory of fundamental rights and legal principles. The principles developed and interpreted by the European Courts are, in turn, derived from the legal orders of

¹¹⁹⁴ For Dutch Law, see Section 5.2.4. The Swedish principles are described in Chapter 2.

¹¹⁹⁵ See: Sections 4.2.5.1–4.2.5.5.

¹¹⁹⁶ See: Section 4.2.1.

¹¹⁹⁷ See: Sections 1.2.4, and 2.2.1.4.

the Member States, their constitutions and the international agreements that they have signed, illustrating fundamental rights in the different and common legal cultures.¹¹⁹⁸ A constructive interrelationship therefore exists between national law and common international law. This may be described as a search for common legal principles and basic rights.

In both the Swedish and Dutch orders, case law from the European Court of Human Rights has set in motion reforms of the administrative law order. The case law has essentially concerned the right to fair trial in administrative law cases. In particular, the case of *Sporrong Lönnroth v. Sweden* brought about the general right to appeal administrative decisions to the administrative courts, and the systematic changes that came with that. *Bentham v. the Netherlands* also revealed the lack of appeal opportunities in the Dutch system, and brought about changes in access to appeal in administrative decision-making. More generally, it also brought about new ways of viewing and dealing with the exercise of administrative power, especially administrative sanctions or coercion. The administrative law order was thoroughly reformed, essentially through the introduction of a general administrative law act *Awb*, between 1994 and 2005.¹¹⁹⁹

An important and common European development concerns the different policy agendas on Better Regulation. Similar policy agendas have been referred to as deregulation, simplification, or smart regulation. They are all concerned with cutting administrative burdens, especially on business, but in some cases for other actors and for the regulators themselves. In different contexts these policies are more or less tied to efficiency and effectiveness of administrative regulation, and to coordinating and simplifying regulatory procedures. This trend rests on EU policy and law, and has in recent years been influential in regulatory reform in all the studied countries. This has had different results in the various systems. Common features within environmental law are lessening of permitting obligations, mainly in the Swedish and Dutch orders,¹²⁰⁰ and coordination and simplification of permit procedures, such as in the Dutch *Wabo* and the English Permitting Regulations.¹²⁰¹

6.2.1.3 The Administration and the Courts

The Swedish system alone has a separate administrative court system. All the studied legal orders, however, have special administrative courts or tribunals, or branches of their judiciaries that specialise in administrative law cases. The Dutch administrative law case will eventually be appealable to a

¹¹⁹⁸ Darbyshire, P., *Eddey & Darbyshire on the English Legal System* p. 70.

¹¹⁹⁹ See: Sections 2.2.3.3, and 5.2.1.2.

¹²⁰⁰ See: Sections 5.3.1.3–5.3.1.4 on Dutch deregulation of permit obligations in favour of regulation through general rules; and Section 3.3.2.5. A significant deregulation of the Swedish permitting obligation was made in 2008 (SFS 2008:690), when the Ordinance (1998:899) was amended. Many permit obligations were replaced with notification duties.

¹²⁰¹ See: Sections 4.3.1.3, and 5.3.1.5.

supreme judiciary within the Council of State,¹²⁰² and the English High Court has a special administrative court within its Queen's Bench Division.¹²⁰³ Apart from this, all of the orders have different kinds of special courts and tribunals set up within the administrative law area.

All these different legal orders provide access to court review – either by way of appeal or judicial review – for concerned parties. The range of this group of parties is decided in case law. The immediate comparative impression is that the English and Dutch orders will consider a wider range of individuals and organisations to qualify as concerned parties. On the other hand, when a case comes to court the English and Dutch systems are much more focused on issues of legality – a judicial review. The Swedish system has a general full appeal in administrative law cases – including a review on the merits of the case. The Swedish administrative appeal is also more reformatory in character; while the review approach of the English and Dutch systems are more or less cassatory. The matter, of course, is not clear-cut, and the appeal orders will in the exercise of control over administrative powers always balance a principle of respect for administrative discretion and a need to provide effective and appropriate remedies for interested parties. Swedish courts will display a sense of caution as to meddling in the discretionary assessments of an expert authority, while English courts will by judicial review consider whether the administrative authority has made a reasonable assessment of the law. Nevertheless, there is clearly a wider mandate for the Swedish courts in their exercise of control over administrative decision-making.¹²⁰⁴ It should be noted, in this context, that the Swedish environmental courts consist of both jurist judges, and different kinds of expert judges (such as different kinds of engineers).¹²⁰⁵ This organisation provides basis for such full trial on the merits.

Variations in court functions should be viewed in the context of another comparative difference. The courts' respect of administrative discretion is based upon the fundamental constitutional idea of division of state powers. The courts have the task of checking that the administration keeps within the boundaries of the law. The executive branch – the administration – sets policy and exercises executive power as it sees fit. The administration contains a wide range of operative authorities in the civil service, in a hierarchy with the Government at the top – steering the appropriate execution of policy and application of law. However, the Swedish system involves an important constitutional difference in the prohibition against ministerial steering in individual cases. An authority and its decision-maker are thus independent in the

¹²⁰² See: Section 5.2.3.

¹²⁰³ See: Section 4.2.3.

¹²⁰⁴ See: Sections 3.2.3, 3.3.2.6, 4.2.4, 4.3.2.4, 5.2.3, and 5.3.6, for access to appeal generally in administrative law cases, and specifically within the area of environmental law, in all the different legal orders.

¹²⁰⁵ See: MB 20:4 and 10:11; and above in Section 3.3.2.2.

exercise of their powers within the framework of the law and general guidance and policy statements from higher authorities.¹²⁰⁶ In the Dutch and English systems, the order is different. The minister is responsible for the executive branch, and has much wider power to control the exercise of administrative power, as well as in the individual case.¹²⁰⁷ The English ministry Defra, for example, has power to direct the regulator in the individual case. The Dutch ministry has similar authority, for example with regard to review of environmental permits. In the Swedish system, this function could to some extent be seen as being replaced by a full and reformatory appeal procedure. The appellate body thus intervenes to control the proper exercise of public authority in the individual case, rather than the central administrative body. It could be noted that administrative appeal was previously only made to a higher administrative authority. With the introduction of a general administrative judiciary, the administrative courts stepped into the role of the highest administrative authority.¹²⁰⁸

The Swedish order suggests that the courts have a wider public task and role than that of ensuring the proper exercise of authority within the framework of the law. They will perhaps also see to that the administration ensures the aims and purposes of law and policy in the individual case. If this is not the case, then the control of the administration's fulfilment of administrative tasks probably weaker under the Swedish order.

6.2.2 Comparing Fundamentals, and Fundamentals for Comparison

What the stated observations indicate is that essentially, despite differences in legal history, terminology, and the organisation of the administration, the fundamental principles and purposes of administrative law in the legal orders compared, are markedly quite similar. A more recent development has even brought about the idea and doctrine of a common European administrative law. The influence of European law is strong in the field of administrative law in all of the countries studied. Another common European development is the different policy agendas on Better Regulation, which have been very influential in recent year's the regulatory reforms carried out over recent years in all of the involved countries. These parallel developments and essentials together lay the foundations for a fruitful comparison.

Administrative court procedures are well represented in the compared legal orders, and play an important part in controlling the administration to ensure the lawful and legitimate exercise of administrative power. Generally,

¹²⁰⁶ See: Section 3.2.1.

¹²⁰⁷ See: Sections 4.2.2, 4.3.2.1, 5.2.2, and 5.3.4.1

¹²⁰⁸ Even though appeal will still often be made to an administrative authority first, before further appeal to the courts.

the functions of the administration as an executive branch of state are more focused on ensuring that public policy is realised, and the public interests aimed at are best met. The court function concentrates on ensuring that this is done within the limits of the law. The Swedish courts, however, have a wider controlling mandate, which will also to some extent ensure the proper exercise of executive branch functions in the individual case. This is important in the constitutional context, and in the modern concept of legal certainty, and legal protection of legitimate individual interests and rights. The court not only has the function of ensuring that the administrative authorities do not act beyond their powers, but also to make certain that they properly execute their public tasks and responsibilities. This is essential against the background of collective rights and the public interest. It is accordingly of interest to study the procedural duties and responsibilities of the courts in the context of the analysis in Part III, and the protection of environmental law interests.

6.3 Environmental Law

6.3.1 Legal Background

The compared legal orders have seen common developments of environmental law, tied to planning and health law. The modern environmental law core of public law control of industrial pollution was introduced already in the 19th century.¹²⁰⁹ Being more scarcely populated and later industrialised, the Swedish system introduced modern legislation on environmentally hazardous activities in 1969. It was founded on earlier water law regulation but now had a wider scope.¹²¹⁰ In all the involved countries the environmental issues were addressed one by one through extensive regulation and sector by sector. Different kinds of permit regimes were instituted.

During the last decades of the 20th century, especially after the Bruntland Report and the international movement it symbolised, environmental law grew and public environmental law regulation became more comprehensive, holistic, and integrated. The Swedish Environmental Code (MB), the English Environmental Protection Act, the Pollution Prevention and Control Act, and the Dutch Environmental Management Act (Wm), were all introduced during the 1990s. To different extents, they aimed at comprehensive and integrated environmental regulation. These Acts still provide basis for environmental law in the studied legal orders, even though there are many other

¹²⁰⁹ See; Sections 4.3.1, and 5.3.1.2.

¹²¹⁰ See: Section 3.3.1.

sectoral regulations, for example within water law and nature protection, which are not studied in the scope of this thesis.

It should be noted in this context that the environmental law field is comprehensively covered by EU law, and effective enforcement thereof is considered part of the Member States duty of sincere cooperation. Administrative enforcement of environmental law will therefore often involve application of EU law, and this adds on the Member State duty of effective enforcement. Apart from substantive environmental standards, and such substantive regulation, EU law prescribe different procedural requirements within environmental law regulation, for example on permitting, EIA, and access to justice. These requirements must then be fulfilled at the national level, in the public control of environmental activities. EU law is today a prominent source of environmental legislation in all the studied countries. The basic framework of substantive environmental law, and to some extent also the control system, is therefore harmonised. However, while permitting is much influenced by EU law, the administrative enforcement procedure is still very much a matter of domestic law. However, the fundamental demands for effective enforcement and good administration serve as basic standards for the administrative procedure involved when applying these rules of EU law. In the following analysis in part III, these matters provide further authority and weight to the already stated national demands of enforcement duties and proper administrative procedure. However, any further qualitative difference of these demands will not be further discussed.

The Swedish MB has the widest scope and represents the most comprehensive effort to change the regulatory approach. Apart from coordinating many different areas of law under one Code, the MB also embodies a change in regulatory approach towards sustainable management. The intent is to involve all actors in active and proactive efforts to reach sustainable development. MB also covers each and every actor and action, with any effect of significance, under the aims of MB. Dutch and English legislation is somewhat more limited in scope. Their environmental legislation is more focused on control of pollution from industrial installations, etc. Regulation of other environmental activities, for example, is dealt with under statutory nuisance law, basically health law focused on neighbour disturbance.

It might be observed that in the environmental legislation of the compared countries, English and Dutch legislation generally provide more detailed provisions. Legal texts are long and often specific. Environmental statutes can often be described as framework law, supplemented by lower level legislation. Even within the context of such lower level legislation it seems that the Swedish rules are often more generally formulated. The general rules of consideration of the Swedish MB, and their central role, illustrate this well. Nevertheless, more particular sector regulation and lower level legislation will frequently require specification. There is often room for the weighing of interests and for flexibility in the consideration of individual circumstances.

This provides considerable administrative discretion, which can be helpful in achieving effective and appropriate control, but it can also be problematic in relation to the legal certainty of the addressee.

6.3.2 Environmental Law Regulation

Modern environmental law in all of the described systems has been based on extensive permit regimes. Administrative enforcement has subsequently centred on monitoring and enforcing the compliance of permit conditions. This is changing with recent deregulation, or Better Regulation reforms, reducing the number of activities that are required to have their operations authorised through an environmental permit procedure. This has been done in different ways in the compared legal orders. Moreover, permitting procedures have been simplified in different ways so as to reduce the applicant's burdens, with the advantage of shorter procedures.¹²¹¹

An important purpose of the Swedish Environmental Code reform was to coordinate regulatory procedures. The main aim was to be able to assess and control the complete picture of environmental effects, and thus gain the best environmental result. The legislator later deregulated permit obligations and made certain efforts to coordinate and simplify permit procedures, etc. Regulation under this comprehensive environmental code will thus increasingly be left to general regulation and compliance control through administrative enforcement.¹²¹² The English and Dutch orders have recently undergone fundamental reforms of their environmental permitting regimes, consolidating many different permit regimes into one, so that the operator will need to be authorised only once, by one permit authority. Before these reforms, several types of permit were required from different authorities. Sectoral legislation will still state substantive standards and requirements, but the permitting regime is laid down in a coordinated system in a separate environmental permitting act: The Dutch Environmental Permitting (General Provisions) Act (Wabo), and the UK Environmental Permitting Regulations, both from 2010.

The individual permit regulations are also supplemented by different kinds of general regulation. In the Dutch system, a substantial cut has been made in the regulated activities that need an environmental permit. The thus deregulated permitting obligations are replaced by general rules, especially in the Activities Decree (Barim), which are rather detailed and said to contain basically the requirements that the permit conditions would have stated. The enforcement authority can often supplement these general rules with customised regulation.¹²¹³ The English permitting regime prescribes a sim-

¹²¹¹ See. Sections 3.4.1, 4.4.1, and 5.3.1.4

¹²¹² See. Sections 3.3.1.4–3.3.1.5.

¹²¹³ See. Section 5.3.1.4.

pler “standard” permit, which is an individual permit but based upon standard rules instead of specific permit conditions. These rules are generally prescribed and continually updated by the competent regulator, as are the provisions of the standard permit – an “automatic” process. This general regulation means less administrative burdens in the form of procedures for application and review of the permit – a standard permit decision cannot be appealed, for example. The decision to regulate an activity through standard provisions is nevertheless made in the individual case.¹²¹⁴

The Swedish order does not have these supplementary general regulation systems. Competence to issue general rules are stated in the MB (for example in MB 9:4–5), but these are only scarcely used. The activities not under permit regulation are still covered by MB, and they can be controlled through administrative enforcement instruments. But no comprehensive system of general rules exists in the Swedish order, with substantive standards and requirements for different kinds of operations and environmental problems, such as in the Dutch Activities Decree, and the UK standard rules. As noted earlier, regulation of environmental activities outside the permit regimes will often have to rest more on generally stated legal standards, which can become problematic in view of the legal certainty of the individual addressee.¹²¹⁵ Deregulation of the permit regime may thus ease the administrative burdens tied to the permit procedures, but bring about new problems in the uncertainties in terms of substantive demands and legal certainty. Furthermore, there is still a need for the supervision of the environmental actors, perhaps even more so when such tasks are not laid on the operator in permit conditions. And if there are no permit conditions or general rules to set limit values or required precautionary measures, these matters will need further investigation by the enforcement authority in its communication with the operator. It may be questioned whether these changes really lessen administrative burdens. This new situation may also put them in a normative role, when their original functions and tasks were to monitor and enforce compliance. These matters will be analysed further in Part III. Perhaps the more organised general regulation systems set up in the Dutch and English order could inspire the Swedish legislator to take measures to provide administrative enforcement authorities with better preconditions for supervision and enforcement that is effective and safeguards legal certainty.

¹²¹⁴ See: Section 4.3.1.3.

¹²¹⁵ See: Section 3.3.1.5.

6.4 Administrative Enforcement

6.4.1 General Comparative Remarks on Functions and Tasks of Environmental Law Enforcement Authorities

In all the studied legal orders, the core of environmental law regulation lies with administrative authorities.¹²¹⁶ The regulatory authorities of the studied enforcement orders all have fundamental duties to supervise and enforce environmental law – to exercise their regulatory functions through different administrative instruments, at least in principle. The actual exercise of these tasks – when and how to supervise and enforce – is very much left to the discretion of the competent authority. There are outer limits to this discretion in the different administrative control mechanisms: criminal and civil liability for faults in their exercise of office, judicial review on grounds of reasonableness, etc.¹²¹⁷

The concerned public may also influence the administrative enforcement work by way of its procedural access. An interesting feature of this function is the opportunity in Dutch administrative law for the concerned public to apply for an administrative decision, and enforce a timely decision. A concerned person may thus trigger enforcement action, and further appeal the subsequent decision by the enforcement authority. Enforcement authorities in all the studied legal orders should, of course, deal with complaints and act on them. Swedish administrative practice works basically similarly.¹²¹⁸ However, the Dutch construction means that the applicant actually – formally – initiates a case, which must be decided within a clearly stated period of time, and that they possess stronger instruments for coercing the enforcement authority. They can, for example, appeal the authority's failure to make a decision on the application within the time stated in statutory law. The court can then impose sanctions on any authority that continues to be passive.¹²¹⁹ These instruments limit the administrative authority's discretion, at least in cases where an environmental problem affects a concerned person.

This administrative law steering and control of environmental activities have fundamentally been based upon different permit regimes, and the administrative authorities' subsequent compliance control. Outside the permit regimes, environmental control is more diverse and complex, and relies more on general regulation, particularly through public health regulations. Administrative control and enforcement of non-permitted activities will generally rest on local authorities and their administrative orders and sanctions of different kinds. With the deregulation of the permit system, however, the

¹²¹⁶ See: Sections 3.4.1, 4.4.1, and 5.4.1.

¹²¹⁷ See: Sections 3.4.4, 4.4.3, and 5.4.2.

¹²¹⁸ See: Section 3.4.4.3.

¹²¹⁹ Described in: Section 5.3.6.

traditional order is changing. As explained earlier, more and more regulated activities are no longer controlled through individual permit procedures, and will thus be controlled through administrative enforcement based upon general rules. This indicates the growing importance of administrative enforcement on the part of administrative authorities. As noted earlier, the structure of these systems differs in the various legal orders. These differences will be discussed in the concluding analysis in Part III.

A comparative observation that has been argued in earlier chapters is that of the fundamental difference in the institutional organisation of enforcement competences. While the Swedish system separates functions tied to permit regulation and compliance control, the competent regulatory authorities in the UK and the Netherlands will have both functions.¹²²⁰ Another notable feature is the criminal enforcement competences of the English administrative enforcement authorities. This can be seen in the context of a traditionally central role of criminal enforcement in the UK order – in general, and in environmental law. In the Netherlands and Sweden, prosecution is as a rule reserved for special prosecuting authorities, as is criminal investigation (though the boundaries are somewhat blurred). Consequently the general comparative impression is that the Swedish administrative enforcement authority has the most limited enforcement competence. They only control compliance, while others handle permitting matters and criminal enforcement. The enforcement functions and instruments are quite clearly separated between different authorities.

An interesting comparative point to make in this context is that under the Swedish order special environmental courts act as permit authorities. They thus have a more normating role, while separate administrative authorities control compliance with the permit conditions and general rules. The courts act as the original permit authority for the most hazardous activities, and appeal instances for all other permit decisions.¹²²¹ It should be remembered that the Swedish appeal procedure is full and reformatory, so the court will step into the function of permit authority as well as appeal – but somewhat more limited by the earlier procedure – and decide on the merits of the case and the appropriate permit conditions. They have environmental engineers, etc., acting as expert judges for this purpose.

Permit regulation in the UK and the Netherlands is a matter for competent administrative authorities, and are generally reviewed in a more limited scope. UK permit decisions are generally appealed to the Secretary of State and can only be challenged in court by judicial review.¹²²² The Dutch permits are appealable to the District Courts and the Council of State, but the general

¹²²⁰ See: Section 3.3.2, and for example Sections 4.3.2, and 5.3.4, and the concluding remarks in Sections 4.6 and 5.6

¹²²¹ See: Section 3.3.2.

¹²²² See: Section 4.3.2.4.

approach of the courts is that of a more limited judicial review of the lawfulness or otherwise of the decision.¹²²³

What this means against the background of this comparative study is that the Swedish enforcement authorities are kept clearly outside the permit regulation function. This suggests that they control compliance only and not nor mate. They must raise the matter in a higher authority, sometimes in the courts, to have control measures taken within the scope of the permit regulation. Furthermore, the permit authorities can only take enforcement action within the range of the permitting functions on application from a very limited number of authorities, or from the permit holder. The scope of the Swedish enforcement authorities' functions and instruments are thus restrained by many limitations and obstacles. The situation is quite different in the UK and the Netherlands where the competent regulatory authority acts as both permit authority and enforcement authority, and in the UK even as prosecutor within the relevant area of its administrative tasks. Thus they will fundamentally have access to a wider range of regulatory competences and instruments, which they can choose between and combine appropriately. Moreover, initiatives are able to be taken to widen the set of enforcement instruments in these legal orders.¹²²⁴ These initiatives will shortly be the subject of further comment, but first some remarks should be made on the role of the environmental actor in the context of environmental control and the regulators' enforcement duties.

6.4.2 Actor Responsibilities and Enforcement Duties and Tasks

A notable difference in enforcement law and policy in the compared legal orders is the intended systematic reconstruction – or shift of paradigm – of the Swedish Environmental Code reform. The introduction of the Environmental Code (MB) was intended as a landmark reform, a shift towards focusing on sustainable development, to be driven forward by each and every actor with the support and guidance of enforcement authorities. The earlier established rules on actor responsibility in environmental control were enhanced and placed in a new perspective of comprehensive regulation and the proactive approach of sustainable management and progressive improvement. Rules on actor self-control and reporting, and administrative enforcement competences to request investigation and information by the actor, and the setting up of self-control programmes and so on, were emphasised and made generally applicable for the whole comprehensive regulatory scope of the MB. Furthermore, in Sweden such authoritative preparatory works reiterate the responsibilities for each and every actor to be actively involved in

¹²²³ See: Section 5.2.3.

¹²²⁴ See discussions in: Section 4.6 and 5.6.

environmental law control and to strive towards sustainable development. It is stated that the enforcement authorities should ideally and primarily have the role of controlling the actor's own control efforts. Moreover, the fundamental principles stated in general rules of consideration set out the responsibilities for each and every one for seeking sufficient knowledge and taking all necessary precautionary measures, but also a duty to show in the regulatory situation, compliance with the rules of the Environmental Code system. This thus places the burden of proof on the actor when regulated by the administrative enforcer.¹²²⁵

Both the English and Dutch orders contain aspects of reporting duties, competence to request information, and more general duties for operators to cooperate and ensure sufficient expertise, especially for operators of larger installations under permit regulation. Nevertheless, a fundamental difference can be seen in the order of the Swedish Environmental Code with its explicit, systematic and principal focus on actor-driven control and improvement work, and the extensive and generally regulated actor responsibility for investigation, supervision and evidence. The Dutch and English orders are more traditionally derived from regulator-driven control through inspections and orders, and only supplemented by self-control and system control in more limited individually selected cases. This difference is very interesting in the context of this thesis. The Swedish approach may be argued to really take seriously the environmental principles of sustainable development, prevention, precaution and polluter pays. Here, all relevant environmental actors are held responsible for any environmental risks they cause, and potentially in a very holistic scope, of sustainable management.

Nevertheless, these potentially wide and burdensome responsibilities, however legitimate and based upon fundamental legal principles, will become problematic in an enforcement context. The earlier described problems of legal certainty against a lack of clear norms – in general rules or permit conditions – are multiplied when set in a context of wide preventive and proactive responsibility in a collective management strategy – and, moreover, having to know, investigate and provide evidence to support compliance with such responsibility. These challenges have been commented upon in Section 2.4, and will be analysed further in Part III. The ambitious regulatory reform intended with the introduction of MB, and the international sustainable development discourse to which it belongs, will invariably give rise to a problematic encounter of effective enforcement of legitimate environmental responsibilities and fundamental Rechtsstaat values safeguarded through principles and rules of legal certainty and good administration. Some of these problems are addressed in this thesis, and the following analysis will examine the meeting of these perspectives in the context of responsibilities for knowledge and decision-making materials. This issue is crucial in

¹²²⁵ See: Sections 3.3.1.5–3.3.1.6, and 3.4.3.

the precautionary approach of environmental law – managing risks instead of repairing damage.

6.4.3 Relationship to Criminal Enforcement

As noted earlier, the United Kingdom has a somewhat unusual character in that its administrative enforcement authorities generally have prosecuting competences as well. It can, moreover, be noted that they do in fact use these competences, and rather successfully. All in all, the English enforcement order of tradition has to some extent focused on criminal enforcement. Centrally, for the purposes of this thesis, it is observed that breaches of administrative enforcement orders generally constitute a criminal offence. They can and will be prosecuted by the administrative authority itself. This feature of UK enforcement law is fundamentally different from the other legal orders in this comparison, and provides enforcers with significant authority in their work on environmental control. If the addressee does not do as they are told they can, and often will, be prosecuted. It should be noted that the enforcement authority is often, but not always, the Environment Agency, which is a large administrative authority with its own procedural lawyers in specific prosecuting offices. Considerable legal expertise would generally be required here, and this may be more challenging for smaller municipalities to organise appropriately.

The reforms of recent years have made considerable efforts to move away from the traditional criminal law focus. Criminal enforcement has been argued to be too blunt an instrument. It is often costly and ineffective in view of the purpose of the regulation. Therefore a new and wider range of administrative enforcement instruments need to be introduced as “civil sanctions”, which are believed to be more flexible and effective in making the potential offender comply with the law.¹²²⁶

Civil sanctions cut across the functional structure described in the country reports. They include a flexible set of instruments of both punitive and directing character, which involve features reminiscent of penal sanctions, administrative law steering, and private law voluntary agreements. The instruments include a kind of enforcement order called compliance notices, restoration notices, and stop notices, with obvious content and purpose.¹²²⁷ Administrative monetary penalties are prescribed for different offences, as well as the opportunity for a suspected offender to take initiatives to enter an agreement with the regulator, and voluntarily take on some relevant duty, typically a restorative task.¹²²⁸ Access to these instruments is specifically prescribed in the Environmental Civil Sanctions Order for different kinds of

¹²²⁶ See: Section 4.4.1.

¹²²⁷ See: Section 4.5.3.4.

¹²²⁸ See: Section 4.5.6.

environmental offences listed in attached tables. Access to such alternative sanctions varies from offence to offence, as deemed appropriate. To some extent these sanctions can be combined in order to best customise the appropriate remedy for an environmental offence. The civil sanctions are surrounded by procedural safeguards of the rights of the individual offender. These sanctions were introduced towards the conclusion of this thesis, so there is little to be said in way of assessment of their success or otherwise, or even on the application of the new instruments. It is nevertheless interesting to note that this has come as a result of massive efforts to reform the entire enforcement law order. Many years of investigation of effective and less burdensome enforcement methods preceded the civil sanctions reform, as well as the formulation of many documents establishing a new enforcement policy focused on targeted and proportionate enforcement with the main purpose of bringing offenders in line with the law rather than punishing their offences. Enforcement law is under considerable development in the English system.

Another interesting aspect of the civil sanctions reform is that it cuts across the traditionally distinctive kinds of steering approaches (at least in the Swedish tradition). Criminal and administrative law steering, and private law agreements, become progressively integrated. In the Dutch system another aspect of this observation could be noted in the competence of criminal enforcers to impose sanctions in the form of reparative orders or the financial restoration of damage. There have also been some experiments on granting administrative enforcers competence to reach out of court settlements with offenders in cases of less serious contravention. Such settlements commonly involve monetary compensation and are known as administrative transactions. There is still criticism of lack of cooperation between prosecutors and administrative enforcement authorities, which will generally have more competence in environmental issues. There are nevertheless features in Dutch law pointing to a blurring of the line between different steering approaches.¹²²⁹ This also ties in with the introduction in all these countries of administrative monetary penalties. These will have an indirect, and supposedly quite effective steering feature, but administrative fines of different kinds are also repressive penalties, punishing breaches of law. Administrative enforcement shows a tendency of moving closer to an enforcement role and character which is more commonly reserved for penal law, with more extensive procedural safeguards for the individual. The legal discourse also indicates a new, or renewed, perspective on administrative decision-making, viewing administrative enforcement as repressive authority and an intrusion on the individual's rights and freedom. Such a shift can be drawn from the European law demands on the right of fair trial, and the right of appeal to

¹²²⁹ See: Section 5.5.9.

court in administrative law cases.¹²³⁰ A discussion paralleling administrative enforcement measures in environmental law with criminal enforcement, and the context of fundamental human rights in criminal procedure, will be discussed in Chapter 7.

6.5 Administrative Enforcement Instruments

6.5.1 Introduction

The studied legal orders provide the competent authorities with a set of fundamentally similar administrative enforcement instruments. These instruments generally consist of administrative enforcement orders.¹²³¹ These orders are basically administrative decisions stating the addressee's positive and negative legal duties, thus directing them to take certain measures or refrain from doing something, or to ensure a certain qualitative or quantitative result or standard. There are usually also different kinds of coercive instrument used for putting pressure on addressees to change their behaviour so as to comply with the order. These will generally consist of different kinds of monetary sanction or the actual coercive enforcement by the enforcement authority, at the expense of the responsible actor.¹²³² Furthermore, the administrative enforcement authorities can to different extents also initiate enforcement action tied to the permit,¹²³³ and sometimes criminal procedures. In the following the content and access to these instruments will be compared.

This thesis is focused on the actual authoritative enforcement competences and instruments of the administrative authorities. It should, however, be noted that in all these legal orders the authorities exercise a considerable amount of informal or "soft" steering, including consultation, information and advice. Most environmental steering can be effectively carried out in the pre-enforcement stage, where an authority acts on a complaint or inspects an operation, etc., and informs the responsible actor of the accompanying legal duties. It is often argued that most actors wish to comply with these duties and will voluntarily follow any direction from the authority. Despite these very important tasks and instruments of the enforcement authorities, this study has looked at the crucial coercive authority of the administrative enforcement authorities. As argued at the beginning of this thesis, such tasks and competences are essential to the function of juridical steering, since this

¹²³⁰ See: Sections 2.2.3.3, 3.2.3, etc.

¹²³¹ See: Sections 3.5.3, 4.5.3, and 5.5.1.

¹²³² See: Sections 3.5.5, 4.5.5, 5.5.4, and 5.5.5.

¹²³³ See: Sections 3.5.7, 4.5.7, and 5.5.6.

is the way regulate the actor that will not be steered voluntarily. This is a fundamental function of juridical steering instruments, in comparison to steering through, for example, information or economic incentives.¹²³⁴ The authoritative enforcement action is also indirectly imperative for the success of the informal approach, and voluntary environmental steering efforts. It functions as the proverbial “axe on the wall”, presenting a background threat of public coercive and punitive power.

6.5.2 Enforcement Orders

Administrative powers to issue enforcement orders are generally stated in the relevant environmental legislation. The statutes will state that the competent authority has the duty to inspect and to see to it that the rules and aims of the relevant legislation are followed. The actual instruments in the form of orders are specified in the environmental legislation.¹²³⁵ These rules all provide for a power to direct both duties to take measures and to refrain from doing something. Notably, the Dutch orders are always coupled with the threat of a sanction – administrative coercion or a conditional fine.

With the exception of Swedish regulations, the legislation will also prescribe some requirements of the form and content of the order. Generally, the required form includes specifying the breach of law, the required action, or prohibition on action, as well as a time frame for this where relevant. Such specification, however, will also generally be demanded for the Swedish enforcement orders, but there is no statutory form of a simple enforcement order. Notably, when the order is coupled with a conditional fine there are statutory requirements similar to the ones stated in Dutch and English legislation. This can be understood in the context of these orders. While the Dutch enforcement order is always coupled with a sanction, and non-compliance with the English enforcement order is generally criminalised, the Swedish order can and will often not be coupled with a sanction. In such cases, formal requirements of certain specific information could be argued not to be as important as that when the threat of a sanction is involved.

6.5.3 Enforcement of Enforcement Orders

6.5.3.1 Introduction

Enforcement orders will not embody the authority needed for juridical steering without the threat of some kind of sanction if the order is not adhered to.

¹²³⁴ See: Section 1.2.1.

¹²³⁵ Central examples include: the Swedish MB 26:9, and the English Environmental Protection Act Section 80, and the Environmental Permitting Regulation 36, etc.), or in the case of Dutch law, in the general administrative act (Awb Art. 5:21 and 5:31d).

The explicit or implicit statement of such a threat puts pressure behind the enforcement order and will make it effective. Otherwise, public steering would normally have been achieved through voluntary measures and informal steering in the pre-enforcement communications.

6.5.3.2 Conditional Fines

The most common of the described pressure instruments is, in Sweden and the Netherlands, the conditional fine.¹²³⁶ These are monetary fines that the responsible actor must pay for not complying with the order. The conditional fine order can set out a fine payable for each time a prohibited action is taken, for not having taken ordered precautionary or reparatory measures within a stated period of time. Although the conditional fine has a repressive element, its central purpose is not punitive. The conditional fine is a financial pressure instrument. An important purpose is to take away the financial benefits of non-compliance and to persuade the actor to change behavior. The administrative authority will thus have the power to vary the sum of the conditional fine in order to achieve these purposes. A financially strong actor that saves a lot of money from not taking the precautionary steps required by law can be required to pay a larger sum than the small private business that takes small steps to resolve the problem.

English law does not include this instrument for environmental law enforcement, though the recent introduction of civil sanctions has included some monetary penalties that will be described further below.

6.5.3.3 Administrative Coercion – Default Action by the Authority

The administrative enforcement action that most obviously remedies the relevant environmental problem is administrative coercion. This means that the authority takes actual physical action itself, or commissions another to do it, at the expense of the responsible actor. All the studied legal orders contain administrative coercion powers.¹²³⁷ The competence rules are similarly formulated. They generally require prior warning, thus providing addressed actors with the opportunity of taking action themselves. In urgent situations, typically imminent risks of considerable damage, the authority can act without prior warning, and give a motivated notice afterwards.

The problem with this kind of enforcement instrument is, first of all, practical and financial; it can often prove difficult to recover the costs of the remedies from the actor. There are generally different kinds of civil procedures, often through executive instruments, but while these procedures might be successful, the actor often might not be able to stand the costs anyway. A further disadvantage of administrative coercion, more in principle, is that these measures do not involve the actor in taking responsibility. The point of

¹²³⁶ See: Sections 3.5.5.2 and 5.5.5.

¹²³⁷ See: Sections 3.5.5.3, 4.5.5.3, and 5.5.4.

sustainable management should involve each and every actor, and simply forcing them pay for the public authority's environmental work is not the ideal solution. The actor would not have "learnt anything" and perhaps may be less prone to changing future behavior. These aspects – especially the financial part – mean that administrative coercion is, generally speaking, not the first choice of the enforcement authority – to put it mildly. A study of legal sources, such as case law, policy guidance and the literature, will give some indication of the extent to which the powers are used. These sources would give little or no indication of Swedish environmental enforcement authorities using the instrument. A few examples of administrative coercion can be seen in UK case law. Dutch legal literature suggests this original enforcement instrument has taken a back seat in relation to the conditional fine order, which to a great extent shifts the responsibility and the initiative to the responsible actor. Dutch authorities, however, use the instrument now and then, and these measures are argued to be appropriate to take when the enforcement authority sees little chance of actors taking action themselves.

6.5.3.4 Criminal Enforcement as Pressure Instrument

As noted earlier, UK enforcement law differs from its Dutch and Swedish counterparts in its strong presence of criminal law enforcement. Many different non-compliance situations are criminalised. Crucially in this context, non-compliance with an administrative enforcement order is generally criminalised. This is not the case in Sweden or the Netherlands. Moreover, the British enforcement authority can, and will, prosecute such non-compliance, and other offences against the authority. This provides them with more extensive and serious powers, and a sense of authority behind their administrative decisions and directions. Above, the civil sanctions reform has been discussed. It should be noted that the offences against environmental enforcement authorities – non-compliance with orders or obstructing inspection, and so on, are generally not replaced by the new civil sanctions, and enforcement policies will still point out these offences against the enforcement authority as offences prioritised for prosecution.¹²³⁸ It is clear that it is considered important that the administrative enforcer has a real and strong authority in the exercise of its powers to control environmental actors. Offences against this control system are serious enough to require criminalisation. One might also suggest that non-compliance with administrative enforcement orders is difficult to remedy through more administrative enforcement. Some kind of repressive sanction might work better. As noted earlier, some such sanctions may be found in the scope of administrative enforcement, but there are critical similarities to criminal enforcement. In light of these administrative sanctions in the structural and principal distance

¹²³⁸ See: Section 4.5.8, on the UK order.

to criminalising breaches of enforcement orders, it is not as great as first imagined.

6.5.4 Enforcement Instruments Tied to the Permit

In all the compared countries, there are different instruments connected to permitting functions, which can be used to enforce non-compliance or to respond to a new regulatory situation.¹²³⁹ A need for new environmental regulation can arise due to external circumstances such as new environmental technology, new legal requirements (most often through EU law), a degrading environmental quality or a newly-disclosed environmental problem. Moreover, poor management by the operator may give rise to stricter regulation in permit conditions, or as a last resort to withdraw the permit altogether. The latter measure is fundamental but is often stated to be hardly ever used, and then only when no alternative remains.¹²⁴⁰

The most notable difference between the studied legal orders is the already stated institutional organisation. While the Swedish enforcement order separates permitting and compliance control functions, these are part of the same regulatory functions in the UK and the Netherlands. There the same regulator will permit, supervise, enforce non-compliance, and change or withdraw permit regulations. They thus have a more comprehensive regulatory role, and can more readily use the permit competences as enforcement instruments. The Swedish enforcement authority will have to apply to the higher authority, or the courts for review and withdrawal of permit regulations. They have access to initiate such a procedure, but not the actual permitting functions. Furthermore, the permitting authority requires one of the competent authorities to initiate such a procedure. The concerned parties have no access to the permit review procedure. Permit review is also rarely initiated by the enforcement authorities. I would suggest that this limits the Swedish enforcers' steering powers considerably. It also means that the permit regulations are quite strong and seldom updated on the initiative of the concerned public or by the enforcement authorities protecting the public interest. As administrative compliance control and enforcement is limited by the provisions of the permit, there are challenges present in achieving dynamic public steering of permitted activities, and to adapt to environmental circumstances and technological developments. And that is what contemporary juridical steering should achieve in order to bring about sustainable development.

¹²³⁹ See: Sections 3.5.7, 4.5.7, and 5.5.6.

¹²⁴⁰ Darpö, J., *Rätt tillstånd för miljön* pp. 152–153. Note, however, discussion on Dutch practice of revoking and amending permits and their conditions, at pp. 103–104.

6.5.5 Administrative Penalties or Fines

Administrative penalties, or fines, are different kinds of monetary sanction that have more recently been developed in all the compared legal orders. The comparison has shown that these sanctions differ in content, purpose, and application in the various legal orders. The Swedish order introduced the Environmental Sanction Fee with the introduction of the Environmental Code in 1999. This is a fixed monetary penalty prescribed for different kinds of easily established breaches of law. The sums and the “offences” are stated in the Environmental Code and the subsequent Environmental Sanction Fee Ordinance, and the enforcer has a basic duty to impose the sanction when the breach of law has been considered, but they should not go into assessments of culpability and seriousness of the offence, or appropriate a penalty sum. The sanction has a repressive function. It is partly punitive, but has also proved to be an effective instrument for directing environmental behavior. The fast and simple reaction affords it a strong preventive effect.¹²⁴¹

In the English and Dutch orders these instruments have only recently been introduced (there have been some earlier experiments and sector regulations). The Dutch order have introduced the bestuurlijke boete – a monetary penalty instrument. There are, as yet, few competences for environmental authorities to impose such penalties – the area is still under development. The administrative penalties are flexible and require more of the authority in assessing the appropriate sum. The seriousness of the actions should be considered, the environmental effects involved, prior behavior, etc.¹²⁴² This punitive sanction comes closer to a criminal fine in its construction. It is therefore worth noticing that the assessment of suitable “punishment” with regard to the culpability of the act, is carried out by the authority. They become quite involved in the normative part of penal sanctions.

The English administrative penalties rest on a different legal structure. These monetary penalties are introduced as alternatives to criminal enforcement in reaction to a criminal offence. As stated earlier, criminal enforcement has had a central role in UK enforcement law and many different breaches of law and administrative regulation are criminalised. The basis for these administrative instruments is thus found within the criminal system. However, the administrative authority can for specifically prescribed environmental offences choose not to prosecute and instead impose monetary sanctions. There are both instruments of fixed monetary penalties (FMP) and variable monetary penalties (VMP), with similar character as the above described Swedish and Dutch counterparts.¹²⁴³

¹²⁴¹ See: Section 3.5.6.

¹²⁴² See: Section 5.5.8.

¹²⁴³ See: Section 4.5.6.

6.5.6 Some Other Instruments

There are also a range of different alternative instruments outside these common and well-known ones. There are, for example, different types of voluntary agreement, such as the recently formalised English civil sanctions known as enforcement undertakings and third party undertakings. Through these undertakings a person suspected of an environmental offence can avoid prosecution by voluntarily agreeing to repair the damage.¹²⁴⁴ Another measure an authority may use as a type of sanction or pressure instrument is one that is directed at the goodwill of an actor that fails to comply with environmental law. This is the publication of enforcement action – thus “naming and shaming”. Strategic use of such instruments has been noted in the Dutch legal order.¹²⁴⁵

6.6 Some Comparative Conclusions

The general comparative remarks to be made here mostly concern differences in structural approach and scope. Despite similarities in actual enforcement instruments, and the context of common European Law and, when it comes to structural organisation of enforcement competences and tasks, the Swedish system stands out. The Swedish Environmental Code has a wide scope. It regulates generally all actions and operations with effects of any significance to the aims and purposes of environmental laws, and provides general administrative enforcement tasks, duties, and instruments for control of compliance with the Code. There are some sectoral laws that make specific regulation of that specific sector, but the basis and the supplements to such rules are still found in the Environmental Code. This is a more comprehensive and integrated approach than those found in the Netherlands and the UK. However, on the structure of the enforcement powers, the Swedish system distinguishes clearly between permitting, administrative enforcement, and criminal enforcement, while no authority has combined functions and access to all enforcement instruments. This is different from the Netherlands and the UK, where the competent regulator will generally have access to the whole spectrum of administrative enforcement measures. In the UK, they also have criminal enforcement powers. This provides the authority with a more comprehensive and flexible regulatory power, and the possibility to exercise more flexible and appropriate regulation. Furthermore, the Dutch and English environmental regulation orders are under current reform. These reforms are to some extent focused on enriching the “tool box” of enforcers to give them opportunities for more flexible and effective compliance control. This is especially true in the UK.

¹²⁴⁴ See: Section 4.5.8.4.

¹²⁴⁵ See: Section 5.5.1.

Furthermore, the structural changes that the environmental law orders have undergone, and will undergo, under the auspices of Better Regulation will make environmental regulation more effective and streamlined. All the studied environmental law orders have been based upon regulation through permitting regimes. But, the permitting procedure is often long and complex, and has been argued to hinder business development. The permit regimes are thus being coordinated and deregulated. All permit regimes have been thoroughly reviewed and reformed over the past few decades, and the lists of installations under obligatory permit regulation have been reduced, especially in Sweden and the Netherlands. However, the Dutch and English orders have introduced comprehensive schemes for standard or general regulation of the thus deregulated permitting duties. In the Swedish system, there is no such systematic strategy for deregulated activities. The regulation falls to administrative enforcement through existent general rules, principles and guidance. The comparison may suggest that the Swedish order should consider some more structured and detailed general regulation of those activities outside the shrinking permit regime. This makes the situation for the enforcement authority much easier, especially in its role of merely checking compliance and not being concerned with the normating.

Another way in which the Swedish order stands out is in the regulatory approach that the Environmental Code reform has brought with it. The idea is that each and every actor within the wide regulatory scope has a basic and principal responsibility for precautionary measures, and self control, and for continually improving the quality of their efforts. This is not only expressed in statements of aims and principles, but also in general rules on self-control, enforcement competence to demand extensive investigation, and a kind of shifted burden of proof in the enforcement situation, where the actor must demonstrate compliance with Environmental Code requirements. The preparatory works and administrative guidance also emphasise the shifted regulatory paradigm stemming from the international agenda and doctrine of sustainable development. The enforcement authority primarily is to ensure that actors control their own activities, and in that regard to guide and steer them. There is a clear policy of system control and of making actors become not only involved in sustainable development and management, but to play active and proactive parts in it. The regulator stands in the background and oversees this work. This shift of the active role and responsibility requires much from the actor. This can be argued to be appropriate in view of environmental law principles and the principal natural scientific background. It will nevertheless challenge basic administrative law conceptions on the relationship between the public authority and the individual. These challenges will be addressed in the following analysis, which looks into this contemporary environmental law paradigm of actor responsibility within the context of administrative law fundamentals of due procedure as safeguards of legal certainty and general Rechtsstaat values.

Effective Enforcement and Legal Certainty; Comparative Analysis of Thematic Encounters

7 Enforcement of Actor Responsibilities for Information – Knowledge, Investigation and Proof

7.1 Introduction to the Analysis

Information is fundamental in administrative decision-making. Information about the relevant law and the concrete factual circumstances to which it applies is essential in order to reach the correct and appropriate decision within the framework of the law. This is certainly true in environmental law where information plays a central and somewhat distinctive role.¹²⁴⁶ Legal certainty and the appropriate and legitimate exercise of public power are safeguarded through due procedural care. This is also reflected in the concept of good administration. Due procedure involves consideration of all relevant circumstances and sufficient information with which to ensure it.

The extent of the relevant decision-making materials is potentially wide in the environmental context, and responsibilities for gaining and imparting such information can be quite burdensome. Apart from legal and technological knowledge, the relevant facts include environmental circumstances. These are, for example: the status of the surrounding environment, protected species or sensitive habitats, the risks involved in the operation, the result of such risks – including synergy effects, as well as different ways of remedying or abating damage or risk. Human dependence on these complex biological systems necessitates a preventive and precautionary approach, which entails that information becomes relevant before any damage, or even the evident risk, occurs.¹²⁴⁷ A typical issue in the field of environmental enforcement therefore concerns the distribution of the burdens of responsibility for decision-making materials. This will be studied next. It is a complex matter, especially in a comparative perspective. The general point of departure is that the administrative authorities have fundamental responsibilities for making sure that the exercise of authority is lawful. This essentially means that it is well grounded in law and in relevant substantive facts. This

¹²⁴⁶ Decleris, M., *The law of sustainable development* p. 57.

¹²⁴⁷ See: Sections 2.3.1.3 and 2.3.2.

is part of good administration and due procedural care. But in the area of environmental law, the individual actor has extended responsibilities for decision-making materials.

One comparative observation made in Part II is that the explicit focus on actor responsibilities and self-control in the Swedish Environmental Code stands out.¹²⁴⁸ Though all the studied legal orders include responsibility of the environmental actor to exercise due care and to think ahead, including certain investigatory duties, the Swedish order states more explicit and fundamental principles and rules of such responsibility. It further includes wide powers to enforce the information responsibilities. The administrative enforcement authorities are claimed to have a new role of supporting and directing actors with regard to their own control efforts. This difference motivates an analysis of the information responsibilities of actors and their relation to administrative law principles – essentially legal certainty.

It should also be noted that actor responsibilities for information can be found in several areas of administrative enforcement law, primarily within financial law. Demands on actors for cooperation in self-regulation are now common.¹²⁴⁹ The relevant areas of law are normally such that it is difficult for anyone but the involved actors themselves to discover breaches of law. Their knowledge and insights are needed for optimal regulation. There is, furthermore, the interest of fair competition, since ‘free riders’ could benefit financially by escaping regulations that others follow. Accordingly there is a common interest in involving actors in a cooperative regulation of activities under the relevant areas of law.

Actor’s responsibilities under environmental law to a great extent differ from those in areas of competition or tax law. They are based on different grounds. Actor responsibility in environmental law links to the notion of equitable rights and responsibilities for the management of common resources for each and everyone. This can be described as a global and inter-generational idea of good neighbourliness. This actor responsibility is based on the perception of activities involving environmental effects (and attendant risks) perceived as hazardous, and which affect common resources with potentially serious consequences. It is not merely a question of helping authorities to gain access to complex information in the public interest. The acceptance of activities involving environmental risks and effects are conditional on the actor’s extensive responsibilities, including information responsibilities. This is where the environmental control system comes in and balances the interests involved. Environmental law stipulates many different demands that are made on the environmental actor to provide such information. The following investigation comprises an analysis of the encounter between these

¹²⁴⁸ See: Section 6.4.2.

¹²⁴⁹ Compare: Darpö, J., *Miljörett och Europakonventionen* p. 93, with reference to the European Court and the Swedish Supreme Administrative Court practice.

ideas and the administrative law expressions of the argued Rechtsstaat values. At a more basic level, the demands of environmental law on precaution and actor responsibility challenge the limits of Rechtsstaat principles of legal certainty and the investigatory responsibility of public bodies in decision-making procedures. The question is, how flexible are these limits? Simply put, what kind of knowledge and investigation, and how much, can be demanded of an actor in the case of administrative involvement through enforcement measures? These topics are of particular interest in combination with administrative coercion and criminal punishment.

The analysis is based on an investigation of the distribution of information responsibilities. This investigation concerns itself with the duties to have the sufficient knowledge and expertise and to make investigations and share their results, as well as with issues of evidence in the enforcement situation. I will use the collective term information (information responsibilities, or burdens). The investigation focuses on administrative enforcement of these responsibilities. Such enforcement involves monitoring the actor's self-control, but also authoritative and coercive involvement, demanding more information and further investigation.

I will begin by discussing the administrative authorities' responsibilities for information (Section 7.2), and the principles of environmental law (Section 7.3), which shift these responsibilities on to actors. This presentation will (in Section 7.4) illustrate and discuss, step by step, a widening scope of the enforcement of environmental law in relation to the actor's responsibilities for knowledge, investigation and proof. Comparative remarks will be made continually, generally contrasting the Swedish system to those of the United Kingdom and the Netherlands.

Having thus illustrated the range of administrative enforcement of the relevant actor duties for information, the reach and limitations thereof will be discussed in light of the encountering legal perspectives of administrative and environmental law (starting from Section 7.5). The discussion will then move to an analysis of these encountering perspectives within the context of administrative enforcement, and the consequential distribution of information responsibilities. First, some analysis of the application of the shifted burden of proof will be made (Section 7.6). Following this, the discussion will consider the context of sanctions, and investigate how this influences their application (Section 7.7). This will include a discussion on self incrimination, which might become a problematic consequence of the shifted burden of proof in environmental law enforcement. The chapter will be concluded with a summary and concluding remarks (Section 7.8). An underlying question in this investigation is how far the actor's responsibilities for information reaches, not only in relation to aspects of legal certainty, but in effective environmental steering and attaining environmental objectives.

7.2 General Administrative Law on the Distribution of Burdens for Investigation and Proof

7.2.1 Introduction

In this section the administrative law principles of information responsibilities are described and their application in the administrative procedure discussed. The presentation is made separately for each of the compared legal systems, starting with Sweden. It should be noted that all of the compared legal orders are covered by administrative law principles of European law, such as good administration and due procedural care. These principles are applicable through EU law. As described in Chapter 2,¹²⁵⁰ good administration prescribes due care in the administrative procedure.¹²⁵¹ The established principle demands investigations of reasonable extent and quality. That includes taking care to gather sufficient decision-making materials, and to carefully and impartially consider all relevant decision-making facts.¹²⁵² Bearing this in mind, the country by country presentation will proceed.

7.2.2 Sweden

7.2.2.1 The Inquisitorial Principle

As established earlier,¹²⁵³ Swedish public authorities carry a principal responsibility for investigation. This norm refers to an inquisitorial principle and procedure¹²⁵⁴ where the function is to safeguard legal certainty. In this role the public authority must acquire a comprehensive overview of all relevant circumstances of a case, and thus ensure information required for the decision.¹²⁵⁵ This principle applies both to courts and administrative authorities and works as a safeguard for legal certainty as the authority, through investigation and communication with the parties concerned, assists them in advo-

¹²⁵⁰ Section 2.2.1.4.

¹²⁵¹ The Charter of Fundamental Rights in the European Union Art. 41; SOU 2010:29 pp. 78–79. Notably, the application of the principle of due care by the national authorities has not been expressly stated in EU law, but based on the fundamental duty of loyalty a duty to carefully investigate the implementation of EU law should follow. Note also: SOU 1981:46 pp. 104–106 for pre-EU reflections on the relation to objective and factual procedure.

¹²⁵² See Cases C 16/90 *Nölle*, and C-269/90 *Technische Universität München*.

¹²⁵³ Section 2.2.3.1.

¹²⁵⁴ In Swedish: “officialprincipen”. On the terminology, see: Section 2.2.3.1.

¹²⁵⁵ Lundin, O., *Officialprincipen* pp. 171–172; Petré, G., *Om förvaltningsdomstolars utredningsplikt* p. 154 (In 1977 Petré discussed the unclarity of the application of the principle outside the courts, but today the application of the principle on the original decision-making authorities is recognised); Ragnemalm, H., *Förvaltningsprocessrättens grunder* pp. 77–78. Note also the statement of such a principle in JO 1977/78 p. 310.

cating their lawful interests.¹²⁵⁶ Administrative decision-making should, according to the principles of good government, be correct and appropriate as well as objective. In order to reach the right decision, the authority must ensure that relevant facts and arguments are considered, and to achieve this there must be an investigation. Without the necessary information an objective and factual assessment of the case is not possible.¹²⁵⁷ The investigatory duty of the authority thus functions as a safeguard of objectivity.

In Chapter 2 the inquisitorial principle was also described in connection with legality and as a means of warranting the legal basis for administrative competence in the specific circumstances of an individual case, and consequently safeguarding that correct and appropriate decisions are made in accordance with the law. This is also relevant in a wider sense in the realisation of the policy behind the law, and thus proper execution of the authority's public task. This is essential in the wider sense of legal certainty and the modern Rechtsstaat.¹²⁵⁸ It guarantees that the public interests are protected in any decision-making.¹²⁵⁹ Especially in a case with only one party, the inquisitorial principle helps guarantee a comprehensive view of the case by requiring the authority to acquire information that supports interests other than those advocated by the individual addressee.¹²⁶⁰ This aspect of the inquisitorial principle is significant in environmental law cases, where the legitimate interests involved are many and varied, and often not represented by any of the parties to the case.¹²⁶¹ Safeguarding sufficient decision-making materials is also important for the authority concerned and the effectiveness of its work. A poorly based decision may be overruled on appeal, and will therefore entail using up more resources.¹²⁶² Additionally, in serious cases, the individual administrative decision-maker, in a case of the exercise of authority, may be liable for such faults, both in criminal and tort law (Criminal Code (1962:700) 20:1, and the Law (1972:207) of Damages 3:2).¹²⁶³

¹²⁵⁶ Edelstam, G., *Förvaltningsmyndigheters utredningsskyldighet* pp. 19-24; von Essen, U., *Processramen i förvaltningsmål* p. 23. Note also Prop. 1971:30 emphasising the importance of basing decisions on full and objective investigation in the interests of legal certainty.

¹²⁵⁷ Lundin, O., *Officialprincipen* pp. 172-173; Sundberg, H., *Allmän förvaltningsrätt* pp. 120-121, and *Förvaltningen och rättssäkerheten* p. 327; SOU 1981:46 pp. 99, and 105.

¹²⁵⁸ Ragnemalm, H., *Förvaltningsprocessrättens grunder* p. 110; and von Essen, U., *Processramen i förvaltningsmål* pp. 30-31 on the court control of the administration.

¹²⁵⁹ SOU 2010:29 p. 416. See, also: SOU 1964:27 p. 294, on earlier law.

¹²⁶⁰ SOU 1964:27 p. 303. In a case with two or more contradictory parties, these interests will often be brought up in argument by the parties, at least when the public interest parallels their own private interests.

¹²⁶¹ Such interests may include, for example: future generations, indirectly affected users of the same resource, or nature itself, such as species of animal. See Section 2.3.3.3.

¹²⁶² Petré, G., *Om förvaltningsdomstols utredningsplikt* p. 162.

¹²⁶³ Compare, however, the argument in: Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* p. 164, that in reality it is probably close to impossible to convict a case-handling official of the administrative authority of a poorly conducted investigation, however serious the consequences for the individual may be.

The inquisitorial principle and procedure can to some extent be paralleled to the principles and rules on due procedural care and good administration. It does, however, retain a special character and role within the Swedish context. The responsibility of public bodies for decision-making materials is fundamental, with a long tradition in Swedish administrative law.¹²⁶⁴ The purpose and aim of the principle is wide. The administrative authorities and courts are entrusted with wide responsibilities in their exercise of power over the citizen. The decision-maker is essentially responsible for ensuring the best decision, protecting all the different interests involved in a case, both public and individual interests, and acting independently of the parties to the case. This may be put in the context of the Swedish constitutional tradition, where the administrative decision-maker is legally independent and protected from involvement by another authority, including central government.

7.2.2.2 Regulation and Application of the Principle

As indicated earlier, the inquisitorial principle is codified for the courts (FPL Section 8),¹²⁶⁵ but also applies to administrative decision-making – as a fundamental principle of law, by analogy, practice, and generally by its logical function in administrative procedure.¹²⁶⁶ Investigatory duties for the administrative authorities are also regulated specifically in several areas of law.¹²⁶⁷ A general structural idea is that the main part of administrative procedure is undertaken in the first instance – by the original decision-making authority. Such procedure is held most effective, and good for legal certainty.¹²⁶⁸ The administrative authority often has the necessary expertise and first-hand

¹²⁶⁴ Petré, G., *Om förvaltningsdomstolars utredningsplikt* p. 154, starts off by stating that the principle as of old has been perceived as applicable in the administrative procedure.

¹²⁶⁵ Prop. 1971:30 pp. 388, and 529–530. Petré suggests, in *Om förvaltningsdomstolars utredningsplikt* p. 154, that the codification of the principle in the court's procedure was a natural response to the perceived uncertainty on the reach of its application in the court procedure. Such clarification was not necessary for the administrative authorities. Thus the principle was stated in the Administrative Procedural Code, but not in the Administrative Procedure Act.

¹²⁶⁶ SOU 2010:29 p. 405; RÅ 1993 ref. 76 on failure to give the individual the opportunity to provide further information about his suitability to receive a driver's licence; RÅ 2006 ref. 15 on the tax authority's responsibility for investigating the objections of an individual, referring to investigatory duties as a general administrative law principle; JO 1977/78 p. 310 criticising, with reference to a principle of investigatory duty, an authority for conducting too short an investigation, and causing unnecessary court procedure; and JO 1998/99 p. 179; JO 2006/07 p. 172. See, also: Lundin, O., *Officialprincipen* pp. 171–172; Petré, G., *Om förvaltningsdomstolars utredningsplikt* pp. 154 och 162; Ragnemalm, H., *Förvaltningsprocessrättens grunder* pp. 80–81. Closely after the introduction of the general administrative codes, it was claimed that this choice on the part of legislators had significance in stating a stricter investigatory duties for the courts (See: RÅ 1974 ref. 29, and SOU 1981:46 p. 100). However, as more recent sources show, the inquisitorial principle applies fully to the administrative authorities, despite the lack of any explicit statutory support.

¹²⁶⁷ See, for example: Taxation Act (SFS 1990:324) 3:1, and Discrimination Act (SFS 2008:567) 4:9. See, also SOU 2010:29 pp. 400–402, for presentation of investigatory duties.

¹²⁶⁸ Prop. 1985/86:80 pp. 12 and 41; Dir. 2008:36 p. 8, followed up in SOU 2010:29 p. 397.

information on the facts of a case. This position makes it easier for them to produce a full and relevant basis for a correct and appropriate decision.¹²⁶⁹ There are, however, strictly no obstacles against the court's involvement in the area of administrative discretionary decision-making. It may well assess the circumstances differently from the original decision-maker, and come to a substantially different conclusion.¹²⁷⁰

Importantly, the duties of the decision-maker to ensure the basis for a correct and appropriate decision should be balanced against other aspects of effectivity.¹²⁷¹ Administrative cases ought not to be burdened with unnecessary investigation. The decision-maker should be able to move forward with cases, and deliver decisions reasonably promptly. This is also important for legal certainty, and the real and relevant protection of legitimate interests. Public resources should, moreover, be used effectively. Extensive investigations may therefore not always seem motivated.

The interest of legal certainty as described is protected through different procedural rules. Apart from the principal responsibility for the investigation, the authority must communicate with the parties to the case and be of service to them in such things as guidance, providing information, and offering advice on access to procedure. It may also have to consult other authorities. These procedural rules are stated in the Administrative Procedure Code (Sections 4, 6–7 and 16–17). These rules can be seen as expressions of the inquisitorial principle in that they indicate investigatory duties for the administrative authority.¹²⁷² The principle is also supported by the duty to motivate decisions (Section 20), which indirectly requires that the authority demonstrates its careful preparation of the case in question. Several of these procedural safeguards are included in the principle of good administration. Due procedural care, including communication and impartiality, are thus regulated, not only for EU institutions and the Swedish system, but also for the other Member States, including the legal orders compared here.

The administrative procedure is consequently a communicative procedure that strives to bring forward all relevant aspects and necessary decision-making materials to ensure a correct and appropriate decision. This includes giving a voice to involved interests, whether or not they are parties to the case. The authority bears the main responsibility for this procedure and for the investigation. Even in cases involving an application for a beneficial

¹²⁶⁹ Compare: SOU 1981:46 p. 105.

¹²⁷⁰ Von Essen, U., *Processramen i förvaltningsmål* pp. 30–31.

¹²⁷¹ Petré, G., *Om förvaltningsdomstolarnas utredningsplikt* p. 157; Lundin, O., *Officialprincipen* p. 173; and Sundberg, H., *Allmän förvaltningsrätt* p. 121

¹²⁷² Prop. 1971:30 p. 465; SOU 2010:29 pp. 399, 425 and 458. See, also: Prop. 1971:30 pp. 374, 383 and 388; and Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* pp. 186–187.

decision the decision-making authority is required to support the individual, informing her of these responsibilities and how they should be carried out.¹²⁷³

The principle that the authority takes responsibility for the case being properly and sufficiently investigated does not mean that it has to undertake all of the investigatory measures itself. The public authority may to a varying extent involve the individual in the investigation.¹²⁷⁴ The relevant legislation will often prescribe powers for the authorities for making the actor share in this work. Such powers may involve asking for existing documentation from the actor, having them answer questions, and in other ways giving and validating information and making investigations. The more specific meaning and application of the inquisitorial principle, the extent of the investigatory duties and the legitimate involvement of the individual, varies in different cases.¹²⁷⁵ More responsibility can be placed on the individual in cases where the individual has applied to the authority for some kind beneficial decision – in the environmental context this typically involves the granting of a permit. Conversely, the public authority generally has far-reaching responsibility for investigating the case and gathering all the necessary and relevant materials before making an onerous decision, especially when perceived as an intrusion on the fundamental rights and freedoms of the individual.¹²⁷⁶

¹²⁷³ Prop. 1971:30 pp. 371–372; and RÅ 1974 ref. 29, holding that the decision-making authority should have actively given the applicant for a driver’s licence opportunity to supplement his application before it was denied. See: SOU 1981:46 pp. 105–106, on the close relationship between the authority’s investigatory duties and service duty; Ragnemalm, H., *Förvaltningsprocessrättens grunder* pp. 77 and 80; and Hellners, T., and Malmqvist, B., *Förvaltningslagen; med kommentarer* pp. 74–77. See, also: SOU 2010:29 pp. 374–375, for a current proposal to explicitly state this service duty in a new FL Section 17. Compare also the corresponding duty of the court to communicate how the investigation should be supplemented in FPL Section 8 para. 2, and RÅ 2002 ref. 22.

¹²⁷⁴ Sundberg, H., *Allmän förvaltningsrätt* p. 123. Note the proposal in SOU 2010:29 to formulate the codification of the principles so as to mark the expected cooperation of the parties to the case, see pp. 418–419 (only cases initiated by an individual party – normally applications for beneficial decision).

¹²⁷⁵ Lundin, O., *Officialprincipen* pp. 171; Petrén, G., *Om förvaltningsdomstolarnas utredningsplikt* 1977 pp. 154–166, arguing the need for precedential guidance (commented further in Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* pp. 161–162 and 175–179; Sundberg, H., *Förvaltningen och rättssäkerheten* p. 328–329. These complexities explain the hesitance in codifying the principle in FL; see SOU 1964:27 p. 289; SOU 1968:27 p. 110; Prop. 1971: 30 p. 375; SOU 1981: 46 pp. 104–106; and Prop. 1985/86:80 p. 19, illustrating dissatisfaction with the rule not being codified, suggestions to do so, and final choice not to because of difficulties in formulating a rule with such pluralistic applications in different cases. The current proposal in SOU 2010:29 argues again for codification of the rule, but in general terms to leave room for the necessary flexibility in different kinds of case, and noting the cooperation of the parties to the case, see p. 417–419.

¹²⁷⁶ SOU 1981:46 p. 105; SOU 2010:29 p. 416; Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* p. 162; Petrén, G., *Om förvaltningsdomstolarnas utredningsplikt* pp. 158–159; Lundin, O., *Officialprincipen* p. 173; Ragnemalm, H., *Förvaltningsprocessrättens grunder* pp. 77–78. See for examples RÅ 2002 ref. 85, where the economic consequences for the individual was held to influence the assessment of the authority’s investigatory duties; and JO 1998/99 p. 179.

These decisions are commonly initiated by the authority *ex officio*, in its task of protecting the public interest. This in itself motivates investigatory duties for the authority.¹²⁷⁷ Special regulation for the different areas of administrative law may reformulate the principle and the duties involved. The inquisitorial principle could be described as flexible, though it states a basic core linked to the functions and intentions of the rule – reaching the substantively correct and appropriate decision and protection of legitimate interests.¹²⁷⁸

7.2.2.3 The Inquisitorial Principle in the Context of Appeal

This investigation is focused on procedure with regard to the original decision-making authority. But, when an enforcement case is appealed, the issue of the appellate body's responsibilities for the decision-making materials becomes relevant. In the Swedish full and reformatory process the appellate body may deliver a new and different enforcement order, and thus to some extent take over the function of the enforcement authority. A few remarks should so be made on the inquisitorial principle in the appeals procedure.¹²⁷⁹

The appeal is generally heard by an administrative authority as first instance. In the enforcement of environmental law, this authority is commonly the County Administrative Board. Their decision may subsequently be appealed to the Environmental Courts.¹²⁸⁰ As indicated earlier, the inquisitorial principle applies to both these types of appeal body. The investigatory duties take a somewhat different shape in the appeal procedure. First of all, in the common appeal case, the case has already been well prepared by the original decision-making authority. That investigation marks the starting point. Secondly, the procedure relies significantly on the parties to the case. Though the administrative procedure has traditionally involved one party in relation to the decision-maker, private interest versus the public interest,¹²⁸¹ the Swedish system has since 1996 had a general two-party appeal procedure, where the original decision-maker becomes a contradictory party to the appellant (FPL Section 7a).¹²⁸² The parties will state their conflicting claims

¹²⁷⁷ Note the argument in SOU 1964:27 p. 299 that the more prominent the public interest, the more extensive was the investigatory responsibility for the public authority.

¹²⁷⁸ SOU 1981:46 p. 105; SOU 2010:29 p. 416; Petrén, G., *Om förvaltningsdomstolars utredningsplikt* p. 166. See, also: Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* p. 159.

¹²⁷⁹ See: Sections 3.2.4, and 6.2.2. The appeal body also has the function of seeing that the original decision-maker arrives at a properly based, lawful decision. The original decision-maker will in the appeal procedure have to show that this has been done. This demand for evidence also validates investigation of the appeal procedure. This will be discussed in Section 7.2.2.4.

¹²⁸⁰ See: Section 3.3.2.

¹²⁸¹ Ragnemalm, H., *Förvaltningsprocessrättens grunder* p. 33; Lavin, R., *Tvåpartsmål i förvaltningsprocessen*, p. 99.

¹²⁸² Prop. 1995/96:22; SOU 1991:106. This rule is applicable in environmental procedures through MB 20:3, see: MÖD 2003:19. This concerns the courts. In a procedure before the County Administrative Board, FL applies. See further in Section 3.3.2.6.

and grounds thereof to the court, similar to an adversarial procedure, and show support in relevant factual circumstances. This should provide a good basis for sufficient decision-making materials.¹²⁸³ The court is, however, not limited to the materials stated by the parties.¹²⁸⁴ Its responsibilities under the inquisitorial principle include ensuring a sufficient standard of decision-making materials,¹²⁸⁵ and to take steps to supplement this when necessary. This can entail advising the parties to supplement the materials, or making its own investigations. The Court has investigatory responsibilities, but that the task is made easier by the two-party procedure.¹²⁸⁶

The described supplementary responsibility can be drawn from the function of the administrative court procedure, and of public administration generally. This function, or task, reaches further than the resolving of conflicts, or the punishment of illegal offences. It has to do with the protection of legitimate private and public interests, and thus the realisation of public policy.¹²⁸⁷ The court's supplementary responsibilities for the investigation can be of considerable importance in this function.¹²⁸⁸ Nonetheless, the investigation in an appeal case is limited. Based upon FPL Section 29, the investigation of the court is conducted within the procedural framework set by the arguments of the parties, their claims, and the grounds for such claims.¹²⁸⁹ While the court is not limited to the materials submitted to support these claims, it should be careful to respect the procedural framework provided by the parties, since it express their request for legal protection. It has therefore been contended that the court should be restrictive in bringing in new decision-making materials itself. Its role is primarily to exercise judicial control over the administration. Excessive involvement of the court may endanger the quality and relevance of the preparations, and the perception of their impartiality and equal treatment.¹²⁹⁰

¹²⁸³ Lavin, R., *Tvåpartsmål i förvaltningsprocessen* p. 101, arguing the benefits of a two-party process (see: Section 4.2.5.2).

¹²⁸⁴ Von Essen, *Processramen i förvaltningsmål* pp. 61–62.

¹²⁸⁵ Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* pp. 80–81, noting that the procedure is not inquisitorial in the sense that the court produces the evidence.

¹²⁸⁶ Petrén, G., *Om förvaltningsdomstolars utredningsplikt* p. 164; Lundin, O., *Officialprincipen* p. 172; Ragnemalm, H., *Förvaltningsprocessrättens grunder* p. 81, describing a cautious application of the inquisitorial principle in cases where both parties are capable of making their own investigations. See, also: Prop. 1971:30 pp. 526–530, on adversarial procedure as a useful working method which does not replace the investigatory duties of the authority.

¹²⁸⁷ Von Essen, U., *Processramen i förvaltningsmål* pp. 24–35.

¹²⁸⁸ Von Essen, U., *Processramen i förvaltningsmål* pp. 110–111, and 115; Lavin, R., *Förvaltningsprocessen inför 2000-talet* p. 456, and *Tvåpartsmål i förvaltningsprocessen* p. 118; Ragnemalm, H., *Förvaltningsprocessrättens grunder* p. 81.

¹²⁸⁹ Prop. 1971:30 pp. 579–580; When there is special cause, especially protection of the individual's legitimate interests, the court can go beyond the claims – when beneficial to a private party and done without detriment to an opposing private interest. Von Essen, U., *Processramen i förvaltningsmål* p. 161. See, also: Wennergren, B., *Förvaltningsprocessen – en fullbordad tvåpartspocess* p. 78.

¹²⁹⁰ Von Essen, U., *Processramen i förvaltningsmål* pp. 238–248, esp. pp. 242–243.

7.2.2.4 Evidence

The inquisitorial principle is generally understood to bring with it a principal duty for the decision-making authority to prove that its decision is correct and appropriate. This duty is a consequence of the investigatory responsibility. It can be described as a burden of proof.¹²⁹¹ It will decide who will have the benefit and who will carry the corresponding risk for the lack of supporting investigation and information.¹²⁹² The burden of proof and the responsibility for investigation are different concepts, but in the enforcement situation they become two sides of the same matter.¹²⁹³ The connection between investigatory responsibilities and evidence becomes clear when an enforcement decision is appealed. In the appellate body's review, it will determine whether the original decision-maker was well-based in the relevant materials, had considered all the relevant circumstances of the case and made a correct and appropriate assessment of the facts before reaching a lawful decision. The original decision-maker must then show that it has done so. Such a burden of proof makes it interesting to discuss evidence in the context of appeal of the enforcement decision.¹²⁹⁴

Evidential theory in administrative procedure is complex, and will not be investigated in depth here.¹²⁹⁵ Some basic points, however, will be made. Firstly, the procedure relies on a free evidence theory. There are basically no regulations on admissible evidence, or the relative authority thereof. Certain kinds of evidence are usually seen as being more reliable than others, but such perceptions may not be systematically used as rules for admitting or weighing evidence. All relevant evidence must be considered.¹²⁹⁶ In court the process is not just linked to the facts argued by the parties. The court can

¹²⁹¹ The term "burden of proof" is here used in a wide sense, as a reflection of the procedural responsibilities of the authority. This includes the onus of proof but sometimes also with the weighing of evidence, and standard of proof. When motivated, a more precise terminology will be used. The administrative procedure being so complex in its focus on risk assessment, weighing of interests and evaluation of the appropriate decision, as well as the involvement of several parties in the investigation, including the decision-making authority itself. The different aspects of investigation and evidence are intertwined in a way that it is sometimes difficult to distinguish the separate concepts and functions of evidential theory. See: Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* pp. 14–15.)

¹²⁹² Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* pp. 14, and 62.

¹²⁹³ SOU 2010:29 p. 407; Ragnemalm, H., *Förvaltningsprocessrättens grunder* pp. 107–108; Petré, G., *Om förvaltningsdomstols utredningsplikt* pp. 155–156. The issue of who should stand the risk of poor investigation, or uncertainty generally, is a typical issue in the precautionary approach of environmental law enforcement, and will be developed further.

¹²⁹⁴ See Section 7.2.2.3 and footnote 1279.

¹²⁹⁵ For an extensive analysis and attempts to systematise evidential theory in the administrative procedure, see: Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål*.

¹²⁹⁶ Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* p. 122. See, for example: JO 2001/02 p. 430 criticising a municipal board that drew up requirements of certain kinds of evidence in applications for a consent; and JO 1979/80 p. 427, criticising statements on higher credibility of statements from board members, than from the individual tax payer. Note also: Sundberg, H., *Allmän förvaltningsrätt* p. 246, for an earlier reference.

also consider information obtained elsewhere.¹²⁹⁷ Following the inquisitorial principle, it can gather information of itself, and on its own initiative.

A second basic point of evidential theory is that the basic scheme of onus of proof is that the person initiating an administrative case must state their claims and support them.¹²⁹⁸ This means that in a case initiated by an individual (for example application for an environmental permit), that person will bear the initial onus of proof. In a case initiated by an authority *ex officio* (for example an enforcement case against an addressee) the authority would have to show support for their enforcement case against an addressee. This scheme parallels that of the investigatory responsibilities in different kinds of case. These schemes are two sides of the same coin: in the subsequent appeals procedure the roles are reversed so that the addressee challenging a decision of the authority must state the grounds of the claims. They must convince the appellate body that the initial decision was wrong.¹²⁹⁹

Notwithstanding this allocation of onus of proof, the actual burden of proof is further influenced by the principles of the inquisitorial procedure.¹³⁰⁰ The burden is shared; or more specifically: the investigatory duties to produce decision-making materials is shared between the parties and the decision-maker, and in the appeals procedure, the burden of proof is shared between the individual and its counterparty – the original decision-making authority.¹³⁰¹ The claims from an individual against a public authority do not to the same extent as in the civil procedure have to be supported by evidence in terms of relevant factual circumstances. This is due to the authority's duty to ensure that the decision is based upon a comprehensive overview of all the relevant circumstances of a case. The duty for the decision-making authority to show that it has made a lawful decision will perhaps not take over the appellant's onus of proof. It will, however, lower the standard of proof significantly. After that the burden lies heavily on the authority, supplemented by the duties of the appellate body in the inquisitorial procedure.

As discussed earlier, the investigatory duties of authorities vary in their extent and reliance on cooperation from the individual. Consequently, the burden of proof will also vary in view of the character of the case at hand.¹³⁰² It will not be enough to show stronger evidence than the counter-party, as in

¹²⁹⁷ Prop. 1971:30 pp. 423–424.

¹²⁹⁸ Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* p. 16.

¹²⁹⁹ Lavin, R., *Förvaltningsprocessen inför 2000-talet* p. 462; Sundberg, H., *Allmän förvaltningsrätt* pp. 245–246.

¹³⁰⁰ Compare: von Essen, U., *Processramen i förvaltningsmål* pp. 247–248, in arguing that the parties should primarily be the ones presenting the decision-making materials, and that the court can urge them to supplement the materials if necessary. Only beyond that is the investigatory duty and competence of the court relevant, and it should then be restrictively exercised.

¹³⁰¹ A court or another appeal body can hardly be said to carry a burden of proof. They do not stand any risk of "losing a case". They nevertheless have investigatory duties, etc. See: Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* pp. 18–19, 62–63.

¹³⁰² Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* pp. 62–63, and 73–74; von Essen, *Processramen i förvaltningsmål* pp. 36–42.

a simple balancing of probabilities.¹³⁰³ Generally speaking, the preparation of an onerous decision requires more in terms of assurance of sufficient decision-making materials. The reasoning is that a poor investigation or lack of knowledge and information should not be detrimental to the individual in the decision-making procedure. This is particularly valid when the authority initiates a case that entails a decision perceived as interfering with the individual's basic freedom – for example, in an enforcement case. In administrative decisions and measures that involve different kinds of sanctions the public authorities will carry a heavier burden of proof.¹³⁰⁴ In such cases, the authority has to show that its decision was properly motivated in light of their competences, and thus based in law.¹³⁰⁵ The heavy burden of proof for the intrusive exercise of power against an individual thus rests on legality, and the Rechtsstaat idea of obligatory legal support for intrusion with individual freedom.¹³⁰⁶ This mirrors the function of the investigatory duties to ensure sufficient support in law and relevant realisation of the public task.¹³⁰⁷

Following the same line of thought of investigatory duties in the intrusive exercise of authority, more burdens can be placed on the individual in the contrary case of an application for a beneficial decision. The individual must show matching qualifications demanded for such a benefit. But this depends on the context of the case. If the authority has a public task of protecting certain legitimate interests, it will have a duty to actively ensure the right and appropriate decision in light of that task, and thus to investigate the case.¹³⁰⁸

It could be argued that the activity of two or more parties to a case could have an effect on the matter of evidence. Certainly when the parties can be seen as having equal opportunities to produce evidence the burdens may be distributed more equally. The theory of evidence would then lean more towards a balance of probabilities. In such cases guidance could be sought from general procedural rules.¹³⁰⁹ But in view of the above-discussed purpose of realisation of public policy protection of legitimate interests, the investi-

¹³⁰³ Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* p. 16.

¹³⁰⁴ SOU 2010:29 p. 407; Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* pp. 73–79 (arguing a general rule that the authority has the burden of proof as to duties of the individual, and the individual the burden as to their rights, nevertheless admitting the difficulties of where to draw the line); von Essen, U., *Processramen i förvaltningsmål* pp. 38–41; Ragnemalm, H., *Förvaltningsprocessrättens grunder* p. 108.

¹³⁰⁵ RÅ 1989 ref. 67 requiring evidence motivating revoking of a doctor's licence; RÅ 1990 ref. 108, and RÅ 1996 ref. 83, on similar requirements for evidence in cases of disciplinary actions. See, also: RÅ 1994 ref. 88 and RÅ 2006 ref. 7, stating a strict standard of proof of grounds for the revocation of permits to, respectively, serve alcohol and manage a school.

¹³⁰⁶ Sundberg, H., *Allmän förvaltningsrätt* p. 115; and *Förvaltningen och rättssäkerheten* p. 324.

¹³⁰⁷ Section 7.2.2.1.

¹³⁰⁸ See: Sundberg, H., *Allmän förvaltningsrätt* pp. 247–248. This links to the issue of rights and responsibilities, esp. in the context of collective rights, see: Section 2.2.1.5, footnote 206.

¹³⁰⁹ Ragnemalm, H., *Förvaltningsprocessrättens grunder* p. 107–108.

gatory duties of the decision-making body are still relevant. The contradictory process serves as a useful tool, but it is still an inquisitorial procedure.

It has been held that the authority that initiates a case has the burden of putting forward and specifying the relevant grounds of its claim. The court will not supplement the materials that support its claim, similarly as for the claims of the individual.¹³¹⁰ This shows a fundamental distinction between the procedural framework, and the circumstances to be assessed within that framework. I would suggest that the many different public and private interests involved in environmental law cases make it almost impossible to separate the two. Environmental law calls for an integrated and holistic approach to decision-making. The court should therefore not rely on, for example, a local authority stating all the relevant grounds to be considered in the enforcement of a local industry. It follows from the systematic approach to public control, and the inquisitorial procedure, that they have further responsibilities. The framework of the environmental procedure is thus widened.

Consequently, the appeal is decided on the claims and the grounds stated in the appeal, but should the investigation prove insufficient, the duties of the decision-making body, under the inquisitorial principle, are activated. It should then take responsibility for improving the decision-making materials.¹³¹¹ The inquisitorial principle thus fundamentally strives to repair the lack of necessary evidence in the materials. If this is not possible, any uncertainties should not be detrimental to the individual.¹³¹² The aim is to reach the correct and appropriate decision in view of the public authority's aims. Moreover, the general scheme of the onus of proof follows the distribution of investigatory burdens under the inquisitorial principle. But the distribution of the investigatory burdens in many ways varies in different areas of public law, and in different types of case. This matter will now be discussed in the context of environmental law enforcement, after describing and comparing aspects of the English and Dutch orders of investigatory duties and evidence.

7.2.3 The United Kingdom

7.2.3.1 Investigatory Responsibilities

English law does not state a legal principle like the Swedish inquisitorial principle, which is based in the so-called inquisitorial procedure. In the UK, instead, the adversarial procedure is the rule. The underlying ideals of the Rechtsstaat – or rule of law – apply here too, but with different expression,

¹³¹⁰ Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* pp. 64–65 and 73, with reference to RÅ 1989 ref. 67, 1990 ref. 64, (revocation of doctor's licence), and RÅ 1991 ref. 67 (revocation of driver's licence).

¹³¹¹ RÅ 2006 ref. 46; Petré, G., *Om förvaltningsdomstols utredningsplikt* pp. 156 and 158, Lundin, O., *Officialprincipen* p. 172.

¹³¹² Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* pp. 82–83.

such as illegality, irrationality and natural justice – or fairness and proper procedure.¹³¹³ The traditional common law rules on natural justice, however, are founded on the adversarial system. The idea is that the truth is best discovered by allowing parties with conflicting versions of the law or circumstances of the case to argue their side of the case to a third impartial party, who will subsequently conclude which is right.¹³¹⁴ This influences the distribution of procedural responsibilities between the involved public authorities and the individual. The adversarial parties will demonstrate, as best they can, their understanding of the situation and its appropriate solution, providing evidence on their own parts. The impartial third party – the decision-making authority or the court – will assess the truth and the best solution based upon these statements and will not get involved in the investigation. The rules on fair and proper procedure are traditionally based upon court procedure, but also apply to the administrative authority's decision-making procedure.¹³¹⁵

It is argued in the English discourse, as with the Swedish, that the authority of the enforcers rests on the competences entrusted to them by law, and they must restrict their decisions to those competences. Applied on the procedure at the enforcement authorities, this means, among other things, that the decision-maker has to consider relevant decision-making materials. Failure to do so, or considering irrelevant materials, constitutes abuse of their discretionary administrative powers, and such errors may be challenged by judicial review.¹³¹⁶ This expression mirrors the principle of due procedural care, as argued in the context of EU administrative law.¹³¹⁷ In principle, the breach of the stated procedural care is considered illegal at common law, and can be compared to the Swedish law discourse on legality and objectivity as a basis for procedural responsibilities such as that of investigation. It should be noted that the English courts have not been particularly strict in their review of the authorities' investigation in the administrative procedure. They have avoided requiring evidence of the administrative authority having considered all the relevant matters. Mostly, their review has involved statements on whether or not certain information should have been considered.¹³¹⁸

Judicial review of irrationality may entail duties concerning the decision-making materials – at least indirectly. A decision-maker has to consider all the relevant decision-making materials for the decision to be seen as reasonable and rational. A decision that is deemed unreasonable and irrational is also considered illegal under common law. In some cases, it has been found

¹³¹³ Further explained above, under Section 4.2.5.

¹³¹⁴ Cane, P., *Administrative Law* p. 136.

¹³¹⁵ See esp. *Ridge v Baldwin* [1063] 2 All E.R. 66, and above in Section 4.2.5.2.

¹³¹⁶ Cane, P., *Administrative Law* p. 221; Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990 – 2002* pp. 573–574. See, also: *J.A. Pye (Oxford) Estates Ltd v Wychavon DC and Secretary of State for the Environment* [1982] J.P.L. 575; and *R. v. Secretary of State for the Environment, ex p. Hammersmith and Fulham BC* [1990] 3 W.L.R. 898.

¹³¹⁷ See: Sections 2.2.1.4, and 2.2.3.

¹³¹⁸ Cane, P., *Administrative Law* p. 222.

that the decision-maker could not reasonably have understood the existing materials and ought to have sought more information to gain the necessary knowledge for making a reasonable decision.¹³¹⁹ Unreasonableness therefore sets both procedural demands, and as such qualifies the limits of legality and administrative discretion. Notably, in the Falmouth case, which will be extensively analysed in the following, it was stated (in obiter) that there could be situations where it would be unreasonable to leave it to the individual addressee to find out what should be done to abate an environmental problem.¹³²⁰ This suggests that there is some potential for laying duties for investigation and assessment on the individual addressee, but that these demands cannot be unreasonable. Moreover, there are rules on consultation that to some extent involve investigatory responsibilities.¹³²¹ This connects with the principle of communication, and the idea of a right to be heard, which is also established in European law.¹³²² Communication with the individual addressee in the decision-making procedure is sometimes specifically regulated in statutory law,¹³²³ but it is also supported by discussed case law on fair and proper procedure, and the right to be heard, etc.

The law on the public authority's responsibilities for decision-making materials reflects wide administrative discretion. The wording of the environmental law provisions of enforcement competences, furthermore suggests that the enforcement authorities enjoy a wide discretion in the decision when and whether to enforce:

“Where a local authority is satisfied that a statutory nuisance exists”¹³²⁴

”where it appears to the Agency that”¹³²⁵

“If the regulator considers that the operation ... involves a risk”¹³²⁶

¹³¹⁹ See, for example: *R. v. Secretary of State for Transport ex p. Council of the London Borough of Richmond and Others* [1994] Env. L.R. 134. However, the challenges were deemed to be on the merits of the case, concerning substantive arguments and assessments, and the case was therefore not the subject of judicial review. See, also: *J.A. Pye (Oxford) Estates Ltd v. Wychavon DC and Secretary of State for the Environment* [1982] J.P.L. 575; *Kelly v. Monklands DC* 1986 S.L.T. 169. On the other hand, it was stated in the case of *Mazzeraccherini v. Argyll and Bute DC* 1987 S.C.L.R. 475, that so long as the authority had had regard to the relevant guidance, they could depart from it as they thought fit.

¹³²⁰ *R. v. Falmouth and Truro Port Health Authority ex p. South West Water Ltd.* [2000] Env. L.R. 658.

¹³²¹ For example: Environmental Permitting Regulations 2010 Schedule 5 Para. 9–10.

¹³²² Art. 41 of the Charter of Fundamental Rights, Art. 16.1 of the Code of Good Administrative Behaviour. See further in: Section 2.2.3.2.

¹³²³ See, for example: Environmental Sanctions Order Schedule 2 Para. 2 on notice of intent before deciding on VMP:s.

¹³²⁴ The Environment Protection Act 1990 Section 80(1).

¹³²⁵ The Water Resource Act 1991 Sections 161(1) and 161A(1).

¹³²⁶ EP Regulation 37.

The actual formulation of these competence rules seem more focused on the authority's subjective perception of the situation, than on objective circumstances – degree of health risk, or the unlicensed storage of a listed chemical. This type of wording does not explicitly require much investigation on the part of the authority in ensuring that there are sufficient grounds for serving an order. On the face of it, this may be criticised in light of the aims of safeguarding objectivity and legality, as argued above in the context of the inquisitorial principle. The procedural safeguards of due procedural care and good administration, however, require that the decision-maker ensures all the relevant materials, and thus protects the individual against subjective, arbitrary, or even partial use of authority.

7.2.3.2 Evidence

In comparison to the Swedish inquisitorial principle, common law does not place as extensive burdens of investigation and proof on the authorities in public law cases. It can be drawn from arguments on administrative discretion, and the formulation of administrative competences, that the enforcement authority does not need to provide extensive proof of an unlawful environmental risks or damage to take action. The enforcement authority has wide competence and discretion to assess the actor's breach of the law. The decision may be challenged on appeal or through judicial review, which functions as an instrument of control over administrative discretion.¹³²⁷ A challenge to the reasonableness of administrative procedure or decisions can be made in an application for judicial review, thus challenging the legality of the decision-making, as described above.¹³²⁸ Another issue is that the substantive decision may sometimes also be able to be reviewed on full appeal, however limited to certain appellants or to specified grounds of appeal.¹³²⁹

As described earlier the appeal procedure relies on an adversarial system. In the court procedure, the initial onus of proof will as a rule lie with the complainant, similarly as has been described with the Swedish system. Should they show sufficient support for the facts that constitute the wrong, the onus of proof shifts to the defendant public authority,¹³³⁰ which will then have to show that it had made a lawful decision – the decision's legal pedigree.¹³³¹ So even though the enforcement authority does not have such far-reaching investigatory duties in the decision-making procedure, as recognised in the Swedish inquisitorial principle, it may have to provide investigation and proof showing that it had reached the right decision – should the case be challenged in court. It would also have had to show that it had con-

¹³²⁷ Cane, P., *Administrative Law* p. 28.

¹³²⁸ See: Section 4.2.3.

¹³²⁹ See: EP Regulation 31, and Section 4.3.2.4.

¹³³⁰ Wade, W., and Forsyth, C., *Administrative Law* p. 292.

¹³³¹ Schwartz, J., *European Administrative Law* pp. 220 – 221; and Wade, W., and Forsyth, C., *Administrative Law* pp. 20–21.

sidered all the relevant decision-making materials for the decision to be viewed as reasonable and rational.

The standard of proof in English administrative court procedure is the civil standard – the balance of probabilities.¹³³² Balance of probabilities, or preponderance of the evidence, entails that the relevant finding is in favour of the party that on the whole has the stronger evidence – however slight the difference.¹³³³ This standard of proof is nevertheless flexible so as to vary relevantly to the gravity of the case. In deciding cases of more intrusive consequence for the individual, the balancing will be adapted to require a higher degree of probability.¹³³⁴

The combination of the adversarial system and the general duty of procedural care has above been argued to entail an indirect duty for the administrative authority to show that it has investigated the relevant case properly. As a point of departure, however, the authority is generally assumed to have acted properly within its powers, so that the person bringing the challenge must show some evidence to the contrary. Accordingly, public officers are presumed to have acted with honesty and discretion within the limits of their authority, as long as there is no evidence to the contrary. Only where the complainant presents evidence to the contrary, will the scales tip accordingly and the defendant be required to reply. The principle is sometimes expressed as *omnia praesumuntur rite esse acta*.¹³³⁵

The actual standard of evidence required to shift the burden of proof on to the authority whose decision is challenged, varies with the nature of the case. If an order is challenged on the grounds of unreasonableness, or if the issue is that the authority has to be satisfied of something or have a certain opinion, then the burden is heavier than if the decision had an apparent fault in on the face of it.¹³³⁶ English law is comparable to Swedish law in that sense, but while the English system departs from a presumption of proper administration, the Swedish system departs from the authority's duty to show that.

Consequently, while an enforcement authority will potentially have to show that it has considered the relevant, and only the relevant decision-making materials, it will only come to this if the addressee first produces evidence of his claim. This relates to both the Swedish and English systems, with the initial onus of proof on the one bringing the claim. Nevertheless, in

¹³³² Wade, W., and Forsyth, C., *Administrative Law* p. 291. It can be noted that many appeal cases are tried by the Secretary of State, who will naturally have governmental discretion in their review of the case on appeal, and in deciding on the merits of the case.

¹³³³ For definition, see: *Black's Law Dictionary*.

¹³³⁴ Wade, W., and Forsyth, C., *Administrative Law* pp. 291 and 294–295.

¹³³⁵ *Earl of Derby v. Bury Improvement Commissioners* (1869) L.R. 4 Exch. 222, approved in *R. v. Inland Revenue Commissioners ex p. T.C. Coombs & Co.* [1991] 2 A.C. 283, and *Point of Ayr Collieries Ltd v. Lloyd-George* [1943] 2 All E.R. 546.

¹³³⁶ Wade, W., and Forsyth, C., *Administrative Law* p. 293, and *Potato Marketing Board v. Merricks* [1958] 2 Q.B. 316 at 331; *Cannock Chase DC v. Kelly* [1978] 1 W.L.R. 1; *Point of Ayr Collieries Ltd v. Lloyd-George* [1943] 2 All E.R. 546.

the Swedish system, this norm is supplemented by the inquisitorial principle, and the task of both the original decision-maker and the appeal body, to ensure a correct decision and proper realisation of public policy. This demands more in terms of evidence from the authorities, than that of the English system, where the authority is presumed to have acted honestly and within its competence. I would suggest here that while the English administrative authorities are required to exercise due procedural care, their burdens of showing evidence of sufficient grounds for a legal decision are lighter in comparison with the general duties of the Swedish administrative authorities. This could indicate that there exists better procedural protection for the individual and her legitimate interests in Swedish administrative law.

7.2.4 The Netherlands

7.2.4.1 Investigatory Responsibilities

Dutch law prescribes a general investigatory duty for the administrative authorities, in Art. 3:2 of the Awb. This principal duty is reminiscent of that under the Swedish inquisitorial principle. It demands active and careful investigation, in gathering all the relevant materials needed for the exercise of their authority. This procedural responsibility is supported by the principles of the weighing of interests and no abuse of power, which are regulated in the Awb Art. 3:3–4. The principle implies a duty to actively investigate the case, but does not mean that the authority must produce the information itself. As with the Swedish inquisitorial principle, the individual may to some degree be required to provide information and proof. According to Art. 4:2 of Awb, applicants for an administrative decision are required to participate in the decision-making procedure. They must supply the information and documentation needed for making a decision on the application, provided it can reasonably be produced. The authority can ask the individual for such information, but it is at the same time responsible for ensuring that the information provided is sufficient for taking the appropriate decision within the framework of the law.¹³³⁷ In principle the investigatory duty entails that the authority must make sure that it takes the right and appropriate decision, which reflects connection to the fundamental Rechtsstaat doctrine. This duty is emphasised in the context of sanctions where the authority has a strict duty to investigate.¹³³⁸

The precise meaning and application of the principle is difficult to draw from Art. 3:2 Awb. Some general observations of the considerations made in

¹³³⁷ Damen, L.J.A., et.al., *Bestuursrecht 1* pp. 336–337. The administrative enforcers' duty of care has been developed in case law to entail a duty to enforce, which restricts the fundamental administrative discretion and has based claims of civil liability for non- or under-enforcement (see: Section 5.4.2.1)

¹³³⁸ Damen, L.J.A., et.al., *Bestuursrecht 1* p. 637.

the application and assessment of proper investigation, however, are made in literature. The actual meaning of the authority's duties – what kind of information and how much of it is needed, and how to accumulate it – will of course depend on the nature of the case. The distribution and extent of investigatory duties may vary in different kinds of administrative case – as in Swedish law. The concrete expression of the principle is based upon the question of who initiated the case and in whose interest. Is the decision made on application from the individual, or *ex officio*? The basic question is: In whose interest is the decision taken? This relates to a basic idea of legitimate distribution of burdens of investigation and proof, which compares with the discussion on the Swedish inquisitorial principle, on the legitimate allocation of the risk of insufficient investigation. The placement of investigatory burdens is thus linked to a burden of proof, rather similar to the described Swedish order. Individuals generally apply to the administration for a beneficial decision. The application is made on their initiative and in their own interest. As a main rule, the burden of investigation and proof will subsequently be placed on the individual as the action is taken in that person's interest.¹³³⁹

In administrative enforcement cases, the principal placement of responsibility for investigation, and the burden of proof, is the reverse. It should be remembered that enforcement orders in the Dutch system are always coupled with a sanction.¹³⁴⁰ These enforcement measures will most commonly have a reparative purpose,¹³⁴¹ but they are still considered, and referred to, as sanctions. For both reparative and punitive sanctions the authority is required to take extensive procedural care. As a general rule the procedural burdens of investigation and proof will rest heavily on the authority. It must show the facts that form the grounds for the sanction decision. The requirements of evidence are said to be high.¹³⁴²

7.2.4.2 Evidence and Investigatory Duties in the Appeal Procedure

Having discussed the similarities between the Swedish inquisitorial principle, and the Dutch investigatory principle, an essential difference should be noted, namely that Dutch courts are not covered by the same investigatory principle. The courts are not governed by the investigatory duties in Art. 3:2 of the Awb, which apply to administrative authorities. They are regulated through the rules of the appeal procedure, essentially in Awb Chapter 8 – for example, in Art. 8:69. They are required to keep the judgment within the limits of the basis of the notice of appeal, the documents submitted, and the proceedings. They have a duty to supplement the legal basis *ex officio*, and they may also supplement the facts. The courts may on occasion supplement

¹³³⁹ Damen, L.J.A., et.al., *Bestuursrecht 1* p. 337.

¹³⁴⁰ See: Section 5.5.1.

¹³⁴¹ Dutch enforcement law will use the term “reparative” somewhat different than in the Swedish discourse, see: Section 5.4.1.

¹³⁴² Damen, L.J.A., et.al., *Bestuursrecht 1* p. 637.

the decision-making materials *ex officio*, even outside the arguments of the parties, especially with regard to the protection of important public concerns. The investigative duties of the administrative court are not general or absolute, though there is some room for such duties in the general interest.¹³⁴³

The courts' duty to investigate is in principle limited by the independence of the authorities in their substantive evaluation. This is an expression of the balance of powers. The courts impose judicial control on the administrative use of authority through administrative law principles of lawful and proper exercise of authority, but they do not assume the tasks that are under administrative discretion. In this controlling role they assess whether the authority has ensured sufficient investigation, proportionality and care in the weighing of all concerned interests, etc. There has been some debate about the sometimes active role of judges in court proceedings. Such active procedure involvement has been motivated by lack of legal representation of the parties, and the public interests involved.¹³⁴⁴ These considerations echo the above-discussed purpose of the Swedish inquisitorial procedure. The debate has involved criticism of public interests being thus over-emphasised in the past. In response to such fears, investigation by courts has become more limited to matters of formality, standing, and time limits for appeal, and they will not go beyond the arguments advanced by the parties in their investigations and assessments of cases.¹³⁴⁵

Dutch law on evidence in the administrative system proceeds from two main standpoints: the principle that the party who claims something must make that probable; and the principle that the party that can provide the best and most plausible and believable evidence must be seen as having proved their case. The standard of proof in administrative enforcement cases is therefore the so-called balance of probabilities, and the court in each case will consider which side has to prove what, generally starting from an appellant stating the decision of an administrative authority to be unlawful. The party will then have to make this claim sufficiently probable. The authority responsible for the decision then has to try to prove the contrary case.¹³⁴⁶ This is comparable to the so-called "civil standard" of English procedural law.

In comparison, these facts reflect the rule on the initial onus of proof for the initiator of the case, which is common for all the compared systems, and the balance of probabilities which is the rule in the English system, while the Swedish system is essentially ruled by the inquisitorial principle. Thus far the Dutch system is comparable to the English arrangement. This is, however, influenced by the investigatory duties of the original decision-maker. The Dutch system is therefore closer to the Swedish system in the original

¹³⁴³ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 364.

¹³⁴⁴ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* pp. 364–365.

¹³⁴⁵ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 364.

¹³⁴⁶ Michiels, L., *Hoofdzaken van het bestuursrecht* p. 189.

decision-making procedure. In the appeal procedure, however, the English and Dutch orders show more similarities. Note, however, that the Dutch administrative authority in an enforcement case (regarding an onerous decision *ex officio* against the actor) has a significant burden of proof, which of course gives a new meaning to the balancing of probabilities.

7.2.5 Summarising Comparative Remarks

In summary, the studied legal orders illustrate somewhat different expressions of the responsibilities for procedural care and duties to investigate. The Dutch administrative procedure is chiefly determined by an administrative duty of care, including investigatory responsibilities and a consequential burden of proof. This is similar to the Swedish system with its inquisitorial principle. The English system, however, does not manifest such explicit duties, though there are duties of procedural care to ensure fundamental legality and rationality of the administrative procedure. When these administrative cases are reviewed by the court, the Swedish system stands out with its inquisitorial procedure, where both the original decision-maker and the appellate body have investigatory duties. Though the basic procedural structure is that of the appellant showing support for their claim, this entails a fundamental burden of proof in the court procedure. The court's inquisitorial duties are also important in view of the Swedish reformatory system, where the appeal functions as a main means for control of the independent administrative authorities. It will in this sense act as a sort of superior administrative authority. This is somewhat different from the Dutch and English systems where the courts' role of controlling the lawfulness of the administrative exercise of power is emphasised. The procedure is basically one of judicial review. The Dutch system, has involved some room for a wider role for the courts in the context of protection of public interest, but in more recent years this function has been criticised and limited. The noted differences and similarities will be considered in the following study of the meeting with the environmental law perspective.

7.3 Environmental Law Actor Responsibility; New Game, New Rules

7.3.1 The Inquisitorial Principle in the Environmental Law Context

As noted above, the general scheme of the inquisitorial principle and the distribution of burdens of information are quite generally formulated, and

needs to be specified in each legal area. In this thesis the environmental law context, and its special regulations on the subject are studied. This is where the environmental law fundamentals meet – and challenge – the established administrative law structures. The purpose is both to specify the expression and development of the general administrative law principle in this specific area, but also to see whether environmental law twist on these issues pushes the limits of fundamental general administrative law principles. This investigation will begin by discussing the grounds for these challenges, and then move on to the expressions thereof in Swedish environmental law.

In the Rechtsstaat the individual enjoys private autonomy that is legally protected against both the State, and other individuals. The individual also enjoys certain human rights. Regulation of the individual is to be exercised through law, in order to respect the rights and freedoms of the individual against the power of the State.¹³⁴⁷ As explained in Chapter 2, due procedural care by the public authority has a function of safeguarding, in different ways, the proper exercise of public power – for instance, through ensuring sufficient decision-making information. The purpose of the inquisitorial principle is thus connected to legal certainty, in that it ensures proper exercise of the authorities' public task and essentially a safeguard against arbitrary and unlawful exercise of power against an individual. The principle, however, needs to be more specifically formulated in its relevant legal context.

The environmental law context introduces certain features that complicate the application of the matter and influence the expressions of the principle. The fundamental understanding of the grounds of the inquisitorial principle will therefore have to be reconstructed in order to find an appropriate implementation of the principle, and its functional aims, in environmental cases. First of all, the point of departure in the regulation of environmental law is not an unconditional freedom for the individual to harm the environment. The individual freedom to act is fundamentally conditioned by environmental requirements and responsibilities. Secondly, any environmental case will concern a plurality of legitimate interests, both individual and public. This context complicates the characterisation of the procedure. The actual application of the principle, and the distribution of the concrete burdens of information, is basically connected to the perception of the resulting decision as onerous or beneficial, and to the question as to who was the initiator of the case. These factors are too simplistic to apply in the environmental context. The circumstances or features of environmental law, and their consequences, will be elaborated next.

¹³⁴⁷ Peczenik, A., *Vad är rätt?* p. 46; Sundberg, H., *Allmän förvaltningsrätt* p. 112–113, and *Förvaltningen och rättssäkerheten* p. 323–324; and Tuori, K., *Har förvaltningsrätten en framtid?* p. 557. See further under Section 2.2.1.1.

7.3.2 Fundamental Freedoms and Common Interests

To assess the appropriate extent of the authorities' duties in this respect, the notion of a fundamental individual autonomy, or freedom, should be further discussed. The basic principle is that exercise of public power must have legal pedigree in order to intrude upon private autonomy – or freedom. The individual is thus only autonomous and protected against state involvement, to the extent that the relevant situation or activity is not regulated. Administrative enforcement of environmental law will be formed by the idea of protection of fundamental rights and freedoms, but also by regulations delimiting such rights and freedoms. It is therefore based upon the legal regulation of the relevant situation, but also – fundamentally – our perception of fundamental freedom. The investigation in this thesis centres on the situation of the carrying out of activities with environmental effects, or the risks thereof. Typical examples are industries and activities detrimental to human health. Environmental law provides ample support for the exercise of public power, including the fundamental responsibility of the actor to prevent and repair environmental harm; for example, permit obligations, liability for ecological damage, emission standards or requirements of precautionary measures, and so on. The exercise of environmentally hazardous activities is extensively regulated – nationally, at European level, and globally.

In some cases the autonomy of individuals is linked to fundamental human rights. This provides added authority. The exercise of activities involving environmental effects are often connected to the actor's property rights. Nonetheless, such rights and freedoms are not absolute, and may be delimited through regulation. Environmental interests are commonly considered as legitimate such counter-interests, both in the case law of the European Court and in the Swedish constitutional regulation of property rights (RF 2:15).¹³⁴⁸ Environmental standards are furthermore applied to determine the meaning of other established human rights, such as the right to a home and private life, the right to life, health, etc. The exercise of property rights can also intrude upon the property rights of others – for instance, water pollution destroying wells on neighbouring land.¹³⁴⁹ Despite the lack of formal status of an individual and independently the executable right to the environment, the interests of protection of the human environment have a significant presence

¹³⁴⁸ The meaning and reach of land owner rights with regard to environmental interests has been much discussed in the environmental law literature; see for examples: Bengtsson, B., *En problematisk grundlagsändring*; Michanek, G., *Energirätt* section 9.6, and *Markägare – med rätt att döda?*; Westerlund, S., *En hållbar rättsordning* Chapter 11. See, also: Åhman, K., *Åganderätten i konflikt med andra skyddsvärda rättigheter eller intressen*, on conflicts between property rights and other rights and interests.

¹³⁴⁹ See: *Zander v. Sweden*, Judgment of 25 November 1993, a case concerning lack of remedy for environmental harm to the party's property. The Court stated that it could be maintained that the claimants were entitled to protection against the relevant water pollution on their property emanating from the activities on the neighbouring property.

and influence within the continually developing human rights discourse.¹³⁵⁰ There is therefore strong support for considerable delimitation of the exercise of property rights having environmental effects, and legal grounds for intrusion on the autonomy of the individual in the Rechtsstaat. Another matter, however, is the question of how clearly these activities are regulated. Sometimes a hazardous activity will simply be prohibited, and viewed as intrinsically illegal. More often, an activity will be subject to limitation, requirements for precautionary measures, etc., and its legality depending on the balancing of competing interests. The perception of the fundamental freedom and autonomy of the individual actor thus becomes more complex.

To advance the discussion a little further into the earlier presented fundamental environmental law culture and the idea of sustainable development, it may be held that natural resources such as air, water, fish, or iron ore, are not fundamentally free to exploit or damage. This argument has been established and emphasised in the concept and doctrine of sustainable development. Nature and its resources are common and shared interests of mankind, and access to them is guided by the principle of inter- and intragenerational equity. There is a collective responsibility to manage the limited natural resources sustainably, even if they are on someone's property. As argued earlier, this is comparable to the notion of good neighbourliness. While land cannot be used in a way that causes harm to the use of other surrounding lands, natural resources cannot be exploited in a way that causes harm to other people's legitimate use of them, now or in the future. This is the thinking behind sustainable development.¹³⁵¹

Environmental responsibilities and the fundamental aim of sustainable development are agreed and established in international and national law, and implemented in the Swedish Environmental Code.¹³⁵² This basic principle of collective management and equitable use of natural resources must reflect in the notion of a fundamental individual autonomy, and the exercise of property rights. Though there will often be an environmental regulation supporting infringement of such individual autonomy, the establishment of the concept of sustainable development changes the actual interpretation or reach of the fundamental freedom. And it does so independently of specific regulation. This suggests that the individual has no fundamental right to act in a way that risks harming the environment, or exploiting its resources in an unbalanced manner. The individual is not autonomous with regard to the

¹³⁵⁰ See: Birnie, P., et al., *International Law and the Environment* pp. 300–302; and Kiss, A., and Shelton, D., *International Environmental Law* pp. 725–730; and the discussion in Section 2.3.1.4.

¹³⁵¹ See: Section 2.3.1.2.

¹³⁵² This is stated in the opening paragraph of the Swedish Environmental Code, and supported in the preparatory works, see: Prop. 1997/98:45 Part 1 pp. 1–2; SOU 1996:103 Part 1 pp. 22, 182 and 223–227, and Part 2 pp. 7–8.

management of common and shared resources.¹³⁵³ It could be held that environmental sustainability is such a fundamental substantive value that it must be considered a necessary precondition in the Rechtsstaat.¹³⁵⁴ Such claims challenge the perceived priority of considerations of the legal certainty of the addressee, at the expense of environmental interests.

However, apart from the standpoint of limits to the fundamental freedom of the individual in principle, sustainable management is also implemented in more specific regulation of such freedom. As noted in the country reports, the studied systems have a long past of regulating the use of common natural resources and protection from pollution. Sustainable development and environmental protection is in contemporary law translated into environmental standards and duties – in general rules, and in individual regulation through permit decisions or enforcement orders. These principles are also linked to wide and fundamental actor responsibilities. When it comes to measures entailing more substantial risks, a precautionary perspective has long since entailed extensive actor responsibilities. In Swedish environmental law there has been since the early days of industrialisation demands for precautionary responsibilities to be placed on those undertaking environmentally hazardous activities, especially in relation to water pollution. These responsibilities have to some degree also included preventing harm and making investigations and assessments of the activity, its environmental risks, and how to manage them.¹³⁵⁵ Such responsibilities result in extensive administrative burdens, and in subsequent liabilities. Apart from administrative liability, the extensive actor responsibilities are reflected in the construction of strict, or absolute, civil and criminal liabilities for environmental damage.¹³⁵⁶

In the context of the analysis of information duties in administrative enforcement of environmental law, the perspective of the fundamental position of the environmental actor also extends to procedural safeguards of legal certainty. The inquisitorial procedure is differently formulated in accordance with the nature of the case. The sustainable development claim of limited individual right to natural resources, and the related management responsibilities, put the distinction of the decision between beneficial or onerous, and the gravity of the infringement, in an environmental law context. Being denied the ability to cause risk or harm, or required to abate an environmental problem, may not seem that serious an infringement on the legal position of the actor since he is not fundamentally free to cause harm. Enforcement of environmental law against individual actors must be viewed in that context.

¹³⁵³ See: Section 2.3.3.2.1.

¹³⁵⁴ Compare: Nilsson, A., *Rättssäkerhet och miljöhänsyn* pp. 24–25; and Peczenik, A., *Vad är rätt?* p. 97.

¹³⁵⁵ ML Section 5, SOU 1966:65 p. 211, and p. 221 on duties already at risk of harm.

¹³⁵⁶ See, for example the Swedish law on environmental torts, MB Chapter 32, and English law on environmental offences (Section 4.5.8).

More specifically, the procedural role of the individual is different. The administrative authority's investigatory and other procedural responsibilities will in the environmental case encounter actor responsibilities for knowledge, investigation, and proof. Actors have generally and specifically regulated duties to participate in the control of their own activities. If they take action that could potentially entail their overusing or damaging the common resources, they will also have to ensure sufficient information about the matter to make a responsible and appropriate management decision. These duties will be further examined in Section 7.4.

7.3.3 A Concessional System

The matter of fundamental freedom of the actor, and environmental regulation thereof should be considered against the background of the historically important concessional idea. In the concessional system, the reasoning is that there is no general freedom to act in an environmentally hazardous manner, but can be authorised under certain conditions, thus regulating clearly the actor's responsibilities. The risk of causing some qualified environmental harm to others is basically forbidden, or at least very limited.¹³⁵⁷ However, complete bans, prohibitions and stop notices are not in the public interest. If bans and prohibitions are too extensive, they become almost impossible to uphold.¹³⁵⁸ Some flexibility is called for, but it needs to be appropriate and purposive in the context of environmental law aims and purposes. Such flexibility should be regulated through law and guided by rules on the balancing of risks and benefits.¹³⁵⁹ For this purpose there are extensive regulations on the actor's responsibilities, substantive demands on action and standards, and processes such as permit regimes for granting concessions to carry out the activity, thus releasing the actor from the fundamental prohibition. This is a way of allowing for, indeed facilitating, industry. There is, however, no fundamental right to a permit. The permitting authority has the discretion to deny authorisation,¹³⁶⁰ though this is not often the case.

Permit regimes have traditionally been the primary instrument for controlling hazardous activities. The process is in essence a risk assessment, which puts the burden on actors to prove that they can see to it that the uncertain

¹³⁵⁷ Compare the classification of administrative acts in Sundberg, H., *Allmän förvaltningsrätt* pp. 148–149, and 151–153.

¹³⁵⁸ SOU 1966:65 p. 211.

¹³⁵⁹ The fundamental rules of consideration in Chapter 2 of the Swedish Environmental Code illustrate such balancing and the assessment is basic to regulatory decisions, such as permitting and enforcement orders. Westerlund has argued extensively for many years on the matter of balancing environmental risks; see the legal and political analysis, that has since echoed through his writings, on environmental law theory, in: Westerlund, S., *Miljöskyddslagstiftning och välfärd*.

¹³⁶⁰ Sundberg, H., *Allmän förvaltningsrätt* p. 151, referring at p. 152 to concession as the term traditionally used for an authorisation based upon the public benefit of the activity.

effects do not have to be feared.¹³⁶¹ To be granted a concession – a permit or authorisation of some sort – actors must meet certain requirements involving precautionary measures and responsibilities. They have to investigate, document, and prove a large amount of information, carry heavy responsibilities for controlling their installation; mitigating effects, preventing harm, and repairing any damage. The acceptance of hazardous activities is thus conditional on the information duties of the actor. As discussed above, demanding information from the applicant in a permit procedure is common in the administrative law context. But in environmental law cases, the burdens are potentially very heavy, and to some extent also dynamic, in that they demand continual improvement. The actor's responsibility for knowledge is very much a dynamic requirement. It demands of the actor the continual updating and development of information so as to ensure the necessary knowledge to manage the activity in question. Such requirements may be prescribed and specified in the permit conditions of an installation.¹³⁶²

The environmental law requirements together with the concessional system, means that extensive and dynamic demands on the actor to ensure sufficient knowledge and investigation is a prerequisite for its legality. Deficiencies in such routines can result in a stop order or prohibition.¹³⁶³ This means that there is no fundamental freedom of action in the context of environmental risks.¹³⁶⁴

In the described legal structure, increased environmental concerns and a more comprehensive regulatory approach, could possibly involve one of two things: increased regulatory burdens for actors, or reduced acceptance of environmentally harmful activities. The former seems preferable, especially for the actor who then has more freedom, however conditioned by responsibilities. In exchange for these efforts permit holders are awarded with a permit with far-reaching legal certainty.¹³⁶⁵ This means that a permit is something an actor will generally want, and even has a right to have tried in the specifically Swedish construction of voluntary applications for permits. Actor may thus ensure their legal position in the future through applying for a permit, even if they are not obligated to do so.

¹³⁶¹ Prop. 1969:28 p. 210.

¹³⁶² NJA 2006 p. 310. The Supreme Court noted the fundamental position of the responsibilities for knowledge. As it seems, and as the Environmental Court of Appeal reads the judgment (Judgment of 12 November 2007, in case nr. M 4317-06), there was support for making conditional the use of chemicals on such demands for knowledge. The Supreme Court, however, deemed the formulation of the relevant condition too imprecise. This issue will be further developed in Chapter 9 on precision and goal steering. Note also Sundberg, H., *Allmän förvaltningsrätt* pp. 165–166, on the terminology.

¹³⁶³ See, for example: Judgment of the Environmental Court of Appeal of 12 November 2007, in Case M 4317-06, following the Supreme Court Judgment in NJA 2006 p. 310.

¹³⁶⁴ Compare: Peczenik, A., *Vad är rätt?* pp. 533–534.

¹³⁶⁵ Compare: Sundberg, H., *Allmän förvaltningsrätt* p. 151, describing a business permit as an acquired right.

7.3.4 Plurality of Interests and Legal Certainty

The environmental context of individual rights and responsibilities in relation to common resources explains another typical procedural characteristic of environmental law, namely that there are interests other than the enforcer and the addressee. Many stakeholders are involved, including future generations and nature itself, with its intrinsic value.¹³⁶⁶ These stakeholders, or interests, are often referred to collectively as “public interests”. It should be pointed out, however, that these public interests comprise of many individual and collective interests – and rights.¹³⁶⁷

A common case is where an enforcement measure is taken, or indeed not taken, in response to a complaint from a neighbour about disturbances, such as noise or polluting smoke. Every decision by the enforcement authority, or the appellant bodies, will be directly beneficial or onerous, respectively, to the opposing parties. Add to this the interests of advocators of nature conservancy, or future generations, and the image becomes ever more complex. A beneficial decision for the individual operator of an environmentally hazardous installation may intrude on the individual interests of others, as well as common public interests, and potentially more. Some of those interests do not have access to the procedure; those of future generations with regard to sustainable use of natural resources, but also nature itself. Such interests are generally protected and promoted by the public authorities.¹³⁶⁸ A means of ensuring their protection is by allowing environmental organisations and others access to procedures, and indeed to the courts, and allowing them to argue the public interest. Another is to emphasise further the demands of the inquisitorial principle on the decision-making authorities to ensure full investigation into the different legitimate interests and facts involved.

This plurality of interests challenges the concept of legal certainty, since it shows the legitimacy of legal protection, and foreseeability, etc., for a wider range of concerned parties with legitimate interests. The focus of the concept of legal certainty has often been on the protection of the addressee of an administrative decision, which expresses the exercise of public power against the individual. Despite the legitimacy of concern for the protection of the individual against the arbitrary or excessive exercise of administrative authority, such apprehension should be supplemented with further concerns for the substantive legal certainty of other affected interests and individu-

¹³⁶⁶ SOU 1966:65 pp. 195–202; Gipperth, L., *Miljö kvalitetsnormer* p. 73; Christophersen, A., *På vei mot en grønn ret?* p. 42.

¹³⁶⁷ Compare: Nilsson, A., *Rättssäkerhet och miljöhänsyn* p. 12.

¹³⁶⁸ The tasks and duties conveyed to the environmental authorities are described in the country reports above in Chapters 4–6. It is noteworthy that the origin of modern Swedish environmental law comes from insights derived from growing environmental concern and from the many interests involved, both public and private, as well as the believed insufficiency of civil law action to control such matters (See SOU 1966:65, and above under Section 3.3.1).

als.¹³⁶⁹ Over-emphasis on protecting the addressee could risk losing the whole purpose of environmental law regulation. This purpose is to delimit the freedom of the environmental actor in order to protect and further other interests. Giving priority to the legal certainty of the addressee may lead to environmental interests not being given the protection prescribed by law. The under implementation of environmental law may in this way be linked to the fundamental principles of the Rechtsstaat.¹³⁷⁰

The neighbour situation sets the core example: why should the actor addressed with enforcement action be more subject to the guarantee of legal certainty than the neighbouring home owner suffering the harm – physical harm, or negative effects on his enjoyment of his property? Seen in the context of burdens of investigation and proof, the critical question is this: Why should the addressee and not the affected neighbour be given the benefit of the doubt in cases where decision-making materials do not provide certain grounds for that decision?¹³⁷¹ And in a more contemporary environmental law context of common and shared resources, the “neighbour perspective” grows to concern a variety of legitimately interested persons.

The discussed focus on the legal certainty of the addressee is, of course, connected to the use of authority and coercive power on the part of the enforcer – a representative of the State and the public – against an individual citizen. It is not an exercise of grading the legitimacy or value of interests, or of the individual’s environmental situation. The legal systematic logic is nonetheless unsatisfactory from the perspective of substantive legal certainty, and the fulfilment of the public tasks of the environmental authorities. It does not go well with the environmental situation of such plurality of interests, and may result in unfairness. A specific environmental law concept of legal certainty has therefore been argued, suggesting a wider scope of protected interests and parties.¹³⁷² Environmental law, however, introduces important legal structures, which provide counterbalances to the matter. These include not only actor responsibilities for information, but the principles of prevention, precaution, and polluter pays, all of which are fundamental, also in the enforcement case.¹³⁷³

¹³⁶⁹ Basse, E.M., *Retssikkerhed i miljøretten – hvilke begreber kan anvendes?* pp. 122–123.

¹³⁷⁰ Nilsson, A., *Något om JO:s syn på miljöskydd och rättssäkerhet* pp. 57–58; Nilsson, A., *Rättssäkerhet och miljöhänsyn* p.12.

¹³⁷¹ Compare: Nilsson, A., *Något om JO:s syn på miljöskydd och rättssäkerhet* pp. 63–64.

¹³⁷² Basse, E.M., *Retssikkerhed i miljøretten – hvilke begreber kan anvendes?* pp. 129–133, and 139.

¹³⁷³ Compare: Basse, E.M., *Retssikkerhed i miljøretten – hvilke begreber kan anvendes?* p. 136.

7.3.5 Actor Responsibilities

Building on the described environmental law fundamentals, the Swedish Environmental Code departs from actor responsibility.¹³⁷⁴ This principle applies to all actors of significance to the environmental law context – both actors under permit regulation and outside.¹³⁷⁵ The principle and its history have been elaborated in Sections 2.3.3.2 and 3.3.1.3. It is thus principally those who cause negative effects (or risk thereof) to legitimate environmental interests who will be held responsible. They will also be responsible for avoiding such effects through control, prevention, and precaution, in order to protect the said interests. Apart from the public authorities having tasks and functions of protecting the legally prescribed legitimate interests, environmental actors also have fundamental such responsibilities as a consequence of their exploitation of common and shared concerns and resources. The actor therefore has a duty to abide by environmental law and furthering the environmental law goals – ultimately sustainable development – and to demonstrate they are doing so. In the enforcement situation, the primary responsibility for an activity lies with the actor running it (whether a private individual or a large corporation) as to knowledge, supervision, control, planning, and actively taking measures to that end.¹³⁷⁶ This order of things contravenes the general rule of administrative procedure, where the heavier burdens lie on the decision-making authority, especially in onerous cases of authoritative interventions such as enforcement orders.

7.3.6 Precaution, Prevention, and More

The principles of prevention, precaution and polluter pays are fundamental to environmental law. Actors have duties to take precautionary measures to avoid environmental harm. Environmental problems should be avoided early (the earlier the better, easier, and cheaper). But while preventing problems might be easier than repairing them, detecting the problems becomes more difficult. Gathering and assessing information to support a decision aimed at avoiding harm is more difficult than proving the facts of harm that has already occurred. This involves risk assessment and – to some extent – prediction of the future. This is a common feature of administrative procedure in general,¹³⁷⁷ and it is crucial in the context of prevention and precaution.

¹³⁷⁴ Prop. 1997/98:45, Part 1 pp. 170–171, Part 2 pp. 5 and 12–19. The view is implemented in the NVV Handbook 2001:4, and General Guidance NFS 2001:3, esp. on MB 26:1.

¹³⁷⁵ Prop. 1969:28 p. 217; and SOU 1966:65 pp. 311–315.

¹³⁷⁶ Compare: Darpö, J., *Miljörätt och Europakonventionen* pp. 79–116. Darpö refers to such duties as "preliminaries" (see p. 80 for definition), entailing rules that make it possible to demand information or investigation of an addressee on the grounds of suspicion, or that they carry on an operation that may typically have certain consequences.

¹³⁷⁷ Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* p. 115.

The preparation of an environmental law enforcement case will thus be based upon risk assessment. Negative environmental effects must be anticipated before they can be prevented. This requires information and knowledge about the environmental circumstances, about the activity, and possible solutions. Responsibilities for information and decision-making materials are therefore central to environmental law. Such responsibilities include the active and proactive control of the actor's own activity, before any evident damage to nature or a breach of environmental law occurs. The actor must gather relevant information and respond to any potential risk. Because of the complexities of nature and the non-linear causality factors, relevant knowledge is hardly ever attainable with total certainty. The precautionary principle stipulates that lack of evidence for the damaging effects does not free the actor from environmental responsibilities.¹³⁷⁸ Environmental steering and the instruments and processes of environmental law have to deal with risk situations, discussions of probability and weighing of probability against the seriousness of the environmental hazard at hand. The preventive approach becomes decisive. Judicial measures are allowed to set in "earlier", when there is a risk of some understood significance, even though the potential harmful effects are uncertain. This entails a shift in the traditional understanding of the burdens of knowledge, investigation, and proof.¹³⁷⁹ Furthermore, the precautionary principle can also be seen as having a normative expression, in the demand for a kind of precautionary buffer zone requiring the best of reasonably available precautionary measures that go beyond the lowest acceptable environmental standard.¹³⁸⁰ As a precautionary measure, the control of a facility should allow some room for the buffering of environmental effects that no one could predict.

7.3.7 Remarks on the Encounter between Administrative and Environmental Law, and Information Responsibilities

A concluding assessment, thus far, is that the Swedish administrative authority's has far-reaching responsibilities for decision-making materials and consequential burden of proof. In the field of environmental law these responsibilities encounter actor responsibilities for information: knowledge, investigation, self-control, and proof.¹³⁸¹ The central question is thus to determine what this combination means. How are information responsibilities appropriately distributed in the environmental law enforcement case?

¹³⁷⁸ Generally stated in the Environmental Code 2:3 para 2. See Prop. 1997/98:45 Part 2 p. 19; and also Nilsson, A., *Man ska vara försiktig* pp. 410–414.

¹³⁷⁹ De Sadeleer, N, *Environmental Principles; From Political Slogans to Legal Rules* pp. 202–203. Applied on the Swedish system, see: Prop. 1997/98:45 Part 1 p. 210.

¹³⁸⁰ Reh binder, E, *The Precautionary Principle in an International Perspective* pp. 92 and 94.

¹³⁸¹ Compare: Møller-Sørensen, A., *Administrativ håndhævelse* pp.103–104, making a similar observation under Danish law.

A simple answer would be that environmental law provisions have the status of *lex specialis*, and should thus overrule the general (*lex generalis*) administrative law responsibilities of the inquisitorial principle. However, the basis of that principle are in fundamental principles of law – in the safeguards of the Rechtsstaat. The authority's responsibilities for information entail safeguards of their exercise of power within the limits of the law. This purpose and basis for the procedural responsibilities of the enforcement authority is so strong in the public law culture, and in the fundamental structure of law, that a simple *lex specialis* argument does not hold. The question then arises as to how the different perspectives of information responsibilities can be combined. Administrative law discourse leaves room for flexibility in the expression of these administrative duties and principles in different areas of law. The function and expression of the administrative responsibilities for information will next be studied in that context.

It should, however, first be noted that the administrative authority's information duties also serve to ensure the appropriate and purposive exercise of public tasks and protection of the legitimate interests they are set to protect – including environmental interests. The public authority's decision-making competence rests on the task of implementing law and the policy behind it. It is required to make the proper decision and therefore needs all the necessary materials for the decision. Those duties are directed at protecting all the legitimate interests involved. In environmental law, these are widely prescribed, including a broad range of affected persons, future generations, and nature itself. As discussed earlier, gathering sufficient decision-making materials may represent a considerable undertaking in environmental cases, where the facts are complex and the legally recognised interests involved are many and varied. Many of them have no procedural access. The duties of the administrative authority to ensure investigation into these interests therefore assume great importance for the implementation of environmental law fully and appropriately, in view of the underlying legal aims.

An argued problem from the environmental perspective is the structural focus on the protection of the addressee. This is connected to the narrow and more formal concept of legal certainty for the purpose of ensuring legality of administrative decisions. Despite the obvious value of this purpose, it should be supplemented by a wider sense of legal protection in the exercise of administrative duties. The administrative authority will therefore – in its environmental law enforcement tasks – take upon itself the important role of ensuring possession of sufficient decision-making materials so as to make appropriate consideration and protection of all relevant interests possible. This is a difficult and often very burdensome task, but which environmental law states clearly should be part of the actor's burden. The actor has the fundamental responsibility for the acquisition of knowledge and the taking of precautionary measures. Such obligations include information duties, which may be extensively utilised and relied on by the authority in the administra-

tive decision-making procedure. What's more, the individual actor may, due to the precautionary approach, carry the risk of uncertainty and insufficient decision-making materials.

The actor's duties can be seen as supplementing the administrative authority's responsibilities in the enforcement procedure. The authority is still responsible for proper procedure. This might suggest that the authority has procedural responsibilities while the actor has substantive responsibilities. This description is however quite simplistic. The public – or the State – carries environmental responsibilities. This has been established in Part I. The public task of the authority involves realising these responsibilities, and protecting the involved interests. Their administrative task will therefore involve protection of formal as well as substantive legal certainty. In the inquisitorial procedure this involves a responsibility for making the correct, purposive and appropriate decision under the law, and to guarantee that all the relevantly involved interests and facts have been considered. Moreover, actor responsibilities for information will in the enforcement procedure often replace or make lighter the administrative authorities' investigatory burdens. The border line between the administrative procedural responsibilities and the actor's precautionary responsibilities is blurred. I believe that it is important to distinguish the different grounds and aims of the involved information responsibilities to best combine them in the enforcement of environmental law. In what follows, the matter will be analysed closer with regard to actual actor responsibilities for information in environmental law, and their application. As noted earlier, the Swedish system differs from the English and Dutch orders in its explicit regulation of, and emphasis on, these responsibilities placed upon the actor. This will be discussed next.

7.3.8 General Duty of Knowledge and Precaution

As indicated above, actor responsibilities have long roots in the Swedish environmental law tradition and are linked to international law and policy. The essential matter of knowledge and information is also covered by the principal regulation of actor responsibility. Under Swedish environmental law all environmental actors, whether large multinational companies, public authorities, or private individuals, are responsible for the gathering of relevant knowledge and the controlling of their own activities. This is stated as a fundamental part of preventive and proactive environmental work, both in control and development.¹³⁸² The legislation explicitly regulates for the duty of the actor to provide information, and the preparatory works emphasise this central role. The underlying rules of consideration are the duty of

¹³⁸² Prop. 1997/98:45 Part 1 pp. 512–513. See, also statement of the Environmental Court of Appeal in MÖD 2004:64.

knowledge and of proof in 2:1–2 of the Environmental Code, and the general duty of precaution in 2:3.

Administrative enforcement of Swedish environmental law rests, to significant extent, on the responsibility for knowledge.¹³⁸³ This actor responsibility is also acknowledged in authoritative case law. Its importance and connection to the goal of the Code is stressed, as is its dynamic and progressive character.¹³⁸⁴ The knowledge demand under Section 2:2 states that all who undertake or plan to undertake an activity, whether an industrial installation or an individual act, must attain sufficient knowledge to protect human health and the environment.¹³⁸⁵ This duty arises when there is reason to believe that there is a risk of effects occurring that are regulated by the Code. The reasoning is that everybody has to ask themselves, in every situation, whether such effects might arise. If so, to they must acquire the necessary knowledge and act on it.¹³⁸⁶ The responsibility is thus dynamic and constantly progressing so as to always require the best environmental safeguards that can reasonably be demanded.¹³⁸⁷ In certain respects these duties are more extensive for commercial operators, or at least more formalised.

The precautionary duty states that an actor must take the necessary precautionary measures to prevent, stop or counteract damage or nuisance to health and the environment, or risks thereof. Environmental law has stated precautionary duties at least since old water law from early in the industrial era. These duties include information duties, and have been thus applied.¹³⁸⁸

7.3.9 Self-control and System Control

The duties of knowledge and information are in enforcement law developed into a special procedural order of self-control and environmental reports, which involve general reporting schemes for larger installations as well as many kinds of sector-relevant reports.¹³⁸⁹ The idea is that enforcement of environmental law will rely largely on the actor's own environmental control. This is something other than voluntary environmental editing schemes such as EMAS or ISO 14000.¹³⁹⁰ Self-control comprises generally regulated statutory duties. Apart from the above generally prescribed duties of knowl-

¹³⁸³ Prop. 1997/98:45 Part 1 pp. 170–171.

¹³⁸⁴ NJA 2006 p. 310.

¹³⁸⁵ Prop. 1997/98:45 Part 2 pp. 13–14; SOU 1996:103 pp. 21–22.

¹³⁸⁶ Prop. 1997/98:45 Part 1 p. 170; and SOU 1966:65 p. 200.

¹³⁸⁷ SOU 1966:65 pp. and 310.

¹³⁸⁸ See: NJA II 1942 pp. 79–80. However, the regulatory system for unlicensed activities was weak, and control was very much left to the actors themselves, see Darpö, J., *Vem har ansvaret?* NVV Report 4354 pp. 19 and 29.

¹³⁸⁹ Prop. 1997/98:45 Part 2 p. 14, referring to 26:19 and 22; as well as NVV General Guidance NFS 2001:3. See, also: Prop. 1987/88:85 where the essential role of self-control was noted, before the explicit codification in MB. The rules on self control and reporting were introduced in Section 3.5, and will be further described in Section 7.4.5.

¹³⁹⁰ See, above: footnote 95.

edge and precautionary measures, the Environmental Code states explicit and general duties of self-control, which reaches beyond controlling compliance with permit conditions (MB 26:19). It involves keeping informed about environmental effects, and to plan activities so as to best realise the aims of the Code.¹³⁹¹ Though self-control is more formalised and specifically regulated for permitted activities, the general duty covers all kinds of activity – including private undertakings and short-lived activities. Self-control duties are adjusted to be reasonably in accord with the environmental risks involved. They will generally differ a lot between private actors and large industrial installations¹³⁹²

Preparatory works and guidance emphasise self-control as the core of administrative enforcement. The environmental law enforcement authorities take a supporting role in the background. Enforcement measures should be focused on strengthening the actor's own control, to see that actors have sufficient competence, make satisfactory investigations, and so on. The enforcers have instruments at their disposal (MB 26:19–22) to ensure the information responsibilities of actors. They can require information from actors, or commission a third party to produce the information at the actor's expense.¹³⁹³ The environmental authorities also enforce compliance with legal requirements regarding self-control. When insufficient self-control is found, the enforcement authority should act to have the actor improve their routines, etc. This is system control. The authority might subsequently order the actor to suggest improvements to his self-control (MB 26:19 para. 3).

The discussed order entails that despite general administrative law regarding due administrative procedure and ensuring sufficient decision-making materials, the individual will have more responsibility for investigation in environmental matters. It may be argued that the actor carries some responsibility for ensuring substantive legal certainty in the environmental case. The enforcement authority will rely on the information duty of the actor to make investigations and supply the authority with the information needed as the basis for enforcement action.¹³⁹⁴ If actors do not voluntarily provide the information the enforcers need for their work, they can demand such information through the aforementioned enforcement instruments.¹³⁹⁵

¹³⁹¹ Prop. 1997/98:45 Part 2 pp. 279–280; SOU 1996:103 Part 2 p. 313.

¹³⁹² Prop. 1997/98:45 Part 2 p. 279; SOU 1996:103 Part 2 p. 313.

¹³⁹³ Prop. 1997/98:45 Part 1 pp. 171, and 512–513; and SOU 1996:103 Part 1 p. 556. Compare ML Section 43, introduced through Prop. 1973:141. See, also, NJA II 1942 p. 188, and 1968 Water Act preparations, etc., referred to in Darpö, J., *Vem har ansvaret?* NVV Report 4354 p. 47; and Hydén, H., *Rättens samhällseliga funktioner* p. 195.

¹³⁹⁴ Compare: Environmental Permitting Guidance. Core Guidance Section 5.

¹³⁹⁵ Prop. 1997/98:45 Part 1 p. 171. See, also: NVV guidance in Handbook 2001:4 at p. 82. On earlier regulation, see: Prop. 1987/88:85 pp. 251–258; Westerlund, S., *Miljöskyddslagen* pp. 352–353.

7.3.10 The Shifted Burden of Proof in Environmental Law Enforcement

The management of risks and the proactive goal-oriented legal system of environmental law have been argued to have changed the traditional understanding of the distribution of burdens of information. This also applies to the issue of proof.¹³⁹⁶ The Swedish Environmental Code states explicitly (MB 2:1) that the actor has the burden of proof in the enforcement situation. It regulates that anyone who pursues an activity or takes measures, or intends to, shall in connection to administrative enforcement under the Code, as well as in authorisation procedures of different kinds, show that the activity, or individual measure, is carried out in an environmentally acceptable manner in relation to the rules of consideration. This shifted burden of proof rule was already well-based in environmental law before its codification in the Environmental Code. It is founded on the main principles of prevention and precaution, which form the basis of the concessional system, and indeed environmental law in general. The point is to avoid damage, which entails risk management, for which (as argued above) the actor is fundamentally responsible. As the preparatory works of the 1969 Environmental Protection Act state, the public must not stand the risk of the uncertainties about the involved environmental damage. This should instead rest on the party causing the immission.¹³⁹⁷ This fundamental regulation of a shifted burden of proof is applied generally in the administrative enforcement of the Code in all its different sectors. The sector regulations are to be assessed under the general rules and for the actor this entails demonstrating that these rules are followed. This general application is supported by the systematic order of the Code and also in the preparatory works,¹³⁹⁸ as well as case law.¹³⁹⁹

7.3.11 Comparative Remarks

This focus of the Swedish environmental law enforcement system on enforced self-control stands out in comparison with those of the United Kingdom and the Netherlands. Neither the English, nor the Dutch legal orders contain such extensive actor responsibility constructions such as that contained in the Swedish Environmental Code. They do not state such a wide and general self-control duty, and there is nothing that compares to the general Swedish rule on the shifted burden of proof.

¹³⁹⁶ De Sadeleer, N., *Environmental Principles; From Political Slogans to Legal Rules* pp. 202–203. Applied to the Swedish system, see Prop. 1997/98:45, Part 1 p. 210.

¹³⁹⁷ Prop. 1969:28 p. 210; Bjällås, U, and Rahmn, T, *Miljöskyddslagen. Handbok i miljö rätt.*

¹³⁹⁸ Prop. 1997/98:45 Part 2 p. 13, on actor duty to show the enforcement authority that the activity does not entail effects counteracting the aims of MB; or that the activity does not entail unacceptable health or environmental nuisance.

¹³⁹⁹ Explicitly stated in MÖD 2004:58.

English law does not explicitly state principles of actor responsibilities, though such principles may be implied in the system. Certainly, in the permitting order the operator is required to have sufficient expertise, and so on,¹⁴⁰⁰ but this is not stated in statutory law. This may be linked to the different traditions with regard to sources of law.

Dutch law prescribes a general and fundamental duty of environmental care (Wm Art 1.1a), and can be understood to express principles of environmental law such as prevention, precaution, and polluter responsibilities. It states rather shortly that every person shall treat the environment with due care and that this at any rate means that where damaging effects are reasonably suspected, the person concerned must, within reason, refrain from such acts, or take measures to prevent damage, or if that is not possible to minimise or rectify such damage. This principle, however, is mainly seen as being directed at public authorities. The more specified “general rules” of the Barim, etc., prescribe a further duty of care when the special regulation is not sufficient, which could suggest some flexibility. The regulatory approach is to translate these principles into more specific regulation of substantive requirements, in the general rules or in license conditions, and only in extraordinary cases may the principle be used independently as grounds for enforcement. This is motivated mainly by rule of law considerations.¹⁴⁰¹

It might be argued that the general principle of due environmental care could work as a counterbalance to other legal principles. Theoretically, it could be suggested as tipping the scales in favour of precaution and prevention in relation to environmental risk when balancing factual evidence in an enforcement case. The duty of care that applies to all, could thus be utilised to cause the individual actor take information responsibilities. Moreover, the precautionary duties of actors could be argued to have adjust the burden of evidence in environmental cases, so that their cases would have to be proved to a higher standard, or to stand the risk of poor investigation or lack of certainty. I have nevertheless found no indication of such an application of the environmental duty of care, and the general expression from the investigation of the Dutch order has been that the administrative law investigatory duty is fundamental, and the duty of environmental care functions more as a basis for further operational regulation.

The studied legal orders thus show considerable differences in principles of distribution of information responsibilities in the administrative enforcement of environmental law. An essential comparative observation in Part II was that neither the English nor the Dutch legal orders contain such explicit and extensive actor responsibility constructions as found in the Swedish Environmental Code. The next, and all-important question, is to investigate

¹⁴⁰⁰ Environmental Permitting Guidance. Core Guidance Section 5.

¹⁴⁰¹ See: Section 5.3.3.

whether the actor responsibility idea of environmental law has worked itself into the administrative law system by other means.

7.4 Actor Responsibilities for Information

7.4.1 Introduction

The previous section argued that the distribution of responsibilities for information takes on a particular character in the context of environmental law. The fundamental principles of environmental law and policy subsequently entail actor responsibilities, also for information. This means responsibilities for knowledge and decision-making materials, which is central in environmental law which relates to the complexity of environmental status and dynamics. In this section different expressions of actor responsibilities for information will be presented. Such responsibilities are to a great extent implemented through the permitting procedure, which is the traditional base of the environmental regulatory system and will be outlined first, but briefly. Actor responsibilities for information go beyond the permit procedure, and to an increasing degree, outside the scope of the permit regime. These constructions of legal responsibility will be presented systematically. The focus is on the administrative authorities' enforcement of such responsibilities, on their competences and instruments, and the limits thereof. A main objective is to investigate how far enforcement can extend in this respect. The presentation centres on the perspective of the actor regarding the information burdens in the context of enforcement, and how much effort and active involvement is demanded in the production of administrative decision-making materials. The purpose of this study is to better understand the role of actor responsibilities for information in the administrative procedure, so as to further the coordination and cooperation of the environmental and administrative responsibilities for information and the regulatory procedure.

Actor responsibilities for information are sometimes regulated by the permit conditions. As discussed in Part II, a general trend is that fewer activities are regulated by permits. Responsibilities will therefore be drawn from general rules and in intervening decisions by enforcers.

7.4.2 Providing Information in the Permitting Procedure...

In all the studied legal orders much information is required of the actor applying for a permit. These requirements are to some extent due to EU law regulation, and apply to all the studied orders.¹⁴⁰² The rule in the Swedish

¹⁴⁰² See: Directive 2010/75/EU on industrial emissions (IED) Art. 12, and preamble para. 11.

Environmental Code stating what the permit applicant must submit, have been amended to clarify that the general duty to submit all the information needed to assess the type and extent of the activity, include these EU law requirements. The applicant for a permit must thus submit, for example: plans, a detailed description of the site and the planned operation, a considerable amount of information on emissions, and suggestions for protective measures, including precautionary measures, and of the supervision and control of the operation (MB 22:1 and 19:5).¹⁴⁰³ To this may be added the demands for EIA for certain operations, primarily regulated in EU law.¹⁴⁰⁴

It should be noted that in the review of a permit for environmentally hazardous installations the actor – the permit holder – is responsible for the investigation.¹⁴⁰⁵ The competent authority may in the English system serve a notice requiring the supply of further information if this has not been done satisfactorily (EP Regulations Schedule 5, Part 1 Para. 4). The regulator may consider the application withdrawn if the information is not submitted after a second notice, warning the applicant of that consequence. The Swedish permit authority also has the competence, and indeed the duty, to order the applicant to supplement an incomplete application. If the order is not obeyed it can, according to MB 22:2 Para. 2, and 19:5, remedy the fault at the expense of the applicant, or reject the application. This is drawn from general procedural rules and rules of evidence, under which the person applying for something carrying heavier information duties. In the Swedish system of inquisitorial administrative procedure the applicant for a beneficial decision carries heavier information duties, even though the administrative body has a fundamental responsibility for ensuring sufficient decision-making procedures, and helping in the individual's fulfilment of responsibilities.

Environmental law has the legitimate potential of requiring even more of the actor. Precaution and prevention are central to this procedure, especially where the permit entails strong legal guarantees, as in the Swedish system. Subsequently, as described above, the actor will as a rule carry the risk of insufficient information. The decision-making authorities have a duty to ensure full decision-making materials, and should guide the individual in that direction. However, in the end, the lack of decision-making materials or uncertainties therein, will in effect be detrimental to the individual.

¹⁴⁰³ MB 22:1 was amended to specify information duties in the permit procedure, in order to clarify the duties in view of EU law regulation of the matter in the IPPC directive (now IED Art. 12). See: Prop. 2001/02:65 pp. 51–52. The general duty of the operator to supply all the information needed to assess the kind and extent of the activity. This applicant responsibility for information is also accords with the Administrative Court Procedural Act Section 8, and general principles of administrative law.

¹⁴⁰⁴ Directives 85/337/EC and 97/11/EC. Note also reference in the EID Preamble para. 11.

¹⁴⁰⁵ Prop. 1990/91:90 p. 217 (on the earlier regulation in ML Section 13a); Prop. 1997/98:45 Part 1 p. 480. Note also Prop. 2001/02:65 pp. 37–39, on the introduction in MB Chapter 22 of Section 2a.

In an illustrative case,¹⁴⁰⁶ the Swedish Environmental Court of Appeal held in its decision that the lack of knowledge on ground and water factors was significant, which resulted in great uncertainty as to how the planned installation could affect the drinking water. The Court then referred to the preparatory works of the Environmental Code, stating that already the risk of environmental disturbances should have been considered, and found that such uncertainty entailed that the Environmental Code requirements for permitting were not met. The detrimental effects for the applicant mainly pertain to loss of time and perhaps investment, since there is nothing to stop the actor from applying again with better information to support the application. However, in the situation of inherently uncertain factual circumstances, the precautionary principle will limit the actions of the individual, even without certainty with regard to the risks involved.

7.4.3 ... and Beyond

As described earlier, actor responsibility applies generally in Swedish environmental law, and not only in the permitting procedure. Responsibilities for knowledge, investigation and proof, as explained above, apply to anyone that risks causing environmental harm or nuisance of any significance. Such duties may often be prescribed and specified for the individual activity in the permit conditions,¹⁴⁰⁷ but this is not the only way of implementing and enforcing the actor's responsibilities for information. Administrative enforcers regulate all kinds of actors. The enforcement authorities are responsible for checking compliance with environmental law in general environmental legislation, but also permit conditions and other administrative decisions.

Some comparative differences can be observed with regard to the structure of the system for regulating environmental actors. Sweden has a generally applicable Environmental Code that includes all types of regulation of environmental activities. The UK and the Netherlands have separate regulatory regimes for environmental permitting – essentially the English EP Regulations and the Dutch Wabo, which coordinate permitting in relation to different sectors of environmental law. The relationship between permitting regimes and the substantive regulations and administrative enforcement instruments therefore differ in all of the compared legal orders.

One further observation to be made is that the fundamental rules on actor responsibilities – in Chapters 2 and 26 of the Swedish Environmental Code – are widely applicable. They apply to all kinds of activity and all types of actor, which have effects that are in some way covered by the aims of the Code, and to which the Code therefore applies. In Swedish environmental

¹⁴⁰⁶ MÖD 2000:41.

¹⁴⁰⁷ For example: NJA 2006 p. 310, and the following judgment of the Environmental Court of Appeal on 12 November 2007, in case M 4317-06.

law, it may therefore be held that all actors bear the same fundamental actor responsibilities, as described above. They are just more formalised through permit regulation. The matter is more complex in the other systems where regulation outside the permitting regime is more sectoralised. For example, the Dutch Wm and subordinate legislation contain general rules of environmental care, but these rules generally have to be translated into more specific and substantive legal requirements – in permit conditions or general regulation. The enforcement instruments are generally provided in Awb, but the regulation of enforcement competence is divided between Wabo, Wm, and other sector regulation.¹⁴⁰⁸ Moreover, as indicated in the country report,¹⁴⁰⁹ imposing an enforcement measure – a sanction – is fundamentally reparatory in character, and thus presupposes a breach of a specific legal requirement. The general duties of care are not used independently.¹⁴¹⁰ This indicates a quite different basis for actor responsibility. While it constitutes a primary structural principle of Swedish environmental law, it is not particularly strong in Dutch and English law.

Responsibilities for the protection of what is generally seen as public interests are thus in the Swedish order not only carried by the public authorities, but by the individual as well. The enforcer centrally steers the actor by way of orders to take different precautionary or reparative measures. It can also, with support under MB 26:9 and 26:19-22, order the actor to make investigations or to produce information.¹⁴¹¹ As discussed, these provisions of enforcement competences apply generally and widely. Consequently, activities that are not subject to obligatory permitting also involve actor responsibilities of information and burden of proof and investigation. The work of the Swedish environmental authorities is thus based upon generally applicable and extensive actor responsibility for knowledge and activity.

It should be kept in mind that the functions of permitting and compliance control are separated in the structural organisation of Swedish environmental law regulation. As a principal rule, the administrative enforcer cannot exercise the functions tied to the permitting authority – centrally to revoke or amend the existing regulation through permitting. The legal force of the permit generally restrains the competences of enforcing compliance,¹⁴¹² but in the Swedish system this also means that it restrains the jurisdiction – or the general functional competence of the enforcement authority. The enforcement authority may take action to get an authorisation revoked or its conditions varied, thus changing these restraints, but it must place responsibility for such a decision in the hands of another authority. The comparative

¹⁴⁰⁸ See: Section 5.4.2.1.

¹⁴⁰⁹ Section 5.5.1.

¹⁴¹⁰ See: Section 5.3.3.

¹⁴¹¹ Prop. 1997/98:45 Part 1 p. 212.

¹⁴¹² The legal status of the permit has been investigated in another part of the ENFORCE programme, see: Darpö, J., *Rätt tillstånd för miljön*.

differences of the permitting regimes should be considered in this perspective. While the Swedish system separates permitting and enforcement competences, the Dutch and English systems provide powers to review permits to the same authority; the enforcement authority is also the permitting authority. In view of the permit decision's legal force, the access to both functions should involve more steering room for the enforcement authority.

It should be noted that the procedure of gathering information with these orders, is generally described as a communicative process. Administrative policy and practice in the studied enforcement systems all illustrate a communicative, sometimes negotiating, but always a constructive process in order to arrive at the best solution, and to maintain a good system of control. In the well-functioning system, authoritative enforcement of information duties is not that common.¹⁴¹³ It will not usually come to this if communication between actors and the regulators is good, and where actors are voluntarily involved in the environmental control of their own activities. Nevertheless, the system for authoritative enforcement of information responsibilities reflects the basic distribution of duties, should the voluntary approach not work. This authoritative approach is the central function of juridical environmental steering, and the focus of this study.

7.4.4 Instruments to Help the Enforcement Authority Make Investigations

Supervision and control fundamentally involves the authorities investigating the situation, mainly through inspections. This is also the traditional approach, which can be found in all the studied systems. Through inspections, enforcers (with the necessary expertise) investigate the case. They gather the decision-making materials. To be able to ensure a full investigation and relevant decision-making materials, enforcement authorities have competences to enter the premises of the addressees, inspect and investigate the installation and the operation, and to gain access to (and read and copy) relevant documentation, and so forth.¹⁴¹⁴ Such instruments are clearly regulated in law, and are generally coupled with a prerequisite of necessity, and also rules for notifying the owner, providing identification, etc., and on proportionality and restrictions on access to the addressee's home. Stopping or obstructing such investigation is often criminalised.¹⁴¹⁵ The information obtained can then be used extensively in following enforcement actions, and also be used as evidence against the actor.

¹⁴¹³ See, for examples in administrative practice: NVV Handbook 2001:4 Section 2.4, with reference to General Guidance NFS 2001:3 on 26:19–22 (Sweden), and the Enforcement Concordat (UK).

¹⁴¹⁴ See: MB Chapter 28 (Sweden); Awb Division 5.2 (the Netherlands); Environment Act 1995 Section 108 (UK).

¹⁴¹⁵ See, for example: Environmental Act 1995 Section 110(2)(a)–(c) (UK).

These instruments do not require that much active participation by the actor, other than facilitating the actual inspection, showing where things are, and answering some questions. However, inspectors are not dependent on the consent of the actor. It is the enforcer who conducts the investigation while the actor remains passive. The Swedish rules on inspection do not require active assistance by the actor, even though, in practice, this is often provided voluntarily. Enforcers generally favour a communicative approach, acting as an advisory and supporting partner, furthering voluntary measures rather than authoritative steering.¹⁴¹⁶ This is also often a more reasonable and proportionate method. Another interesting comparative observation is that the authority to ask questions is often quite extensive under relevant English law. An inspector may ask any questions needed from any person reasonably believed to be able to answer, and can demand a signed declaration of the truth of such answers (Environment Act 1995 Section 108(4)(j)).¹⁴¹⁷ Refusal to do so, moreover, is considered a failure to comply with the authority's order and constitutes an offence under Section 110(1). The information obtained in the exercise of these powers may, however, not be used as evidence for the prosecution in subsequent criminal enforcement (Environment Act 1995 Section 108(12)). That would entail self-incrimination, which is contrary to the rule of fair trial stated in ECHR Art. 6.¹⁴¹⁸

The inspection powers of administrative enforcers are less extensive than those of criminal investigators, which in the Swedish and Dutch systems are the police and prosecutors, who may seize property and also bring in persons for questioning, or to arrest them. The English administrative enforcement authorities also prosecute. This is the one significant comparative difference. Here, the same authority conducts the various procedures, but with some differences in the investigatory procedure. The English enforcement authorities have rather extensive powers of entry and investigation, including requiring the relevant person to give information and answer questions, as described earlier. If they begin to suspect that a criminal offence has been committed and start investigating with a view to future prosecution, then the rules of criminal proceedings must be followed.

To complement these instruments and competences for the enforcers' own gathering of information, there are also regulations aimed at ensuring the knowledge and professional expertise of the enforcement authorities. For example, the English system of authorisation of inspectors,¹⁴¹⁹ and the Swed-

¹⁴¹⁶ Bengtsson, M, *Genomförande av tillsyn enligt miljöbalken*, NVV Report 5369 pp. 40–41.

¹⁴¹⁷ Remember that this rule does not cover inspections in the context of statutory nuisance.

¹⁴¹⁸ The Environment Agency's Work Instruction: National Investigations Manual, No 353_03, Version 7, 27/06/2006, Section 5.3(9), however, instructs the inspectors that thus obtained information could be used against the company if the relevant person who answered the question did not represent the so-called "controlling mind" of the company, and was therefore subject to prosecution in this respect.

¹⁴¹⁹ See: Environment Act 1995 Section 108.

ish rules on the duties of authorities to carry out their administrative enforcement tasks effectively and to develop the competence of staff (Administrative Enforcement Ordinance Section 9), including expertise, and to cooperate between authorities (Administrative Procedural Act Section 6). Additionally, the guidance and steering by higher authorities support this structure. Such steering, however, is weaker in the Swedish system, which forbids steering by higher administrative authority in the individual case.

Thus far, the rules are based upon the investigation being performed by the enforcement authority. Little involvement is required of the actor. The actor must bear the intrusion, and to some extent help make it possible, but informative acts on the part of the actor are still not the case in these instruments. The delimitations are focused at protection of the privacy and property rights of the individual.

7.4.5 Pre-set Actor Duties for Information

7.4.5.1 Permit Regulation and General Duties of Information and Reporting

The next kind of information responsibilities for actors, is pre-regulated responsibilities for ensuring the relevant information for supervision and control. Such actor duties provide enforcers with an information basis for their work, which means lessening the administrative authorities' responsibilities for investigation and proof. As described in the country reports, there are many different ways of regulating the assurance of knowledge and information for environmentally hazardous activities, both for the benefit of the actor and for enforcement work. These range from general rules on knowledge and self-regulation, to specified permit conditions on monitoring, measuring, investigating, documentation, and very often different kinds of reporting. Such duties for information can be described as preset rules of the game. Either they are prescribed generally in statutory law, or specifically in permit conditions, they are laid down in advance when the actor enters the game. Actors can adapt to them and plan accordingly. This, however, relies on the foreseeability and understanding of the thus regulated duties.

As earlier described in detail, Swedish environmental law entails generally applicable responsibilities for knowledge in MB 2:2, and the MB 2:3 duty of due precautionary measures also covers information responsibilities. A central construction of constant information responsibilities is self-control. As explained earlier, self-control is not limited to making sure the regulations of the Code and permit conditions are followed. Actors are also obliged to actively keep themselves informed of the environmental effects of their activities, even though such activities are carried out in adherence with gen-

eral rules and permit conditions,¹⁴²⁰ and this might include making their own investigations. It is demanded that the operator have control of the installation or activity, and be able to steer it through different precautionary measures, thus ensuring legal compliance and avoiding negative effects on humans or the environment. There are also documentation requirements in the Self-control Ordinance, and in NVV General Guidance.¹⁴²¹ The legislative intent, moreover, is to convey to actors the responsibility of planning their activities in pursuance of the goals of the Environmental Code; not merely to avoid conflict with those objectives, but actively to realise them.¹⁴²² The focus is pro-active and dynamic, and the duties are quite comprehensive and tied to both legal and factual circumstances (MB 26:19, and the Self-control Ordinance).¹⁴²³ New situations (for example, an observation in local air quality monitoring or of critical levels of a certain regulated substance) demand greater efforts from actors in self-control. Enforcers might impose duties of self-control on actors, obliging them to take steps to improve the control.

Through the self-control regime actors have the constant demand upon them to be active in their information responsibilities, furthering their knowledge and improving their information and control of their activities and their environmental effects. By this means, self-control becomes fundamentally pre-regulated, but the detailed duties are to a great extent not specified. The specific duties formulated in the Self-control Ordinance, and lower level legislation and guidance, are not exhaustive. It is essentially for the actor to assess what self-control they have to do. It will normally do so in communication with the enforcement authority, which supports and pushes the actor's self-control.¹⁴²⁴

Another important means of actor information are reporting duties. There are many different such duties in the studied legal systems. A central reporting system in the Swedish order is the environmental report, which is the annual report on the environmentally hazardous operation's adherence to the permit and its conditions (MB 26:20). These reports serve as important sources of information for enforcement, and are invaluable to other interested parties having a right of access to environmental information. From the start, an important purpose of these reports was to strengthen the self-

¹⁴²⁰ Prop. 1997/98:45 Part 2 p. 279; and NVV General Guidance NFS 2001:2. A suggested method is life-cycle analysis. They should also look at environmental effects from connected activities outside their installations – effect of the products when used and discarded, transports, as well as the effects from the activities of suppliers, thus being able to plan and steer their activities in the future. See: Prop. 1987/88:85 for pre-Code statement on the central role of actor self-control in environmental law regulation.

¹⁴²¹ NVV General Guidance NFS 2001:2.

¹⁴²² Prop. 1997/98:45 Part 2 p. 279–280.

¹⁴²³ See, also: NVV General Guidance NFS 2001:2, listing very comprehensive regulations and recommendations of the contents and use of self-control.

¹⁴²⁴ Prop. 1997/98:45 Part 2 p. 279.

control.¹⁴²⁵ The contents are extensive and include results of monitoring measurements and other investigations, and different kinds of preventive or reparative measures, and sometimes emissions declarations.¹⁴²⁶ Notably, the disregard of both the duties of self-control and environmental reporting is to some extent met by environmental sanction fees.¹⁴²⁷ Giving false information in reports to enforcers is to some extent criminalised under MB 29:5.

Another general reporting duty is that of an actor of a commercial activity to immediately report operational disturbances to the enforcement authority (Self-control Ordinance Section 7). Failure to do so is under criminal sanction (MB 29:5). Already at the suspicion of negative effects of an operational disturbance or incident, such notification must be made before any investigation into the risks is made.¹⁴²⁸ Subsequent precautionary measures continue to be the responsibility of the actor.¹⁴²⁹

7.4.5.2 Comparative Remarks

As argued earlier, no general responsibilities for knowledge, or information in general, is clearly regulated in the Dutch and English environmental law orders. There are nevertheless regulated duties for environmental monitoring, investigation, documentation and reporting. Such duties are quite often prescribed in permit conditions. For larger industrial activities this is, of course, required by EU law, as mentioned above.

In English law permit regulation is connected to actor responsibilities for knowledge and investigation. The permitting procedure relies on this, and the permit conditions will specify the duties of the actor. The operators regulated under the environmental permitting regime have investigatory obligations. Demands on materials and further investigation, monitoring and reporting, are generally stated in the conditions of the permit and must be stated in the conditions for Part A installations.¹⁴³⁰ Permit conditions hence may, and often do, require self-monitoring and documentation, and the information so obtained and saved may be important in any future enforcement against the permits actor. Information provided or obtained pursuant to, or by virtue of, a condition of a permit is admissible as evidence in any subsequent proceedings.¹⁴³¹ Making false entries in records or giving misleading

¹⁴²⁵ Prop. 1997/98:45 Part 2 p. 281; SOU 1996:103 Part 2 pp. 313–314; Ds 1998:22 p. 123.

¹⁴²⁶ The contents are mainly regulated in the Environment Agency Regulations on Environmental Reports, Sections 2–5.

¹⁴²⁷ Mostly for licensed authorities. See the Environmental Code 30:1, and Environmental Sanction Fees Ordinance Section 1, and the Appendix Sections 2.2.1–2.4.1.

¹⁴²⁸ NVV General Guidance NFS 2001:2, on the Self-control Ordinance.

¹⁴²⁹ Environmental Code Chapter 2 and 26:19.

¹⁴³⁰ Hughes, D., et al., *Environmental Law* p. 528. This reference is connected to earlier legislation (mainly the Pollution Prevention and Control (England and Wales) Regulations 2000, SI 2000/1973 Regulation 12(9)). The regulation of Part A activities, of course, parallels EU law regulation of industrial Pollution (IED). The new EP regime, however, is said to not change any substantive demands on the operations and operators.

¹⁴³¹ Environment Act 1995 Section 111(2).

statements in applications for a permit, in response to requests for information, or when under duty to keep records, often amount to an offence (Environment Act Sch. 19).

The described order entails that regulation under the environmental permitting regime stands out when it comes to preset actor duties. Environmental law regulation beyond the permitting regime – for example, in the statutory nuisance regime – is quite different in this sense. The obligatory permitting schemes of the EP regulations comprise extensive obligations on the actors to have the necessary knowledge, to make investigations and carry out self-monitoring, and to document information. Statutory nuisance, enforcement powers do not rest on a permitting scheme, though enforcement action may be directed at a permitted operation. Neither is there any general rule stating actor responsibilities for information. The fundamental investigative burdens are thus in practice very much on the authorities. The local health authorities supervising and enforcing the rules on statutory nuisance are not to the same extent provided with such explicitly conferred powers to require information and documentation. This is often appropriate, as statutory nuisance cases often relate to environmental problems of more limited character – disturbances from neighbours playing loud music, or a property owner not taking care of problems involving damp and mould in houses.

In the Dutch legal order, the duty to give information and the possibility open for the enforcer to ask for information is found both in permit conditions and in general rules. As discussed in Section 5.5.3, general reporting responsibilities were extensively deregulated in 2009. The annual environmental reporting duties for larger installations were repealed and replaced by the more limited PRTR report, which is the essential environmental report and focuses on data about polluting substances, as required by EU law.¹⁴³² There are also some reporting duties under sectoral legislation and agreements, but no longer is there a general and comprehensive reporting duty for environmentally hazardous installations. This entails less administrative burdens for the actor, but potentially more investigatory and monitoring duties for enforcement authorities. This is thus part of the supervisory stage.

In conclusion, the studied orders all have rules on actor responsibilities for environmental reporting, and prescribe duties for measures of monitoring and other investigation, documentation, etc, especially for actors under permit regulation. Such duties are to some extent prescribed in the permit conditions. These regulations set the ground rules for carrying on activities that might risk health and damage to the environment. The burdens are easily

¹⁴³² Regulation (EC) No. 166/2006 of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC. These rules are based upon the international UNECE Protocol on Pollutant Release and Transfer Registers, Kiev, 21 May 2003.

argued to be both fair and foreseeable. This does not challenge the responsibilities of the enforcement authorities for good administration.

The Swedish system stands out in comparison, with its general and comprehensive regulation of self-control, knowledge and proof. This entails a general idea of actor responsibility as part of the fundamental ground rules of the environmental law system. This applies to each and everyone, not only to those operating large installations under the permit regime and therefore already comprehensively regulated. But this observation is limited to the clear and general statement of actor responsibility. The powers and instruments of the administrative enforcement authorities must also be investigated to assess the actual status of such responsibility for information in the different environmental law systems.

7.4.6 Intervening Enforcement of Actor Responsibility; Ordering Investigation and Reporting

7.4.6.1 Enforcement Beyond Preset Duties

Further actor responsibilities for information are reflected in the enforcement beyond the preset information duties. The enforcement authority then intervenes in the activity, and demands that the actor provide information, either existing or non-existing information that requires fresh investigation. Enforcers have different such powers and instruments and will use them to improve the information basis for supervision and control. Apart from asking for information that the actor has preset duties to produce under the permitting regime, enforcers can ask for investigation and reporting from non-permitted activities. They can also address a permitted activity with investigation and reporting demands not regulated in the permit conditions.¹⁴³³ Such enforcement powers will be discussed next, starting with the Swedish enforcement system.

The type of intervening demand for information that seems less disruptive, or intrusive for the addressee, is the order to turn in existing information, generally documentation. This would usually not burden the actor too much. The documentation is already there, generally because of regulated duties for routine supervision and documentation, and the actor has only, for example, to provide copies to the enforcement authority. The Swedish system contains generally formulated competence in MB 26:21 (See also MB 26:21a) to order an actor to supply enforcers with the information and documents they need for their supervision and control.¹⁴³⁴ Such an order can

¹⁴³³ See: Prop. 1973:141 p. 35.

¹⁴³⁴ The regulation in 26:20 on environmental reports is not to be read as delimiting or specifying this duty. The duties in 26:21 may prescribe additional duties, see NVV Regulation on Environmental Reporting (NSF 2006:9) Section 9. Noteworthy is that the environmental authorities' interpretation of earlier regulation of "information" as including a duty to submit

only serve to attain information and documentation that does not require closer investigation on the part of the actor.¹⁴³⁵ The responsible actor will be able to plan for such demands in their routines. The purpose of the enforcers' demands, however, is wide. The demand for providing existing documentation, and so on, might seem a simple and not that burdensome a requirement, which can be easily managed with good administrative routines. Nevertheless, the wide range of the self-control system in the Swedish legal order, and the documentation demands involved in this, suggests that the potential scope of information attainable through these less intrusive measures is greater. The sheer amount of such demands may of itself be burdensome, even though it might be argued to be more foreseeable and easily managed in each individual case.

An enforcement measure that demands more of the actor in terms of active information responsibilities is an order of production of new information – making investigation, etc. According to the Swedish Environmental Code, an actor is obliged to make any investigations required by the enforcement authority, of the activity and its effects, provided that they are necessary for the administrative supervision and control of the relevant individual activity.¹⁴³⁶ This includes a duty to present the results of the investigation to the enforcer. This providing of the enforcer with the facts needed for its evaluation of the relevant activity is the purpose of this regulation. The actual evaluation of whether or not the activity entails health or environment risks is also covered by the regulation.¹⁴³⁷ This measure is thus a step in the enforcement authority's direction in its steering of the relevant actor.

Supervision and control over the actor's self-control also involves enforcing information duties. Apart from providing information needed by enforcers for such system control, the actor must also suggest a control programme, or remedial measures, should the enforcement authority so demand. Such enforcement orders might entail duties for the actor to subsequently make further investigations and produce new and constant information, and to document the results in the event of the enforcer later asking for it. These investigatory duties are more indirect. The function of the system control process is to improve the actor's own ability to fulfil the duty of knowledge, as the authority sees that they do not keep informed well enough.

documentation, was criticised by the Parliamentary Ombudsman on 1 March 1996 (dnr 404-1996), as lacking support in law. The rule was changed and the current formulation expressly states "information and documentation".

¹⁴³⁵ Prop. 1997/98:45 Part 2 p. 282. The statute states only that the actor should supply the information (not gather or ensure).

¹⁴³⁶ Compare: Møller-Sørensen, A., *Administrativ håndhævelse* pp. 113–114 on similar regulation in Norwegian law.

¹⁴³⁷ Prop. 1997/98:45 Part 2 p. 283; SOU 1996:103 Part 2 pp. 316–317.

7.4.6.2 Basis in Actor Responsibility and Enforced Self-control

The fundamental structure, or theory, of Swedish administrative enforcement, is based upon the idea that the enforcer's investigations of an operation should be made within the scope of the actor's self-control, with the enforcer's direct enforcement instruments being secondary.¹⁴³⁸ The system control involves more than supervising and improving a set self-control standard. As indicated above, self-control demands are dynamic and tied to legal and factual circumstances. This means that a new or newly discovered environmental problem may change the self-control duties, and the administrative enforcer may thus enforce the actor's constant duty to remain active in their information responsibilities, furthering their knowledge and improving their information and control of the activity concerned and its environmental effects, and the interrelationship of those things. The administrative enforcers monitor and supervise the self-control, and can ask the actor to suggest improvements and control programmes. Nevertheless, these enforcement instruments and tasks strive towards getting actors to take action to improve their knowledge, monitoring, assessment, and other investigations, and to plan and choose their own best course for following legal regulations, including furthering environmental law and policy goals.¹⁴³⁹

The different enforcement instruments of the Environmental Code should be seen in the context of the idea of enforced self-control. The main enforcement route here is to improve levels of self-control and make actors take responsibility for their own environmental work. Asking for investigations should therefore mainly be based on MB 26:19, and be focused on the actor's improvement of his own knowledge and information. It should only be supplemented by MB 26:22 when self-control falls short, and there is need for more direct enforcement measures.

The competence to ask for existing information in MB 26:21, on the other hand, is a more general instrument. It does not centre on furthering the actor's self-control. A prerequisite of this enforcement competence is that the actor already possesses the information. It may, however, be used by the enforcer to supervise the actor's self-control, in pursuit of an order to suggest improvements to the work. It may thus supplement the information received through preset information duties, such as environmental reports. However, notwithstanding this functional order of enforcement competences, enforcers may have to use the instruments in MB 26:21–22 to ask for information and investigation, to be able to assess whether, and how well, self-control is working, or whether intervention is required by direct steering through an enforcement order to take specific enforcement measures. They may not

¹⁴³⁸ This is part of the systematic working of the environmental enforcement order, and is supported by administrative practice, see: NVV, Handbook 2001:4 at p. 64.

¹⁴³⁹ NVV General Guidance NFS 2001:3 on 26:19.

know if self-control is working until they ask for information about it.¹⁴⁴⁰ The logical chronological order of enforcement measures should probably therefore not be exaggerated. The different steps of supervision, investigation, and enforcement measures, and their purpose and results, will no doubt overlap in practice.

An interesting discussion within Swedish law involves the question whether the actor can be ordered to make suggestions on measures to be taken to better live up to the substantive demands and standards of environmental law. Such a duty could be argued to be read into these competences to ask for information and investigation, together with the actor's duty of knowledge and precaution. Undoubtedly, the Code states that actors, who are under a duty of self-control, can also be ordered to suggest improvements. This line of argumentation has not been accepted in case law.¹⁴⁴¹ Asking for the actor's own suggestions is held as being possible only regarding improvements of self-control. This demand is distinct from the duties of actors to supply information, as decision-making materials for public authorities to help them in the course of their enforcement work.¹⁴⁴² The matter will be further discussed in the context of limits to the wider actor responsibilities.

7.4.6.3 Comparative Remarks

In English and Dutch law it seems that not only are actor responsibilities for information less explicitly laid down in law, the powers to demand investigation and reporting are also more limited in scope. Beyond the requirements through permit regulation, it is left to the regulating authority to investigate and produce information, primarily through inspections. The enforcers' powers basically entitle the enforcer to require provision of information. In Dutch law, such powers are stated generally for all administrative enforcement in Awb 5:16. The wording indicates that the authority can ask for information to which the actor has access. There is no explicit competence to order the actor to investigate – that is, to produce new information.

Rules on the enforcement authority's investigatory powers – discussed in Section 7.4.4 – provide powers to facilitate inspection, including asking relevant persons to answer questions and provide information. In this context it should be remembered specifically the English enforcer's powers to require the addressee to give information and answer questions. A notable feature is their authority to require the addressee to make a formal declaration of the truth. This suggests a more authoritative role for enforcers. The described powers are particularly provided for the Agency and for local authorities in their Environmental Permitting capacities.

¹⁴⁴⁰ MÖD 2009:29.

¹⁴⁴¹ The reasoning behind this non-acceptance is firmly rooted in legal tradition, stating that the administrative orders should be concrete, so as to state clearly the legal duties of the addressee. This will be further described in Chapter 9.

¹⁴⁴² MÖD 2004:23.

The EP Regulations provide the regulator with authority to serve a notice addressed to “any person” requiring information (Regulation 60). Subsection (2) prescribes that it can require information on emissions, though the actor at the time does not possess it, nor could normally be expected to. This means that the notice could confer a duty to investigate and produce new information. The requirement, however, has to be reasonable. This specific provision moreover indicates that the general formulation on requiring the actor to “provide information” does not cover such investigation, but only existing information. The scope of the power to require information is widely prescribed for the purposes of discharging the regulator’s functions. However, this only applies to the regulation of activities covered by the Environmental Permitting regime. The power to ask for production of new information (that is, making investigations) is moreover limited to information on emissions. It should be noted that failure to comply with the discussed kinds of orders (as is usual in the English system) constitutes offences, according to the Environmental Act Section 110, and EP Regulation 38(3).

In conclusion, there are in the Dutch and English systems, powers to ask for existing information, but little explicit authority to order the actor to make investigations. They are then mostly found in permit regulation schemes. Compliance control in the environmental law enforcement schemes of these systems is generally more driven by the enforcer. The actor provides assistance and answers direct questions. From this comparison of legal competences the preliminary conclusion to be drawn is that the actor is less actively involved in the pre-enforcement procedure. The enforcement authority leads the investigation, and drives the case forward. This order must be seen in the context of Better Regulation, or deregulation of permitting regimes, where more environmental law regulation will have to take place outside the permitting regime. The Netherlands have replaced deregulated permit obligations with general rules, including those on duties of information. But there are no general competences for asking actors to make the necessary investigations or for supervision and control of their activities. These duties have to be prescribed in the general rules.

7.4.7 Enforcement through Sanctions

Administrative enforcement of actor responsibility for information has now been discussed from the perspective of burdens on the individual in relation to the public. Responsibilities and enforcement thereof have been described to reflect the escalating intrusiveness of enforcement powers. In view of this, criminal and administrative sanctions for breaches of informative duties should be mentioned. Sanctions are generally the most serious and intrusive expression of public power against the individual. In this context it emphasises the power to enforce information responsibilities.

A noteworthy feature of the environmental law system is that not only behaviour that causes direct damage to people or nature is sanctioned. Criminal sanctions are often directed at offences against the control system. Through such criminalisation, many of the information duties and enforcement instruments are supported by criminal sanctions. The compared legal orders show many similarities in this respect. Operating an activity without the required authorisation, or against the conditions thereof, is generally criminalised.¹⁴⁴³ Failing to carry out the regulated control, documentation, registration, notification, or reporting to the different administrative authorities, is therefore often criminalised as breaches of permit conditions, but sometimes also directly, especially when it concerns misleading the authorities. Giving false information in the regulated reporting, or in the exercise of other generally regulated information duties, is normally criminalised.¹⁴⁴⁴ Hindering the enforcement authority's personnel during inspections, and so on, is obviously criminalised.¹⁴⁴⁵

The notable comparative observation is the criminalisation under English law, of breaches of enforcement notices, which puts the administrative enforcement instruments in a different light. This is especially so as the enforcement authority in itself has the right to prosecute, and to carry out criminal investigations. This means that failing to provide information during an inspection, or to answer questions and validate their truth, is criminalised as this entails breach of such an order. Enforcement and prosecution policies also describe offences against the enforcement authorities as serious, so much so that authorities pursue a policy of prosecution. This differs from Swedish and Dutch law, where breaches of enforcement orders are not criminalised as such.¹⁴⁴⁶

There are, of course, other ways of putting pressure on addressees, such as different kinds of administrative fines. The Swedish and Dutch systems focus more on these sanctions in response to the actor's failure in respect of information duties. These administrative fines are often conditional, ordering specified positive or negative obligations, and coupling the order with a condition that the addressee is liable to a fine should in the event of failure to comply with the order. Such conditional fines can be applied for all administrative enforcement orders in the Dutch and Swedish systems.

¹⁴⁴³ See: MB 29:4 (Sweden); EP Regulation 38(1)–(2) (UK); Wet economische delicten Art. 1a, 2, and 3 (Netherlands).

¹⁴⁴⁴ See, for examples: MB 29:4–5 (Sweden); Environment Act 1995, Section 110, and Sch. 19 (UK).

¹⁴⁴⁵ See, for examples: Criminal Code 17:1–2 (Sweden); EPA 1990, Sch. 3, Para. 3(1), Environment Act 1995, Section 110 (UK).

¹⁴⁴⁶ For a discussion in the Swedish preparatory works on the distinction between criminalising breaches of general information duties, and those conveyed in the individual case, in orders, see: SOU 2004:37 pp. 126–128, with reference to Prop. 1997/98:45 Part 2 pp. 281–282 and 307–308. The criminalisation of information duties was hereinafter specified to show more clearly that duties conveyed in enforcement orders were not criminalised as such.

Administrative fines can also be of a repressive kind in punishing breaches of legal rules. Such are the Swedish environmental sanction fees (MB Chapter 30), providing penalties for breaches of rules, on, for example, on mandatory notification before taking such regulated action, turning in periodical environmental reports on time, registering the chemicals used in an operation, or reporting accidents or other operational disturbances.¹⁴⁴⁷

In summary, breaches of the actor's duties for information often fall under criminal or administrative sanctions. This adds weight to the actor's information burdens. They are placed under greater pressure to meet their obligations.

7.5 Grounds and Limits of Information Responsibilities

7.5.1 Introduction

Having now shown the scope of legal instruments, which implement and enforce actor responsibilities for knowledge, investigation, and proof in the field of environmental law, we have reached what seem to be the outer borders of the matter under valid law. This position provides reason and opportunity to discuss the legal potential of the environmental law notion of actor responsibility. The basis for this discussion is drawn from the grounds of actor responsibilities in environmental law and the potential limitations met in the administrative enforcement context, where the notion is translated into individual burdens. The fundamental administrative procedural safeguards can be criticised when analysed against the background of effective enforcement of environmental law. A primary point of criticism is that the typical over-emphasis on protection of the individual addressee against authority in the exercise of administrative power, risks the legal protection of other parties and legitimate public interests, and thus the core of the applied substantive law.¹⁴⁴⁸ These questions will be discussed in the following, with the focus on the Swedish enforcement system. Some themes to be discussed include legal certainty (in particular the encountering perspectives of foreseeability and precaution), and the assessment of reasonableness and proportionality in the relevant context.

¹⁴⁴⁷ The Dutch and English systems have recently also introduced more generally such repressive administrative penalties. Their application of non-compliance with informative duties, however, so far seems limited.

¹⁴⁴⁸ Compare: Nilsson, A., *Något om JO:s syn på miljöskydd och rättssäkerhet* pp. 57–58.

7.5.2 Legal Certainty

7.5.2.1 Foreseeable Legal Duties

As discussed earlier, legal certainty has a core meaning of formal legal certainty, tied to the Rechtsstaat basis of legality, and expressed mainly in a requirement of foreseeability. The authority is responsible for the decision in itself being appropriately based in law. But legal certainty may be argued to entail much more, including the safeguarding of the legitimate interests of other concerned parties, and legally protected interests. These matters will now be studied more closely within the framework of enforcement of information responsibilities for the environmental law actor.

Environmental law comprises extensive legal standards and requirements, including constant and dynamic responsibilities to control and improve their environmental protection and management efforts. Sometimes legislation states legal standards that refer to environmental quality and consequential public or collective environmental law responsibilities. Administrative enforcement authoritatively requires the compliance of such responsibilities. To ensure legal certainty, the actor must be able to foresee, understand, and follow the regulations with regard to such duties. Actors should know what is expected of them so as to avoid intervention by public authorities. General foreseeability and understanding of the relevant legal requirements will also promote legal compliance, since actors would understand the duties and plan for them, whether or not they are enforced. Additionally, the enforcement authority will probably have better preconditions for communication, and acceptance by the addressee. These aspects suggest that foreseeable and understandable environmental responsibilities will generally be more effective and better for both the relevant actors and the environment.¹⁴⁴⁹

The actor's responsibilities should be clear, precise and known in advance. Clear and foreseeable regulations will work as preset ground rules for the relevant kind of activity, and for the actor. A critical point, however, is to ascertain what precisely has to be foreseen. This may range from a general idea of being able to understand that one has actor responsibilities for information and being prepared for forthcoming needs for information, to the communication well in advance of the detailed steps and measures to be taken – as well as when and how. Enforcement entails authoritative demands of compliance with legal duties. These duties are derived from law. In the enforcement order, generally regulated responsibilities are translated into individual duties which can be enforced. This will then provide a further step for safeguarding legal certainty. Legal certainty should therefore be investigated at different levels, or stages of regulation; the fundamental legal statement of environmental responsibility, and the statement of legal duties in the

¹⁴⁴⁹ Compare: Prop. 1997/98:45 Part 1 p. 172.

enforcement order. The latter will mainly be studied in Chapter 8. Here, the fundamental legal statement of actor responsibilities for information, the potential for foreseeing such obligations, and the appropriate scope and limits for enforcing them will be discussed. These duties can be somewhat specified in advance, in general rules or individual permit regulation. In other cases the enforcer will have to rely on the general principles and responsibilities for knowledge, precaution, and self-control, and so forth. This different regulatory situation may be argued to have different preconditions for legally certain enforcement.

7.5.2.2 Preset Ground Rules; Responsibilities Conveyed in the General Rules, and Permit Conditions

As described above in Section 7.4.5, there are many generally regulated actor responsibilities for information. In Swedish environmental law, they range from statements of fundamental principles, or “rules of consideration”, through general and specified duties of self-control, to specific reporting duties. In English and Dutch law, such fundamental statements of duties are not as yet present. Apart from these generally formulated duties, the permitting regimes require information before authorising the activity. Such requirements can be seen as preset ground rules for the specified activities that entail certain environmental risks, just as statutory duties. In the permitting system, the individual has to live up to certain qualifications to be allowed the permit. The applicant’s information shows that they do. The authorisation of the activity is normally also coupled with information duties in the permit conditions – supervisory and reporting duties, etc. Such duties may be construed appropriately to the individual situation, and the specific risks. The described demands for the actor’s responsibilities for information within the permitting system is found in all the studied legal systems, and indeed in EU law – particularly in the Industrial Emissions Directive.

These kinds of individual pre-regulation promote foreseeability for the actor. They can know more precisely what their information duties are, than would have been the case if they were conveyed in general principles of information responsibilities. The law is translated and specified to be relevant for the individual activity. Permit conditions serve as basis for knowing what is regulated for the operation, and also for some limitation of the enforcement competences of the administrative enforcers.¹⁴⁵⁰ The permit conditions may also make specific the self-control that the operator has to take, thus making it enforceable through the criminal system.¹⁴⁵¹ This connects the permit regulations to the administrative supervision and enforcement with

¹⁴⁵⁰ SOU 2004:37 pp. 244 and 246.

¹⁴⁵¹ See: SOU 2004:37 p. 246. Note also the discussion on specification of conditions, by the Environmental Court of Appeal in: MÖD 2009:2, 2009:9, and the Judgment of 6 February 2009 in case M 5069-07.

regard to these activities. The authorisation procedure potentially also facilitates flexibility as to permissibility. An activity that is not sufficiently controlled through general rules, and therefore fundamentally not permissible, may be acceptable if it takes on more extensive precautionary measures.

In light of the Better Regulation agenda, the permit regimes are being deregulated, or simplified. Fewer activities must subject themselves to the permitting procedure. The result is that the described individual regulation in advance will be lost, and subsequently a means for specification of legal duties. The foreseeability of actor responsibilities may be lost. What we have seen in the Netherlands, is that the individual permit regulation, when deregulated, is replaced by specified general rules. In the UK, there is instead a simpler kind of permitting procedure, where actors voluntarily subject themselves to standard permit conditions based upon general regulations. In both systems the regulatory function that the permit had in terms of specifying the actor's duties in advance, and thus promoting legal certainty, is now being filled by general rules with specific conditions. The Swedish reform of the permit regime, deregulating permit obligations, has not been systematically replaced by such systems. Moreover, central statutory rules with more specified and formalised information duties apply to activities under permit regulation. Such rules are MB 26:20 on environmental reporting, and the Self-control Ordinance with specific self-control duties. More actors are regulated by generally formulated principles of such duties, and the extensive powers of the enforcement authority to demand information. This implies that Swedish environmental law regulation may lose somewhat in foreseeability when it comes to regulation of information duties. On the other hand, the Swedish order includes an opportunity for many actors to apply voluntarily for an environmental permit. If they desire such security and foreseeability, they can apply for it.¹⁴⁵²

However, this matter can also be discussed from another angle. So far, only the actor's legal certainty and foreseeability have been discussed. In the particular circumstances of environmental law and a more substantive approach to legal certainty, it may be contended that the legal certainty of other parties concerned, and the protection of their legitimate interests, should also be considered. This may concern a neighbour whose enjoyment of his property is affected, or a wider range of involved interests – for example, access by future generation to the same natural resources. The permit procedure will generally provide more room for such considerations, not only with the parties being granted access to the procedure, but because of the comprehensive assessment of the activity in advance. In such assessment the legally protected interests are all considered and weighed in context, and the permit applicant has considerable duties to investigate those interests and to provide evidence of the appropriate consideration and protection thereof. The permit

¹⁴⁵² Compare: SOU 1966:65 p. 42.

procedure thus also safeguards the legal certainty of other concerned parties in their reliance on the public protection of their legitimate interests. The process is generally much more limited in the administrative enforcement situation, and therefore the deregulation of the permit regimes may diminish the procedural guarantees for protecting such interests.

7.5.2.3 Demands for Information through Intervening Enforcement Measures

7.5.2.3.1 General Rules of Information Responsibilities and Foreseeability
Actor responsibilities for information apply wider than through the permitting regime. Such duties have earlier been described as being particularly developed in the Swedish Environmental Code: the duty of knowledge and precaution, and the shifted burden of proof in Chapter 2, and the self-control regulation in 26:19. The environmental authorities can enforce these general rules through the discussed instruments in Chapter 26. Here the actor's information duties are not specified in advance. It is up to actors to know their responsibilities under the law and to understand what they mean for their activities, as well as the environmental circumstances that go with them.

The preparatory works of the Environmental Code point out that the duty of knowledge has a general character. It is argued that through this general rule the importance of thinking ahead is emphasised, thus echoing the principles of prevention and precaution. Nevertheless, the same statement predicts that the use of the rule as grounds for enforcement action will seldom occur.¹⁴⁵³ It appears that the rule could be enforced directly, but that due to its general approach, this will not be its main use. The rule seems more like a declaration of abstract principles, goals or intentions. The preparatory works refer to the more specific demands for knowledge in the Chapter 26 enforcement powers for ordering investigation or information. The Environmental Agency's enforcement guidance also speaks of the duty of knowledge as being fundamental, but in general terms, and to be implemented mainly through enforced self-control.¹⁴⁵⁴ In the preparatory works' general guidance to the rules of consideration, however, it is pointed out that all the general rules of consideration may be applied directly as grounds for enforcement.¹⁴⁵⁵ The matter seems rather unclear. Argument of the vagueness and general formulation of the responsibility for knowledge in the general rules of consideration of the Code is to be found in case law to. In MÖD 2004:23, for example the enforcement authority had ordered a person to submit suggestions of appropriate precautionary measures with regard to a sewerage installation. They argued grounds for such an order in the general

¹⁴⁵³ Prop. 1997/98:45 Part 2 p. 14.

¹⁴⁵⁴ NVV Handbook 2001:4 Chapter 2, esp. pp. 32 and 36–38.

¹⁴⁵⁵ Prop. 1997/98:45 Part 1 p. 206.

rules of consideration and the shifted burden of proof. The court held such a rule (the Court looked mainly to the duty of knowledge in MB 2:2) too general to take over the demands of legal certainty that must be upheld in the case under consideration. Apart from this statement there is little case law explicitly discussing the reach of the general principle of knowledge.¹⁴⁵⁶ A discussion on the legal certainty challenges to the enforcement of these general rules is therefore warranted.

Based upon the general rules on the actor's responsibilities for information, the enforcement authority intervenes with its powers stated in MB 26:9 and 19–22 and orders the actor to accordingly provide existing information, or undertake fresh investigations, for the purposes of the administrative authority's control, or the actor's own self-control. Enforcers will use these powers to improve the information basis for supervision and control. This is founded on the same environmental law fundamentals as those of the permit regime. As the actor is responsible for the environmental effects and risks of the activity, that party will assume responsibility for information, including new information and active investigation, whenever the enforcer needs the information for supervision and control. An interesting question is whether the Court in MÖD 2004:23 held actor responsibilities for information as a whole to be generally formulated, or merely in relation to MB 2:2. Would the rules providing powers to enforce information perhaps suffice, as the preparatory works suggest? This matter was not discussed in this case, since the applied provision (MB 26:22) was deemed not applicable in that case.

From the actor's perspective the enforcement of these general duties entails something other than having a list of pre-regulated monitoring and reporting duties, such as in specified permit conditions. Preset duties may be planned and worked into a business organisation and its routines. The enforcer's intervening measures generally orders the actor to turn in information of different kinds and to make certain investigations, which result in the actor having to break their routines to serve the enforcer with information, or to improve existing routines. In view of the sometimes complex and uncertain information in environmental issues, and the wide scope of affected interests, this intrusion may be significant. The actor's responsibility may in this perspective be reflected against the ideals of foreseeability. Actors ought to be able to know in advance how to behave so as to avoid intervention by the authorities, and have certainty about the legal requirements to be able to control their activities. These actors, who are not regulated through permitting, do not have their information duties specified from the start. When addressed with an order to submit information, or make investigations, ac-

¹⁴⁵⁶ Compare: SOU 2004:37 p. 338, and the Environmental Code committee having found no authoritative case law on the application of the general rule on responsibility for knowledge up until may 2003. Notably, the MÖD 2004:23 case referred to in the above came later. What the committee did find was brief references in the permit applications to the use of internal and external expertise within the company.

tors must comply with new situations. They will perhaps argue that this is unexpected and unfair and that there was no possibility of foreseeing the duties – having no certainty as to their information duties. On the other hand, their fundamental responsibilities are expressly regulated in law.

The Environmental Code intentionally does not rely on specified regulation, but instead states more general and flexible rules of consideration.¹⁴⁵⁷ The general rules of consideration apply to all, and state that actors should take necessary precautionary measures and that they must know what they are doing. These duties connect to the actor's responsibilities and are well established in environmental regulations. It should come as no surprise to actors that they should make investigations. The problem may be found in the link between actual individual investigatory acts, and the general duty of knowledge and investigation. This link becomes visible in the authoritative enforcement in the individual case, where demands for such individual action are made. The enforcement order will then authoritatively determine the specific duty for the addressee. However, this way of laying down clear and foreseeable actor duties does not carry out this function as well as pre-regulation in law or permit regulation. The temporal context is different. The permit application will state rules in advance – before the relevant activity is started. The enforcement order often intervenes in an ongoing activity. Moreover, the time limit for compliance with the order can be rather short. In practice there has often been some pre-enforcement discussion before the order, but formally this is not strictly necessary.

7.5.2.3.2 Content and Meaning of Legal Certainty and Foreseeability in the Environmental Context?

The meeting of fundamental actor responsibilities and legal certainty brings about the question of what foreseeability and legal certainty actually mean. The terms are generally formulated and may be used to support legal arguments in many different situations. In the present discussion the question is what, and in what detail, is the actor to foresee and understand with regard to legal duties for information – in ensuring sufficient knowledge and making precautionary investigations, and so on. The demand for foreseeability can be argued to entail that actors must be able to understand that they have extensive information duties and must keep constantly active and adapt to the demands for necessary information in the control of the activity. Or perhaps actors, in the light of their legal certainty, should be able to know in more concrete and factual terms what information they must have and provide the authorities with – as well as when and how. Such matters cannot be simply resolved in definite terms. Moreover, the content and application of the principle of legal certainty should be viewed against the background of other legitimate interests in the relevant area of exercise of administrative

¹⁴⁵⁷ Prop. 1997/98:45 Part 1 p. 214.

power.¹⁴⁵⁸ Some points will be made here in relation to the actor's responsibility in Swedish environmental law.

First of all, the consequences, in principle, of a demand for more specific and concrete foreseeability on the environmental law system should be noted. As illustrated above, the required actor responsibility is a continuing, proactive, and dynamic demand for active assurance of sufficient knowledge and information, and to submit evidence of compliance with environmental law in general.¹⁴⁵⁹ The actual duty is to know, to investigate, to find out and prove the appropriate course of action in the relevant environmental context of the activity in question. In this context, a more concrete and factual provision of the actor's environmental duties would go against the whole purpose and function of the responsibility for precaution and information. In environmental law terms, it would be counter-productive. The environmental law statement of general information duties can be said to describe with appropriate certainty, that actors must foresee for themselves what their actual precautionary action must be.

The principle is that each and everyone is responsible for ensuring sufficient knowledge, and for taking the precautionary measures necessitated by their activities. This is stated in the MB preparatory works as an obvious and basic precondition for any environmental activity, and it applies whether or not any enforcers are involved.¹⁴⁶⁰ This is the basis for conducting activities that affect the environment. Furthermore, MB states clearly that actors must produce evidence in every enforcement situation to show compliance with its requirements. A requirement for pre-regulated specification of what these obvious and basic responsibilities mean, and legal certainty against added or changed information demands, appears to have little merit in the Swedish environmental law system. When the real action is fundamentally conditioned by the responsibility for precaution and reparation, the informative duties are to be expected. They should come as no surprise. Neither should there be surprise at the enforcer's orders requiring information and investigation for the purposes of its control. Actors should be able to foresee that they must be prepared for such orders, and be ready and able to answer the information requirements that enforcers may reasonably impose on them. If the enforcer does not ask for the information, it should normally be necessary for the actor's own self-control – which actors are legally obliged to maintain. They must have sufficient information whether or not the enforcement authority orders it. It is a statutory duty.

¹⁴⁵⁸ Basse, E.M., *Retssikkerhed i miljøretten – hvilke begreber kan anvendes?* pp. 357 and 359.

¹⁴⁵⁹ Prop. 1997/98:45 Part 2 pp. 279–280; and NVV General Guidance NFS 2001:2.

¹⁴⁶⁰ Prop. 1997/98:45 Part 1 pp. 209–212.

7.5.2.3.3 *Safeguarding Legal Certainty in the Enforcers' Normative Regulatory Function*

However, demands of certainty and foreseeability are still important in the individual enforcement case, especially when the rules stating the information duties are very generally formulated, as in the Environmental Code's general rules of consideration. Enforcers will have an important task of translating and specifying the duties for the actor in the relevant situation. They will have a somewhat normative role, similar to that of the permitting authority, especially when enforcing generally formulated legal standards and responsibilities¹⁴⁶¹ In such situations, they will have to take care to consider the possibilities open to the addressee for such intervening enforcement of information duties, to understand what they must do, and reasonably be able to meet these duties in the particular case. Such demands for clear and foreseeable statement of legal duties become even more significant in the context of sanctions, and will be further developed in Section 7.7.

The task of enforcement authorities of communicating a clear message of legal duties to the actor will be fulfilled in the formulation of an administrative order. This order informs actors of their duties. The character and degree of this specification will be further discussed in Chapter 8. It should nevertheless be noted that this is not always sufficient. Actors may find the order an abrupt intervention into individual freedom and autonomy, if they have not understood their general and fundamental actor responsibilities for information. As maintained above, the general actor responsibility is fundamental and obvious in the environmental law and policy system. The procedure for administrative enforcement of environmental law should not mean that the authority takes over the actor's information duties, but that it demands in clear terms that the actor complies with these duties. However, the extensive burdens of the responsibilities, combined with a generally formulated statutory basis for such enforcement, may warrant further communication of the duties to actors. The question is how this should be achieved.

A general means for the enforcement authority to ensure that responsible actors foresee and understand their duties, without taking over information responsibilities, is that of a well functioning communicative administrative process. This does not have to be formalised in rules of consultation, but often takes place within informal pre-enforcement contacts. However, when an enforcement decision is processed, communication with the addressee and other concerned parties is generally demanded. This relates to the right to be heard, and is part of due procedural care and good administration. In Swedish administrative law it is known as the principle of communication.¹⁴⁶² This approach shows the importance of pre-enforcement steps, and the wider scope of administrative tasks for the environmental authorities:

¹⁴⁶¹ SOU 2002:14 pp. 147; SOU 2002:50 p. 228.

¹⁴⁶² See: Section 2.2.3.2.

supervision, information and advice, both in relation to individual actors and the wider public.

Another way of promoting foreseeability with regard to the administrative enforcement of general actor responsibilities is through stating in advance the enforcement policies. Duties to produce such policies, or plans, are prescribed in all of the studied legal systems;¹⁴⁶³ however, mostly with reference to enforcement strategies, priorities, and procedures of the enforcement authority – not guidance as to the assessment of substantive requirements. It should be kept in mind that much administrative enforcement is conducted at local or regional level. To have local enforcement policies state substantive policies for the assessment and application of generally formulated framework law, would perhaps be questionable from a constitutional perspective. Their normative role in the application of law in individual cases would then come close to a local legislating function, at least if this statement of policy becomes a regulatory step deemed necessary for legal certainty in the application of law. Such a system would have to be assessed from a constitutional perspective, a topic that will not be developed here – beyond merely noting the probable conflict with constitutional rules and principles of regulatory competences. It should, however, be pointed out that the local normative role may become problematic in view of the purpose and aims of environmental law: Do we want local authorities to decide what the more concrete substantive environmental law requirements should be? There is a risk that the statement of policy about how general rules will be enforced will be understood as authoritative statements of law. This might also give reasons for concern as to equal treatment in the regulation of the actor's duties in different parts of the country. This is a difficulty with decentralised implementation and enforcement of law. I would therefore suggest that authoritative interpretations, or guidance, on the content and application of general rules of actor responsibilities should be undertaken by legislators and administrative agencies at national level. This then boils down to the obvious means for ensuring foreseeability – specific regulation in law and stronger direction from central government.

In summary, the regulation of actor information can be problematic in view of the actor's foreseeability. When actors are responsible for knowledge, investigation, and proof – in short, to ensure the information needed to control their activity – in enforcement situations, the whole idea of foreseeability of their duties under the law becomes questionable. Foreseeability is easier dealt with when the more concrete duties are specified in the permit,

¹⁴⁶³ See for examples: Ordinance on Administrative Enforcement of Environmental Law (SFS 2011:13) Chapter 1 Sections 6, 8, 10, and 12 (Sweden); Regulators' Compliance Code Sections 4, and 9.2 (UK); *Besluit omgevingsrecht* Chapter 7 (Netherlands). Compare to discussion on foreseeability and codification on administrative practice in official decrees for different areas of law in Denmark, in: Basse: E.M., *Moderniseringen af miljølovgivningen set i et retssikkerhedsperspektiv* p. 358.

or in general rules. However, the activities thus regulated are decreasing in view of recent reforms of the permit regimes. In the Swedish order, general statements on actor responsibilities apply to all actions of environmental significance. The enforcement thereof can be testing in view of legal certainty and foreseeability, and requires the enforcement authority to make the duties more concrete. This should be done without taking over the information duties of actors, or taking on a general regulatory function. As noted above, the scope of the actor's responsibilities are potentially wide and burdensome. This may validate considerations of reasonableness and proportionality. These aspects will be discussed next.

7.5.3 Reasonable Limits to Enforcement of Information Responsibilities

7.5.3.1 Introduction; the Reach of the General Principles

The system of actor responsibilities for knowledge and information may be criticised with arguments of proportionality or reasonableness,¹⁴⁶⁴ especially for private individuals who typically do not have as much technical or scientific knowledge as the environmental inspectors of the risks involved or of the activity itself. In the individual case the actor responsibility may seem too heavy a burden,¹⁴⁶⁵ financially and otherwise, compared with the predicted damage from the relevant activity. It is often not even sure that damage will occur. It is a question of risk management. This means, in the context of the administrative authorities information duties under the inquisitorial, or investigatory principle, such authorities do not have to prove any consequent damage from the activity to order that measures be taken. The actor, on the other hand, will have duties of investigating, and ensuring sufficient knowledge on the matter. In this assessment of the grounds and limits for information responsibilities, it is therefore interesting to study closer how

¹⁴⁶⁴ Proportionality and reasonableness are not the same thing, even though they overlap (see discussion in Section 2.2.2.3.6). I would suggest that reasonableness in administrative enforcement of environmental law mainly concerns the substantive standards, and the weighing of the relevant legal interest in setting such standards (MB 2:7). Proportionality focuses on how these standards should be enforced, and not to apply too far-reaching or intrusive enforcement measures in order to meet the set environmental standards, or substantial requirements (MB 26:9 para. 2). In practice, the terms are sometimes used interchangeably and for a more general idea of fairness or legitimacy in the exercise of administrative enforcement.

¹⁴⁶⁵ Christensen, J., *Enskilda avlopp – Miljöbalken har ändrat de rättsliga förutsättningarna* p. 166. See, also: Michanek, G., *Tillståndsvillkor om utredning av kemikaliers miljörisker*, where the author discussed reasonableness in the individual case (NJA 2006 p. 310) of extensive information duties in permit conditions. Such duties, including risk assessment and information about the relevant recipients, etc., were well motivated in the individual case. The court chose not to regulate that issue in the relevant permit condition. Such demands for knowledge and investigation are therefore left to be regulated by general rules, and implemented in administrative enforcement.

extensive the actor's responsibilities may be, and how the enforcement of these extensive duties may be delimited by considerations of reasonableness and proportionality.

While there is explicit statutory regulation of the actor's responsibilities for information, and an emphasis on the actor's role in preparatory works, the reach and weight of the demand is not that easy to determine with the help of these sources. As discussed earlier, the specific application of the duty of knowledge is debatable. Despite the discussed statements in the preparatory works of the general character of the duty of knowledge, it is also stated that the rule may support extensive demands for information, but that these will vary between different activities, considering their nature and extent, suggesting a rule of reason.¹⁴⁶⁶ The environmental risks thus set the level of demands. It is argued that through this general rule the importance of thinking ahead is emphasised. This echoes the principles of prevention and precaution.¹⁴⁶⁷ There are some judgments on information duties, where the extent of the actor's responsibilities is discussed in more general terms. Some of these cases will be analysed in the following. First of all the scope and extent of the provisions of powers to enforce such information duties will be discussed.

7.5.3.2 The Scope and Extent of the Powers to Enforce Information Responsibilities

In the Swedish system, the two instruments of directly enforcing the actor's information duties have different scopes and limitations. The administrative enforcers have a wide competence in MB 26:21 to order actors to submit all sorts of existing information and documentation.¹⁴⁶⁸ Additionally, they may, according to MB 26:22, order investigations and the producing of new information and subsequent presentation of the results to the enforcer. This competence to order investigation is narrower than the order to submit existing information, in that only information relevant to the supervision and control of the activity in question is covered.¹⁴⁶⁹ When asking for existing information and documentation, the purpose of this gathering of information can be wider. The information does not have to be required in the actual enforcement against the relevant actor, but may also be such information that the enforcer needs in its enforcement work in general, such as its strategic and coordinating supervision and control.¹⁴⁷⁰

The powers in MB 26:21 are thus limited by the extent of the efforts that can be required of the actor. The information has to be objectively existent. Enforcers cannot require further investigations. A normative assessment that

¹⁴⁶⁶ Prop. 1997/98:45 Part 1 pp. 231–232, Part 2 pp. 24–25 and 283.

¹⁴⁶⁷ Prop. 1997/98:45 Part 2 p. 14.

¹⁴⁶⁸ MÖD 2004:64.

¹⁴⁶⁹ Prop. 1997/98:45 Part 2 pp. 282–283; SOU 1996:103 Part 2 pp. 316–317.

¹⁴⁷⁰ Prop. 1997/98:45 Part 2 p. 282; SOU 1996:103 Part 2 p. 315.

the actor should have acquired the information, and thus have it available, does not qualify.¹⁴⁷¹ The function of this enforcement instrument is therefore mainly to provide enforcers with access to the information already attained by the actor. Actors thus become a general information resource for the administration in the exercise of administrative tasks, not only when it concerns the individual actor who provided the information. Conversely, MB 26:22 provides the enforcer with powers to order the actor to investigate – to produce new information. This order provides information for the enforcer’s case preparations, but it also improves the overall basis of the gathered information. The actor is through such an order forced to improve existing knowledge and information. The application of the more intrusive, or extensive, powers in MB 26:22 is thus limited to a more reasonable scope. They only apply to information needed for enforcement against the actor. Such information duties are also more foreseeable for actors, as they should be able to predict what information might be needed. From an environmental perspective, this extensive power is also more normative, or directed, at improving the realisation of actors of their duties.¹⁴⁷²

Noteworthy in this discussion on the scope of information responsibilities, is that Swedish environmental law enforcement powers rest on the aims of MB – fundamentally sustainable development.¹⁴⁷³ This does not only involve protection against pollution, which has traditionally been the main purpose of environmental law. Sustainable development also involves a strive towards optimal management of natural resources, in order to make room for social and economic development within the limits of nature.¹⁴⁷⁴ All of MB is exercised for that purpose. The responsibilities of actors will therefore also include the furthering of best management of resources within their own companies. This is very much a dynamic and pro-active duty, which can potentially motivate extensive information requirements. And the powers of enforcers to obtain them are also tied to this wide scope of the MB. The investigation must not be linked to a risk of pollution, and so on, but can be based upon responsibilities for resource management – for example, energy consumption, or the use of materials.

This warrants the question of what could actually be required in further investigations. The term “investigations” is given wide interpretation. It covers taking water samples or measuring nuisance, and carrying out inspections, and the like. Generally, it is stated that investigations may entail (as with permitting procedures) an investigation of the technical possibilities to delimit emissions to a certain level, or to otherwise reach a certain goal. It may not, however, involve pure research. The ordered duty can also entail

¹⁴⁷¹ MÖD 2004:64.

¹⁴⁷² Prop. 1997/98:45 Part 2 p. 283.

¹⁴⁷³ See: Section 3.4.2.

¹⁴⁷⁴ See: Section 2.3.1.2.

making continuing, or periodical investigations, as well as investigation by each of a collective of environmental actors believed to have contributed to an environmental problem. The described enforcement powers may potentially involve placing considerable burdens on the individual, and accordingly such duties should not be unreasonable (MB 2:7).¹⁴⁷⁵

7.5.3.3 Reasonableness and Proportionality, and a Step by Step Approach

In view of the potentially extensive powers to enforce the actor's responsibilities for information, the limits of reasonableness and proportionality for making such demands require study. Swedish administrative practice shows consideration of such limits. NVV enforcement guidance promotes restraint, and recommends that asking for information should be weighed, motivated and specified in each case, and not just asking for all available information.¹⁴⁷⁶ The enforcement authorities should only seek information that they have the resources to analyse, use, and respond to. They should assess this with reference to the priorities set down in their enforcement plan. In that way they are able to optimise the enforcement of actor investigations, and not use their administrative powers excessively. Asking for all existing documentation should only be relevant in cases of specifically called for enforcement measures, or in the preparations of a pending inspection.

Enforcers may ask for continuing information if called for.¹⁴⁷⁷ NVV recommends that this be used for particularly important enforcement objects that form a health and environmental perspective. Such a decision should be based upon a specific need for constant monitoring; for example, in response to poor self-control, accidents or such alike. The extent and frequency of such reporting should be tailored to individual circumstances.¹⁴⁷⁸

The discussed actor responsibilities, and the subsequent enforcement powers are centrally limited through the principles of reasonableness and proportionality, as prescribed in the general rules of consideration, and of the enforcement instruments (MB 2:7 and 26:9 para. 2). The extent of demands made on information duties should not be unreasonable in relation to the environmental interest.¹⁴⁷⁹ Enforcement measures taken should not be more intrusive than necessary in the individual case and should be in proportion to achieving the desired result.¹⁴⁸⁰ In a case heard at the Environmental Court of

¹⁴⁷⁵ Prop. 1997/98:45 Part 2 p. 283; Prop. 1973:141 p. 33. See, also: NVV General Guidance NFS 2001:3 on MB 26:22, stating the wide understanding of the term "investigations".

¹⁴⁷⁶ NVV General Guidance NFS 2001:3 on MB 26:21 and 22, and Handbook 2001:4, *Operativ tillsyn*", p. 33. The preparatory works specifically indicate such assessment when asking for further investigation through MB 26:22; see Prop. 1997/98:45 Part 2 p. 283.

¹⁴⁷⁷ SOU 1996:103 Part 2 p. 316.

¹⁴⁷⁸ NVV General Guidance NFS 2001:3 on MB 26:21.

¹⁴⁷⁹ Prop. 1997/98:45 Part 1 pp. 231–232, Part 2 pp. 24–25 and 283.

¹⁴⁸⁰ Prop. 1997/98:45 Part 2 p. 273.

Appeal¹⁴⁸¹ it was found that there were reasons for investigations but that ordering the property owner in question to take the relevant noise measurements was too costly and intrusive. The Court ruled that the investigations were too burdensome to be borne by the actor, and therefore the responsibility fell under the investigatory responsibilities of the authority. The Court directed that should the authority's investigations subsequently prove that it was a serious problem, it could then compel the responsible actor to investigate further. The initiative consequently lies with the authority, and reaches some way into the investigation. This judgment can be interpreted as promoting a step by step approach, initially making simple investigations to ascertain the seriousness of the risks, and then requiring active participation of the actor in the investigation should the risk prove to be more serious, and when the authority is aware of what information is needed.

Similar reasoning can be seen in other cases of the Environmental Court of Appeal. In actions concerning precision of orders, the Court often states that it is for the enforcement authority to gather the information and make the assessments necessary for making a specified order of the necessary precautionary measures.¹⁴⁸² Furthermore, in MÖD 2006:60, the enforcer's inspection had revealed uncertainties and a lack of required control with regard to stored materials. It had found certain kinds of waste inconsistent with the actor's information to the authority. As the actor did not have sufficient control over the materials, and was ordered to investigate it. The environmental risks were not clear, but the actor's lack of control was. The purpose of the order was to improve control and decide on necessary precautionary measures. The Court, however, found the ordered investigations too extensive, at least as a first step, compared to the environmental risks – even though nobody knew what the risks were. The order was revoked and the case was sent back to the Environmental Court for further consideration. The Court suggested the step by step approach; that the enforcer obtain a clearer picture of the risk of pollution and of what closer investigation might be needed. It further suggested that this should be achieved by asking for supplementary information, and for more limited investigations. Apparently, the enforcers cannot turn over entirely the responsibilities to remedy uncertainties, but have to gradually ascertain a risk which warrants some more specific investigation, which would further clarify the situation, and the necessary investigation, and so on, until the matter is sufficiently explored to decide on appropriate precautionary measures.

The argument of a step by step approach is reasonable in the general communicative administrative procedure with the competent authority leading the procedure, ensuring the decision-making materials, and assisting the

¹⁴⁸¹ MÖD 15 juni 2009 in case M 5958-08.

¹⁴⁸² See, for example: MÖD 2000:6. More about the specification cases, see Chapter 8.

individual actor in the adherence of legal duties.¹⁴⁸³ Nevertheless, in the context of environmental law, the approach can be questioned. If there is sufficient reason to investigate under environmental law, the actor has a duty to investigate, and to attain the necessary knowledge. The reasonableness of the demands should be founded on the degree of environmental risk, and the proportionality in the choice of enforcement measure should ensure that such measure is no more intrusive than necessary for reaching the stated demand for information. The interesting question arises as to what is to happen when there is uncertainty with regard to environmental effects. A precautionary approach should mean that the actor should be under the duty to find out more. The initiative lies with the actor. The Court's reasoning here seems to depart from the enforcement authority's investigatory duties by having the actor come in later to supplement the decision-making materials. This is not in line with fundamental environmental law theory on actor responsibilities for information. It is, however, connected to the fundamental idea of administrative procedure – that is, ensuring the lawfulness of the resulting decision. The administrative powers are limited by law. They can only exercise authority with support of law, and the preparation of a case ensures such support. This task should not be laid in the hands of the addressee. That would contradict the idea of the Rechtsstaat. Extensive involvement of the addressee in this procedure is another thing. And this might be limited by the discussed arguments of reasonableness.

Another aspect of the studied case is the argument that the competences to enforce information duties are not decided by the normative conception of what the actor should have done, or to repair their breaches of actor duties. If the actor has not done what was required, the authorities have to step in and lead the way in the investigation of the problem.¹⁴⁸⁴ I would argue that the enforcers should have the competence and the instruments to order actors to make good any shortcomings in information duties. If problems occur – environmental damage or administrative difficulties – because they have not followed their legal duties to control their activity, the added burden of investigation should not fall on the public. The enforcer should be able to rely on the existence of required documentation, etc. If that is not so, the assessment of the reasonableness and proportionality of orders to remedy such faults, should be able to take account of any irresponsibility on the part of the actor. A consequence of the basing the assessment of reasonableness on the actual status of the information, and not what the actor clearly should have done, is that the enforcement authority's responsibilities for information are in fact more extensive when regulating a poorly-kept activity, and an addressee who has not made the effort, or had the sufficient competence, to

¹⁴⁸³ This includes the demand for precise orders, so that the demands are clear and concrete to the addressee. This matter will be further analysed in Chapter 9.

¹⁴⁸⁴ See: MÖD 2006:60, and MÖD 2004:64.

comply with duties under law. The authority will then have to step in and take over the pre-regulated actor responsibility, partly or entirely, in order to be able to enforce non-compliance with the law, including the information duties. Such a legal situation is contradictory, and unsatisfactory in view of the purpose of the relevant environmental law, and its substantive content.

Part of the Court's argument refers to its being easier and cheaper for the authorities to make investigations.¹⁴⁸⁵ This is not a legitimate reason with regard to the Polluter Pays Principle, and the explicit actor duties for knowledge and precaution. That would in principle require the costs of the authority's investigations being covered by the actor. Moreover, the purpose of involving each and every actor in environmental management would not be achieved.

7.5.3.4 Orders to Suggest Measures

One enforcement situation that in the Swedish environmental law discourse, has on several instances been disputed on appeal, is the question of whether the actor can be ordered to make suggestions on precautionary measures. Such an order may be based upon the enforcer's powers to ask for information and investigation, together with the actor's duty of knowledge and precaution. MB states that actors, who are under the duty to conduct self-control, can also be ordered to suggest improvements. Enforcement orders to make suggestions for measures have been supported by arguments of system approach to the enforcement competences and actor responsibilities.

In MÖD 2004:23 a municipal environmental board had formulated an order, coupled with a conditional fine, demanding that the addressee submit suggestions on how their sewerage installation could be improved in order to prevent health and environment nuisance. All the appeal instances stated that there was no valid basis in the enforcement competences in MB 26:19 and 26:22. The former rule provides powers to ask for suggestions, but only on improvements on the self-control aspect, not on the activities directly. The latter rule, providing power to order investigations, was admitted to be wider in scope, but did not – like 26:19 – explicitly state powers to order the addressee to suggest measures.¹⁴⁸⁶ Therefore, none of the instruments gave this competence, and the appeal bodies were adamant in keeping them separate as to their purpose, function, and application.¹⁴⁸⁷

¹⁴⁸⁵ An argument which can be seen also in SOU 1981:46 at p. 105, arguing that the authority has both the knowledge about the law and access to the case material, and can therefore more easily assess what investigations have to be carried out.

¹⁴⁸⁶ This becomes an issue of precision of orders, which will be analysed in Chapter 8.

¹⁴⁸⁷ The same day the Court judged a similar case (MÖD 2004:67). It held that even though there was a need for improving measures on the relevant facility, there was no statutory support for ordering the addressee to submit suggestions for solutions. The Court only referred to the competences claimed by the enforcer, and the ordering of investigation in MB 26:22 was not discussed. The principal message is, however, the same as in MÖD 2004:23, and the case further supports the judgment on application of MB 26:19 in system control only.

The enforcement authority had argued in the Environmental Court¹⁴⁸⁸ that the Code conveyed to the actor more responsibilities than earlier legislation for showing the enforcer what measures were needed to abate any health or environmental disturbance, and to show that the rules of consideration of the Code were being followed. They referred to the shifted burden of proof – but this describes a wider sense of actor responsibility. The enforcers had also maintained that the argument that the demands were unclear was not valid as a defence, as there were clear statutory demands for the relevant activity and they were responsible for self-control of the installation, and that the enforcement competence concerning self-control should be applicable to the operation. The Environmental Court agreed, without going into the arguments of the appealing enforcement authority, that the Code brought changes entailing greater responsibilities for the actor for knowledge, investigation, and proof, but this did not entail any wider interpretation of the enforcement competences. The Environmental Court of Appeal in turn did address this issue, but only to the extent needed to resolve the relevant case. Having found as with the lower instances, that the discussed enforcement powers (MB 26:19 and 22) were not applicable, the Court went on to the general rules of actor responsibility. It departed from the fact that solid administrative practice on similar enforcement competences before the introduction of MB, stated that an order should state the technical measures or the levels of disturbance or limit values that could not be exceeded.¹⁴⁸⁹ The appealed order was not accepted. Notably, in this context, the Court did not address the arguments on the shifted burden of proof. Instead, it assessed the application of the general duty for knowledge in MB 2:2. This duty could hence be argued to support a competence for the enforcer, to ask for suggestions under the general power to order precautionary measures. However, the Environmental Court of Appeal found this rule insufficient as support for the ordered measures. The demands for knowledge were argued by the Court to be so general¹⁴⁹⁰ that it could not take over the demands, from the viewpoint of legal certainty, required of the formulation of an order. It must be clear from such an order what the addressee has to consider, and it is the enforcement authority's task to specify this. The Court thus fell back on the notion of foreseeability in view of generally formulated duties, as discussed above. The Court also went on to note that the enforcer could order the addressee to

¹⁴⁸⁸ Probably in response of the County Administrative Board's use of pre-Code administrative practice.

¹⁴⁸⁹ Prop. 1997/98:45 Part 1 p. 494–495.

¹⁴⁹⁰ The text does not reflect whether the Court means that the rule is too generally formulated, which could entail legality and foreseeability issues mainly; or if they are indicating that the general duty of knowledge is of such character that it is not meant to be seen as a directly effective regulation, but only as a kind of statement of principal aims and concerns. The latter is, in my opinion, more troublesome in the environmental law discourse, but finds some support in the preparatory works (Prop. 1997/98:45, Part II p. 14).

make investigations and supply information needed to order the necessary, but specified, measures. This brings us back to the step by step approach.

Awaiting the appeal process in the Environmental Court of Appeal, the appealing enforcement authority debated, supported by NVV, the urgency of forthcoming precedential statement on the relevant competences to enforce actor responsibility for knowledge, information and proof. It argued the MB reform's focus on the actor's responsibilities and burden of proof, and that in the enforcement situation where the necessary measures were not obvious, the enforcer should always leave this choice to the actor. This method was also recommended in the NVV Handbook.¹⁴⁹¹ Both the enforcer and the NVV made the system approach argument that in light of the shifted burden of proof, the duty of knowledge and the relevant enforcement competences, enforcers could ask for suggestions for improvement measures, also for the activity as such. If not, the enforcement authority is put in a consultancy role that requires much resources, and may not always lead to the best solution for the individual activity. The actor has the best knowledge of the activity, and the best possibilities for finding the most cost-efficient solution. The Code's reliance on actor responsibility supports the view that the actor should make the active choices and to have the knowledge and control to be able to translate legal requirements into his activity. Also, enforcement guidance reiterates the importance of the authority not taking on the actor's responsibilities, for example by choosing between different ways of bringing the activity in accord with environmental law.¹⁴⁹² It should nevertheless be noted that the actor will not always be in the best position to ensure sufficient information. This is certainly the case when it comes to larger businesses and industry. But also private persons and small businesses are covered by the same actor responsibilities. These aspects may set the matter in a different perspective.

7.5.3.5 Factors on Part of the Activity or on Part of the Actor?

As discussed above, the actor's responsibility for knowledge will vary for different activities. The reach of competence of enforcers, and the responding actor responsibility, are principally the same for activities under permitting duty and those who are not. The extent of the duty, and of the demands on the different actors, however, has to be decided in consideration of the circumstances of the individual case. The demands cannot be unreasonable, and the reasonableness will vary with different kinds of activities, and it is the environmental risks that decide levels of demand. This refers to the rule of reasonableness (or rather unreasonableness) under the general duties of care in the Environmental Code, which is also as a rule tied to the character

¹⁴⁹¹ NVV, Tillsynsnytt, December 2003, no 3 pp. 4–5, referring to NVV Handbook 2001:4 p. 89.

¹⁴⁹² NVV Handbook 2001:4 at p. 90.

of the activity and its environmental effects, not to the character of the actor. The basis is always that the facts are to be relevant in the supervision and enforcement of the authorities in the individual case.¹⁴⁹³ Often, but not always, will the considerations of environmental risk and the identity of the addressee parallel. The actions and businesses of a private person will most often be smaller and less environmentally hazardous. If they are more significant, they deserve higher demands, despite the fact that the operator is a private person, or person that otherwise cannot be expected to have the necessary expertise. Considerations of reasonableness with regard to the identity of the addressee might be criticised from a perspective of equal treatment in view of the actual purpose and scope of the environmental law requirements.

However, the scope of the Environmental Code, and the wide enforcement powers, warrants some consideration of reasonableness in enforcement of the private person's actor responsibilities for information, or other considerations of factors on part of the addressee. In the actual enforcement situation it is easy to see that such considerations may be taken. It might also be argued that enforcing extensive duties for information on a private person is often less likely to be very effective. The authority will often have more expertise in the matter and may investigate it easier and quicker than the actor. Perhaps actor responsibility then becomes counter-productive in view of effective enforcement. The benefit is the addressee's learning experience. The question then becomes how necessary that experience actually is in the long run for the objectives of environmental law?

There is some indication that considerations of factors on the part of the actor are to some extent considered in practice. General enforcement guidance states that the decision of whether to intervene through enforcement should be based upon the assessment of the actor's capability for carrying out self-control. To some degree, considerations of the character of the actor that they are dealing with will influence the enforcement approach.¹⁴⁹⁴ In MÖD 2004:67, the Environmental Court of Appeal questioned the appropriateness of ordering a private person to carry the relevant responsibilities for knowledge and investigation, even though the need to take measures for better sewage treatment was recognised. It seems factors on part on the addressee are in practice significant to determining the appropriate enforcement approach, and the need for safeguards of legal certainty. This is where the vertical relationship between the state and the citizen is the clearest, and the need for reasonableness in exercise of public power against the individual the most clearly warranted. However, despite these indications, the sources will not give clear guidance on whether and how to take factors on part of the addressee into account when establishing the reasonableness of

¹⁴⁹³ Prop. 1997/98:45 Part 1 pp. 231–232, Part 2 pp. 24–25, and 283. See, also: NVV General Guidance NFS 2001:3 on MB 26:19–22.

¹⁴⁹⁴ See, for example: NVV Handbook 2001:4 p. 56.

information demands. This matter would benefit from clarification by the legislator, or in case law. To some extent, I do believe that a more explicitly applied purposive assessment of the reasonable demands in the individual case would meet the discussed needs for legal certainty and effective enforcement. Such approaches will be discussed further in Chapter 8, in comparison with English law on precision of orders.¹⁴⁹⁵

7.5.4 Summarising Grounds and Limits of Information Responsibilities

So far, it has been established that responsibilities for information in the enforcement of environmental law are shared between the addressee and the enforcer. While the authority has public tasks of realising environmental law goals, the addressee has extensive actor responsibilities, also for information. At the same time the enforcement authority must ensure support for its exercise of authority, and is hence responsible for ensuring sufficient decision-making materials. The expression of these responsibilities, and the more specific distribution of them, varies in different regulatory contexts. All the studied legal orders lay extensive information responsibilities on the actor in the context of permit regulation. The permit regulation is based upon a concessional idea of conditioned authorisation to carry out the action, which warrants such wide responsibilities. Such preset rules of the activity also provide foreseeability and legal certainty in the security of a permit decision. The permit procedure also provides a forum for considering a wide range of legitimate interests, and to compel the actor to take reasonable care for their protection. This promotes both formal and substantive legal certainty.

Outside the permit procedure, however, the situation is rather different. The fundamental idea of actor responsibility for the prevention of harm, and for promoting sustainable development is still warranted, but the means of implementation and enforcement are different. The information duties of the actor will follow from general rules, and it will be left to the administrative authorities to enforce them. The traditional approach of regulation outside the permit regime is the competent authority's supervision and inspection to investigate compliance with substantive legal requirements. The Swedish system is, however, intended to rest on enforced self-control. There are extensive actor responsibilities for information and self-control. For activities outside the permit regime, these are often only based upon generally formulated rules and principles, the enforcement of which can be challenging from a viewpoint of legal certainty. In Dutch law the principle of due environmental care has been held in case law to generally need specification in permit conditions or general rules. Independent or more extensive use of the

¹⁴⁹⁵ Sections 8.4.3, and 8.6.5.

principle to support enforcement is stated to be very limited.¹⁴⁹⁶ The preparatory works of the Swedish MB reflect similar criticism, but it is in the end stated that the general rules of consideration may be used directly to support enforcement action (even if the statements are somewhat contradictory).¹⁴⁹⁷ The Swedish enforcement order also contains explicit powers to enforce information responsibilities, either to improve self-control, to provide existent information to the authority, or to produce new information. This situation will change the basis for distribution of information responsibilities in the enforcement procedure. The actor is thus actively and potentially extensively involved in the administrative control of his own activity. The reach of these duties, and the enforcement powers in the Swedish system, have therefore been studied a little more closely, especially in view of foreseeability, reasonableness, and the administrative authority's basic responsibility for the administrative procedure. The general conclusion is that the authority cannot turn over all of the investigation to the actor. It is to keep charge of the decision-making procedure, but the actor is involved in the investigation on the specific step by step direction of the authority. The next question to investigate is how the actor's responsibilities for information is applied in the context of evidence.

7.6 Actor Responsibilities and Evidence

7.6.1 Introduction

The reach of different information duties, and the competences to enforce actor responsibility, has been investigated. This basically involves the actor's active involvement in the production of information needed for supervision and control of the activity. The actor's responsibilities are ultimately put to the test in the reliance of the information as proof. The actor stands the risk of insufficient information, as decision-making materials. Administrative decision-making in environmental cases is focused on assessments of appropriate management of resources, and of risks, and will therefore involve predictions of the future.¹⁴⁹⁸ In the environmental law context, this also involves predictions of complex natural systems. This entails extensive burdens of investigation and proof. The precautionary approach, and the conditioned rights of activity, will lead to the effect that an activity with uncertain environmental consequences cannot precede, and that the responsible actor, generally the operator of an activity, should not benefit from taking risks

¹⁴⁹⁶ See: Section 5.3.3.

¹⁴⁹⁷ See: Section 7.5.3.1.

¹⁴⁹⁸ Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisprövning i förvaltningsmål* pp. 96–97.

stemming from poor information, especially when the actor is often in the best position for gaining such information.¹⁴⁹⁹ The actor's responsibilities for information may, however, be argued as problematic from the perspective of legal certainty, particularly in the context of potential sanctions against the individual. Departing from the fundamental principle that the regulators must have legal grounds for their enforcement measures, this precautionary approach to information, making lack of information detrimental to the individual, may be open to criticism. The earlier discussed legal certainty and foreseeability, a shifted burden of proof in the enforcement of environmental law is also relevant. In the following sections the actor's burden of proof will be analysed, beginning with its expression and application in practice, mainly through some examples from case law.¹⁵⁰⁰ Some comparative observations will also be made. As discussed earlier in this chapter the English and Dutch systems, do not regulate a shifted burden of proof but rather a fundamental balance of probabilities, and the rule that the party taking action has the initial burden of proof, showing sufficient probability. The Dutch order, however, has a strong investigatory principle, and a subsequent burden of proof for sufficient investigation, making it more similar to the Swedish order.

7.6.2 Showing Cause and Assessing the Effects

The first matter to be discussed is the focus on assessment of risk and its effect on the evidence situation in environmental law enforcement cases.¹⁵⁰¹ As discussed above, this can involve understanding and predicting complex natural system functions and circumstances. Assessing the degree of risk, causality, or seriousness of the consequences, is challenging. Environmental control therefore involves assessment of appropriate risk management rather than establishing absolute proof. This reflects the principle of precaution, which means taking measures even though no actual harm has been proved. This is reflected in the shifted burden of proof, which facilitates administrative decisions, by making the actor carry the risk of uncertainty. The expression in case law of this burden will now be investigated in the context of evidence of causality.

¹⁴⁹⁹ Prop. 1997/98:45 Part 1 pp. 209–210. Compare: Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisprövning i förvaltningsmål* p. 83, arguing that the investigatory burdens in the administrative court procedure are shared where the individual has the burden of evidence – typically a permit procedure.

¹⁵⁰⁰ This illustration does not comprise a full presentation of the use of the rule, but only a representative and typical example, where the issue is explicitly discussed or seem to have been central in the process.

¹⁵⁰¹ See: SOU 1966:65 on regulation on enforcement competence based upon observed risks, to facilitate preventive and precautionary enforcement action as early as possible, and also for non licensed activities.

In MÖD 2005:9 the burden of proof was the subject of comment in a judgment ordering prohibition on the use of a private furnace. In the appealed judgment, the Environmental Court had quashed the original prohibition, basing its decision on the fact that there was no further investigation into the potential health issues and their connection to the relevant activity. The Court argued that the materials in the case did not sufficiently support the view that the neighbours were so negatively affected that the use of the furnace caused such nuisance so as to justify a prohibition on using the furnace. The argument echoes the general inquisitorial principle, and a duty to show legal grounds for an administrative decision. There was insufficient information to ensure sufficient decision-making materials, and the enforcers therefore could not have ensured the correct and appropriate decision. In other words, they had not provided proof of correct decision-making.

The Court of Appeal, however, judged differently. It held that the neighbours had issued complaints for a long time, and that the investigation gave reason to believe that the use of the furnace could cause a health nuisance for neighbours. The Court looked for indications of a potential risk. This risk triggered the enforcement competences. Proving the actual causation between the use of the furnace and the health problems was therefore not required. Essentially, the Court stated that it was for the actor to show to the enforcers that their activities were conducted in a manner that did not entail effects or otherwise counteract the goals of the Environmental Code, in a way not possible to restrict, or that it did not entail an unacceptable health and environment nuisance. They emphasised that the burden of proof was on the actor, and therefore the lack of proof of causality, and so on, as argued in the Environmental Court, was not to the benefit of the actor.

In the preventive and precautionary approach of environmental law enforcement, it may not be necessary to prove the concrete causal link between the use of that particular furnace and the neighbours' health issues. The complaints and claimed health problems function as indicators of risk. In the case of such risks the actor's information responsibilities, including the burden of proof, are triggered. This leaves the individual actor, here the person with the furnace, with the challenges of producing knowledge, investigation and proof of their adherence with environmental demands – here, that they were not causing unacceptable health problems or that their activities entailed legally reasonable risks thereof, risks that they did enough to control.

Something that is often very influential in the assessment of risk is different kinds of general guidance, recommendations, or standards. These are frequently not legally binding, but they often carry a lot of weight, both as indicators of environmental risks that need to be regulated and for establishing a legal standard. This is certainly true where the potential environmental effects are hard to prove in the individual case. The recommendations become normative standards of what is considered typically hazardous. They may be used to set reasonable demands, or where recommendations are not

followed, they can function as an indicator of a risk that activates the actor's responsibilities. In the furnace case, reference was made to rules in lower level legislation on furnaces in the construction of new buildings. These rules were not applicable here, but indicated cause to investigate the risks further. In cases of noise disturbances,¹⁵⁰² general guidance is central, both for the enforcers in their decision-making, and for actors in carrying out their duties. The existence of these kinds of standards, even though not legally binding, may have important functions in the perspective of legal certainty. They provide some idea of what is generally seen as the legal norm, and thus legitimate administrative demands, and their reasonableness. This promotes foreseeability, and thus the effectiveness of the system. The enforcement situation in practice seems to call for some general standards. This parallels the discussion above on foreseeability of information responsibilities.¹⁵⁰³

A comparable situation is that of reliance on product information as being sufficient to fulfil the burden of proof. The MÖD 2002:45 handled an enforcement case on a neighbour's complaint about the use of creosote-treated materials as a barrier. The neighbour's request for enforcement measures were rejected due to the fact that the information from the company providing the materials showed adherence to the regulations on chemical products, and that nothing had been produced to give reason to question the information. It should be noted that this case concerned a private person, which might entail lower demands of knowledge, investigation, and proof.

In a Judgment of the Environmental Court of Appeal on 29 December 2006,¹⁵⁰⁴ the Court held that the addressee had not shown that he had taken such precautionary measures as can reasonably be demanded to prevent damage or nuisance. Enforcement was therefore deemed legally motivated. The appealed Judgment of the Environmental Court of Växjö's decision on 14 December 2005¹⁵⁰⁵ describes more in detail the different circumstances and observations. Here, the one (and only) known flooding of the facility was seen as sufficient indication, together with some observations about the potential risks. The addressee had not proved his control of the system to be enough. It might be argued that this could be an isolated incident, and that this did not prove more permanent malfunction of the installation. No scientific evidence of the relationship between the observations and the claimed malfunctioning is indicated in the judgement. The incident was however described as a typical indication of the functional disorder of the facility. This reasoning suggests reliance on the experience of the enforcement authority and its inspectors. The situation may be compared to an investigation where samples have been taken; noise measurements, sewage water samples,

¹⁵⁰² For example MÖD 2001:17, and MÖD 2005:12, involving noise disturbances from rail roads.

¹⁵⁰³ Section 7.5.2.3.1.

¹⁵⁰⁴ Case M 169-06.

¹⁵⁰⁵ Environmental Court of Växjö's Decision on 14 December 2005, Case no. M 2592-05.

etc. Such samples or observations indicate a risk that triggers the actor responsibilities for information.

7.6.3 Reasonableness and Proportionality

7.6.3.1 Proof of Reasonableness

The actor may also have to produce evidence for the assessment of reasonableness of the environmental law requirement in the individual situation, and also of the appropriate precautionary measures to be taken to prevent or mitigate any environmental effects. According to the preparatory works, the actor should prove the unreasonableness of an ordered measure; for example, that the costs are not environmentally motivated, or that it is unreasonably burdensome. The older version of this rule referred to “reasonable” demands. The change of the wording to instead focus on proving “unreasonableness” marks a higher standard of proof, and influences the distribution of investigatory duties.¹⁵⁰⁶ An expression of such duties can be seen in MÖD 2001:17,¹⁵⁰⁷ where a local enforcement authority ordered a restaurant and nightclub business to take precautionary measures to reduce noise disturbance in the neighbouring residential area. The addressee appealed, and argued in the Court of Appeal that the earlier instances had not shown traces of any weighing of interests, as regulated in environmental law. Consequently, they had not carried out the investigations they should have. The appellant argued that the neighbours’ interests should be weighed against the benefits of the company’s operation, a restaurant and night club. They also referred to the general principle of proportionality.

The Environmental Court of Appeal confirmed that this kind of enforcement decision involved the balancing of involved interests. However, the interests to be balanced are the character of the surroundings and its sensitivity to noise disturbances on the one hand, and on the other, the benefit of the disturbing activity, and the costs, and so on, of the precautionary measures. The Court reviewed the enforcement authority’s investigation and found the decided noise levels justified. However, regarding the arguments of reasonableness and proportionality, the Court concluded that the addressee had not presented any investigation regarding the financial implications for the company of playing music with greater impact on the surroundings at the relevant hours, or regarding the costs of the noise reducing measures and what that would entail for their business. The addressee of an order must consequently produce evidence for claims of proportionality and reasonableness. Departing from the existing evidence in the case, and the fact that the inves-

¹⁵⁰⁶ Prop. 1997/98:45 Part 2 pp. 24–25; Michanek, G., *Att väga säkert och vikten av att säkra* p. 79.

¹⁵⁰⁷ MÖD 2001:17.

tigation did not show that the demands were not reasonable, because the addressee had not produced such evidence, the Environmental Court of Appeal saw no reason to change the decision of the lower courts.

In a comparative perspective, this might not seem so strange, as in the general administrative law case, an appellant would always have to present sufficient evidence for the appeal (and similarly in the judicial review case). A contrast can, however, be made with the Swedish inquisitorial principle (and perhaps the Dutch investigatory principle) which burdens the decision-maker with a further responsibility to show that their decision was made on sufficient decision-making materials, thus entailing an onus of proof. Here the Court instead departs from the lack of evidence to support the appellant's claim of unreasonableness, and lets them carry the loss thereof.

7.6.3.2 Reasonableness and Proportionality

Reasonableness in substantive demands and proportionality of enforcement action are separate matters. In the above presented case of MÖD 2005:9, on nuisance from a private furnace, the Court discussed the reasonableness and proportionality of the enforcement decision. Having decided on the grounds for the order, using the shifted burden of proof, they went on to try the choice of measure. They held that there were alternatives for the furnace owner, probably referring to technical upgrading as the furnace was observed not to be up to modern standards. The prohibition was therefore considered appropriate; in view of the nuisance for the surroundings, a prohibition on its use in its current state was not unreasonable. The proportionality of the enforcement measure was kept outside the actor's responsibility to provide information to prove adherence to material regulations. Uncertainties about the causation thus do not influence the assessment of the appropriateness of a prohibition. This might indicate the burden of proof regarding reasonableness of environmental demands resting on the actor, while the burden of proof for proportionality resting on the decision-maker.

In the nightclub case (MÖD 2001:17); the addressee argued that the actual orders, especially their timing, the time frame for carrying out the measures, and the actual size of the relevant fine, were not appropriate or reasonable. These arguments pertain to the more procedural proportionality of how the substantial demands are to be enforced. The investigation involved in this balancing of the appropriate enforcement measure, would logically not fall under the actor's burden of proof under MB 2:1, as that rule is systematically connected to the assessment of reasonable substantive demands on the actor. Having decided on reasonable environmental requirements, the enforcers should be responsible for investigation in the matter to support a decision on appropriate enforcement measures. The Judgment of the Environmental Court of Appeal, however, did not address these arguments, or question the enforcer's investigation, other than stating that the handling of

the case did not give reason to quash the decision, and that there was no reason to change the amount of the fine.¹⁵⁰⁸

The actor's responsibilities for knowledge and investigation has above been described in relation to information about the substantive facts, such as how their activity works, the quantity and quality of its environmental effects, and appropriate precautionary measures. These duties are limited by considerations of reasonableness. The proportionality of administrative enforcement action would however not fall within the scope of the actor's responsibility. The assessment of the proportionality of the enforcement authority's choice of action is another matter. This administrative responsibility is not shifted to the actor. The assessment of proportionality may however be influenced by the environmental law context, especially in the choice of enforcement instrument in response to a situation of uncertainty. A case where certain information about environmental risks is at the time of decision not attainable, may warrant strict enforcement action, even stopping the activity altogether. This matter will be discussed in Chapter 8, in the context of prohibition instead of orders of precautionary measures.

7.6.4 Proving Risk to Trigger the Actor's Responsibilities

Case law on environmental law expresses reliance on a shifted burden of proof. The enforcer's responsibilities for the decision-making materials, however, still remain. More or less clear references to the inquisitorial principle are made in the arguments of the involved parties, and the reasoning of the courts. This might confuse the issue, making the authority of the shifted burden of proof rule subject to question. This is where environmental law meets the administrative law structure. In the intervening enforcement situation fundamental administrative law demands that the authority ensures that its actions are within its legal competences. In itself, the shifted burden of proof does not replace the administrative authority's procedural responsibilities. Each and every actor is under a legal responsibility to ensure enough knowledge and investigation to assess whether they are in adherence with environmental law, and to take precautionary action if they are not. However, when a public body uses its authority to enforce such duties, or makes decisions that have actors carry the risk for uncertainties due to lack of information, it will have to ensure support for such action. As stated earlier, this fundamentally entails the assessment and management of environmental

¹⁵⁰⁸ It should be remembered that the Swedish administrative appeal is of a reformatory character. The appellate body does not necessarily send the decision back to the original decision-maker. They can make further substantive assessments and a new decision themselves. There is no need to cassate because of lesser faults in the enforcer's investigation. In MÖD 2001:17, the Environmental Court of Appeal's choice not to quash the decision could mean that they thought that no faults had been made in earlier procedure, or that such faults could be repaired directly instead of starting over.

risk. The shifted burden of proof facilitates such intervention by making the actor carry the risk of uncertainty, but the authority must show indication of such risk supporting its enforcement measures. If there is no risk, the actor's responsibilities to produce evidence are not warranted. The indication of risk triggers actor responsibilities. This functions as a threshold for the competence to enforce such responsibilities.¹⁵⁰⁹

Returning to the cases referred to in the above we can see the relationship between the actor's responsibilities for knowledge and proof, and the enforcement authority's responsibility for the administrative enforcement procedure. In the furnace case (MÖD 2005:9), the Environmental Court of Appeal looked for an indication of such a risk triggering enforcement competences. Having found such indication, the actor carried the burden of proof in a consequential enforcement procedure. Also the 2006 case concerning a private sewerage¹⁵¹⁰ can serve as an illustration here. In this case, there was rather little proof of how the installation worked. The Court relied on the evidence of a singular incident of a sewerage installation, together with general arguments of this being a typical indication of functional disorder, indicating some reliance on the expertise of the enforcement authority's expertise. As a consequence of the existence of such typical indication of risk, even though a singular incident, the Court approved of the enforcement demands. It stated that the addressee had not shown that he had taken such action or precautionary measures as can reasonably be demanded to prevent damage or nuisance.

It is interesting, in this context, to make a comparison to the above discussed case law on orders to make investigations, suggesting a step by step approach. In the discussed cases,¹⁵¹¹ the Courts have suggested that enforcement authorities must make initial investigations to find out what investigation is needed and only after that go to the actor for more precise demands of information. The enforcement authority making the intervening enforcement demands is generally burdened with producing the initial information, indicating a need for further investigation.

It can be concluded that the Environmental Code has widened and emphasised actor responsibilities for information. However, though these duties can be enforced, the enforcement authorities still answer for the procedure itself. The actor responsibilities in environmental law certainly shift in the burden of proof, and can take over a considerable amount of the investigatory burdens from the administrative authority. However, it does not take over the authority's responsibility for proper procedure, and ensuring a lawful decision. The authority must steer the case forward and arrive at an ap-

¹⁵⁰⁹ Nilsson, A. *Man ska vara försiktig* pp. 417–418.

¹⁵¹⁰ Environmental Court of Appeal Judgment of 29 December 2006, in case. M 169-06.

¹⁵¹¹ MÖD 2000:6; MÖD 2006:60; and Judgment of the Environmental Court of Appeal of 15 June 2009 in case M 5958-08.

propriate decision, based upon sufficient information. It cannot leave this responsibility to the actor.¹⁵¹² The actor's burden of proof, however, changes the focus of the administrative authority's responsibility. In the environmental case the authority has to show indication of risks, and then to make sure that the actor provides sufficient and relevant evidence of the proper management of these risks under law. Consequently, the shifted burden of proof does not in itself replace the administrative authority's procedural responsibilities. It coexists with the administrative authority's procedural duties of ensuring sufficient decision-making materials, acting within its competences, and leading a procedure forward towards a decision.

7.6.5 Comparative Remarks

7.6.5.1 Structural Comparison

As a point of departure the relevant evidence theories are different. The UK has the so-called civil standard of balance of probabilities, and an adversarial procedure where the one taking the initiative must start showing support for their claim. In the procedure at the administrative authority, the enforcement competence is widely formulated, and the system leaves quite a lot of discretion for the authorities. On appeal or application for judicial review, the appellant will have to show grounds for their claims. The order that a claimant has to show support for their claims is basically valid in the Swedish administrative court procedure too. While a similar balance of probabilities may be seen in the other legal orders as well, the notable feature of the Swedish and Dutch administrative procedures in the context of this thesis is that they rely on the inquisitorial/investigatory principle, which bases a fundamental burden of proof for the administrative authority.

In the Swedish administrative enforcement procedure, the burden of proof emanating from the inquisitorial principle is coupled by the environmental law shifted burden of proof. The application of this burden of proof in authoritative enforcement is discussed in case law and it is commonly found that the administrative authority must find indication of risk to trigger the competence to enforce based upon the shifted burden of proof. The English or Dutch environmental authorities cannot rely on any explicit actor burden of proof with which to support their enforcement decisions. They have a general duty, of course, to act within their competence, and reasonably so. However, when challenged, the claimant will have to provide evidence to make it probable that they have not acted inappropriately, and if so, they will have to make their case more probable, and so on, according to the balance of probabilities. It should be noted, however, that the environmental law principles of prevention, precaution and polluter pays, are also valid for the

¹⁵¹² MÖD 2004:23.

Dutch and English enforcers, through domestic environmental law, and through primary EU law. They should be able to rely on these in their enforcement action, making the actor carry the information duties, and in the weighing of evidence in the balancing of probabilities. To some extent the preventive and precautionary approach to evidence can be seen as a balancing of probabilities, with the purpose of protecting the environmental interests against the risks of uncertainties as to evidence. I have, however, noted such associations being argued in Dutch or English case law. In Dutch law, there is also a general duty for environmental care. This duty has, however, in case law been perceived as a general principle, mainly directed at the authority. The authorities should regulate through permit conditions or general rules, the more concrete duties that emanate from this principle of care.

Sometimes, the case law of Swedish environmental law enforcement procedure and the question of evidence, together show a strong resemblance to a balancing of probabilities. In MÖD 2002:45 for example, a neighbour had complained about the use of creosote-treated materials as a barrier. The neighbour's request for enforcement measures were rejected due to the fact that the information from the provider of the materials showed adherence to the regulations on chemical products, and that nothing had been produced to give reason to question the information. This could be argued to reflect a rather low threshold of the burden of proof, relying only on the accessible product information. The burden is then shifted back to the complainant, having to show more reason – evidence essentially – to shift the burden back. This procedure seems to rely more on a balance of probability order. The case of the noisy nightclub (MÖD 2001:17) also shows such resemblance. In cases presented in the above, the standard of evidence required for indication of risk are not that high, indicating that the administrative authority's burden of proof as to its acting properly within its competence, could be argued to be lower in the view of precautionary risk management of environmental law. The end result in practice relies on the required standard of proof, and how that proof is weighed.

7.6.5.2 Standards of Proof and Weighing of Evidence

Here we return to the basics: environmental law as fundamentally based in a preventive and precautionary approach. Consequently, the supervision and control thereof essentially entails risk assessment and management. The precautionary approach means that lack of proof does not hinder regulatory action. The existence of a relevant risk is enough. For the Swedish enforcement authority this means limited demands in the gathering of decision-making materials, or of expertise in the legal assessments. They only have to prove indication of a relevant risk, to trigger the responsibilities of the actor. Furthermore, the actor will then be burdened with the risk of uncertainties in the decision-making materials. The cases above have indicated that enforcers may rely on the typical risks connected to certain activities, and to certain

incidents, often coupled with the general standards described in general technical recommendations or guidance. Sometimes, the experience of the enforcers and other public officers are noted, even though no direct statements of their authority are expressed. This seems a fundamental advantage for the enforcement of environmental law. The Swedish system's use of a shifted burden of proof would therefore indicate the potential for comparatively effective enforcement.

There are differences in the evidence theory of administrative procedures in the compared systems. But the end result may not be that different after all. The effects of the differences may, however, be seen in matters other than the effective enforcement of environmental law. Some comparison can be made here with the English system.

As described earlier, English enforcers enjoy a wide discretion in their assessment of whether, and what kind of, enforcement action is necessary and appropriate. The regulated enforcement authority is based upon their discretionary assessment, even though it has to be reasonable. On appeal or judicial review, there is no general added burden of proof on enforcers. They hold an extraordinary position in the relationship towards the addressee, whether an individual citizen or a large corporation. The regulator is generally entrusted with a fair amount of authority and weight in relation to their arguments, making the task of proving to the contrary very burdensome indeed.

This authority can be illustrated by the common law rule of *omnia prae-samuntur rite esse acta*,¹⁵¹³ which applies both to the exercise of central and local authority powers.¹⁵¹⁴ According to this rule, public officers are said to be presumed to have acted with honesty and discretion within the limits of their authority, as long as there is no evidence to the contrary. In the case of appeal, it is the appellant that has to show that the decision was wrong, or at least a certain probability of this, and then subsequently the balancing can begin. Challenging a decision in a judicial review entails that one has to argue its illegality. If and when the complainant shows evidence to the contrary, the scales will tip accordingly and the defendant will have to reply. The standard is thus again the balance of probabilities. So the burden is on the applicant, and the presumption is that the authority has acted correctly. This raises the standard of proof. How much evidence that is needed to shift the burden of proof to the part of the authority whose decision is challenged, varies with the nature of the case. If an order is challenged on the grounds of unreasonableness; or if the issue is that the authority has to be satisfied of

¹⁵¹³ *Earl of Derby v. Bury Improvement Commissioners* (1869) LR 4 Exch. 222, approved in *R. v. Inland Revenue Commissioners ex p. T.C. Coombs & Co.* [1991] 2 A.C. 283; and *Point of Ayr Collieries Ltd v. Lloyd-George* [1943] 2 All E.R. 546

¹⁵¹⁴ *Vale of White Horse DC v. Allen & Partners* [1997] Env L.R. 212, referring to *Stoke-on-Trent CC v B & Q (Retail) Ltd* [1984] Ch 1.

something or have a certain opinion; the burden is heavier than if the decision has an apparent fault.¹⁵¹⁵

Additionally, it may be observed that in the case where the enforcement authority may have provide evidence in response to such claims, the professional knowledge and the experience of the inspector constitutes an important consideration that shifts the burden of proof to the actor once again, having to show him or her to be erroneous. This means that the burden of proof may be argued to be lighter for the enforcement authorities. Some examples can be derived from case law.

In statutory nuisance cases, a fundamental issue is determining whether the alleged disturbance amounts to a statutory nuisance; for example, when noise interferes with a neighbour's reasonable enjoyment of property. In such instances it has been held in several cases that it is not necessary to rely on witness statements from the particular neighbour, or to even have received complaints from or asked for the opinion of neighbours. The evidence of police officers witnessing the nuisance, or expert witnesses, including enforcement officers can well be relied on to prove that a nuisance was at hand.¹⁵¹⁶ Their statements of observations made at an inspection weigh heavily as expert evidence in court.

Another illustration of the weight of enforcement officers' statements as expert witnesses is the case law that scientific measurements are not required as evidence.¹⁵¹⁷ There have been a number of cases where an enforcement officer has given his or her professional opinion and accounts of observations. It is held that in general there are no requirements, statutory or at common law, as to the type of evidence needed. The balancing of the evidence falls back on the balance of probabilities looking at all the evidence given in the case. Refusing to convict only because there was no scientific measurements provided as evidence is an error at law. The judges cannot require the production of a certain type of evidence, for example, acoustic measurements in case of noise disturbances, as a precondition to convict. They may, of course, not be convinced by the statements of the enforcement officer as amounting to the standard of proof, and in those cases, the absent of scientific evidence, or witness statements, or any other kind of evidence for that matter, may well be cause for a rejection of a conviction.¹⁵¹⁸

It is also sometimes explicitly argued in cases where the expert statements of enforcement officers are the only evidence, that the absence of evidence

¹⁵¹⁵ Wade, W., and Forsyth, C., *Administrative Law* p. 293, and *Potato Marketing Board v. Merricks* [1958] 2 Q.B. 316 at 331; *Cannock Chase DC v. Kelly* [1978] 1 W.L.R. 1; *Point of Ayr Collieries Ltd v. Lloyd-George* [1943] 2 All E.R. 546.

¹⁵¹⁶ *Wellingsborough BC v. Gordon* [1993] Env. L.R. 218; *East Northhamptonshire DC v. Brian Fossett* [1994] Env. L.R. 388; *Cooke v. Adatia* (1989) 153 JP 129; *Westminster CC v. MacDonald* [2005] Env. L.R. 1.

¹⁵¹⁷ *R v. London Borough of Haringey ex p. Hibbert* [2001] Env. L.R. 29; *Lewisham LBC v. Hall* [2003] Env. L.R. 4; and *Westminster v. MacDonald* [2005] Env. L.R. 1.

¹⁵¹⁸ See: *Lewisham LBC v. Hall* [2003] Env. L.R. 4.

to the contrary leads to the conclusion that their statements are proved, or at least are not disproved, and that is the central issue in cases where the balance of probability is the standard of proof.¹⁵¹⁹ It is also argued that even though the court is not forced to accept the expert evidence of the officers, valid reasons have to be advanced to justify their rejection.¹⁵²⁰ This system could be argued to make the enforcement task easier. If the authority also has the expertise they are ascribed, and the will to implement it, this would indeed provide for more effective enforcement.

It should, however, be noted that the mere fact that a person is an English enforcement officer does not make them an expert. It is stated in the London Borough of Southwark v. Simson¹⁵²¹ that any building surveyor, building inspector or environmental officer with appropriate knowledge and expertise can properly testify, but in a case where the officer in question stated himself not to be medically qualified to provide evidence, nor did he claim the experience necessary for this, except for reading some articles on the matter in question, damp problems, and that he had no better expertise than a layman to state if the damp in question was prejudicial to health. His evidence was therefore not considered admissible. One can also note that in many cases the years of service and the education of the officer is stated, supposedly to show his qualification (by experience) as an expert witness. The main point is that we can see in the Court's arguments, assessments of the expertise and experience of the enforcers, and explicit statement of reliance on such expertise, in a way that I do not recognise from the Swedish discourse.

Swedish case law shows little reliance on the expertise and experience of enforcers, though there are indications in the weighing of evidence in some cases, of some weight to the expertise of an inspector.¹⁵²² The perceived expertise of the authority is sometimes argued to warrant more extensive duties for the decision-making authority.¹⁵²³ The presented English discourse seems quite different. Statements from administrative authorities or their officers can be given more weight. However, it does not give such evidence a special status. On the other hand, Swedish enforcers generally only have to indicate relevant risk to shift the burden of proof to the actor in the enforcement case. The English enforcers may not be in that great a need for such an actor burden of proof, as they have lower evidence demands as it is. However, they should legally be able to argue the environmental principles in the balancing of evidence, if their environmental enforcement action is challenged.

¹⁵¹⁹ For example in: *R v. London Borough of Haringey ex p. Hibbert* [2001] Env. L.R. 29.

¹⁵²⁰ *Westminster v. MacDonald* [2005] Env. L.R. 1, at p. 7.

¹⁵²¹ [1999] Env. L.R. 553.

¹⁵²² See for example: Judgment of the Environmental Court of Appeal on 29 December 2006, Case no. 169-06.

¹⁵²³ JO 1997/98 p. 418, at p. 421.

7.6.5.3 Concluding Remarks

In conclusion, this comparison has shown that the actor's burden of proof in environmental enforcement cases is only found in Swedish law. All the studied orders include procedural responsibilities for the authority, which more or less include investigatory duties. In Dutch and Swedish law the duties are the strongest, with a fundamental inquisitorial/investigatory principle, and a subsequent burden of proof. In Swedish environmental law, the actor's burden of proof, and general information responsibilities, supplement the procedure, and make the investigatory burdens lighter for the authority. English law demonstrates another way of raising the demands for evidence on the addressee, within the balance of probability. In this order, the authority has a stronger position in the evidence situation. They are in principle presumed to have acted properly, so that evidence to the contrary will have to be proved so much as to tip the balance. Furthermore, the expertise of the enforcement officer is given more authority in the English system. This seems to reach the same result of facilitating environmental enforcement. It should nevertheless be noted that this is only effective if the authority chooses to take enforcement measures. If it does not, this is also presumed to be proper. Much faith is put in the appropriate exercise of discretion. The inquisitorial/investigatory principle requires the authority to show support for the correctness and appropriateness of its decision, which better protects the legal certainty of the individual citizen. In the context of environmental law, and the actor's responsibilities for information, the burden of proving this is nevertheless made easier. This does not mean that the protection of legal certainty is removed. The authority's responsibility is to ensure it is still valid. In my view the shared responsibilities for the investigation best meet the need for protection of legal certainty of the addressee – the actor – as well as the legitimate environmental interests of others, and the assurance of the proper exercise of administrative tasks for furthering such interests.

7.7 The Context of Sanctions

7.7.1 Introduction

The context of different kinds of sanctions¹⁵²⁴ adds a dimension to actor responsibilities in environmental law enforcement.¹⁵²⁵ Imposing sanctions on

¹⁵²⁴ The word "sanction" is sometimes difficult to use, given the penal law connotations it carries. I will use the term as a common word for different kinds of authoritative interventions by the public authorities against behaviour that is or has been in breach of law. This comprises criminal law interventions as well as administrative law interventions, for example administrative charges and fines (compare: SOU 2002:50 pp. 211–212) Thus, reference to an enforcement instrument as a sanction does not make it a criminal enforcement instrument.

individuals in response to their breaches of law constitutes a more intrusive exercise of authority. More qualified procedural safeguards of legal certainty are therefore generally demanded. This may entail further challenges to the enforcement system, especially one relying on actor responsibility for knowledge. Sanctions are, however, also central parts of the administrative enforcement system. They are used to put pressure on the addressee, to convince, or coerce them into compliance. Enforcement orders may be coupled with conditional fines, and breach of the permit conditions and general rules, with which the administrative authorities control compliance, may be sanctioned through criminal or administrative sanctions. Sanctions are sometimes also required through EU law.¹⁵²⁶ In the English system, non-compliance with enforcement orders is also criminalised. Perhaps the application of administrative enforcement instruments, and indeed the extent of the responsibilities per se, might well be influenced by a connection to sanctions. This could influence the burden of proof in the different processes, as well as the powers to require the actor to ensure sufficient information, and to cooperate with enforcers in the steering of the activity.

Criminal enforcement may be described as the most serious and intrusive exercise of the state's power against the individual. The exercise of such authority is therefore placed under many different procedural restraints so as to guarantee legal certainty. Such guarantees are expressed in the ECHR, Art. 6, stating the right to a fair trial, the presumption of innocence, and some minimum procedural safeguards, such as the right to be informed of the charges, and the right to a defence, etc. Most of the procedural safeguard apply to persons under "criminal charge", but may to some extent also apply to administrative sanctions; administrative fines, and other enforcement instruments that use administrative authority against citizens. This study is focused on administrative enforcement. Connections to criminal enforcement are nevertheless very influential in the administrative process, which will be described in the following.

The described influences include organisational issues, questions of evidence, and of the right to remain passive – or protection against self-incrimination. These influences will also be discussed in the following. First the connection between administrative and criminal enforcement will be considered, as well as the influence on the burden of proof in administrative enforcement. In Section 7.7.5, the specific issue of self-incrimination will be discussed in the context of information duties in the administrative enforcement case.

¹⁵²⁵ See for example: NJA 2006 p. 310.

¹⁵²⁶ See: SOU 2004:37 pp. 19 and 53–54; and Section 1.2.4. above.

7.7.2 Connection to Criminal Enforcement

Administrative enforcement of environmental law is inherently connected to criminal procedure. An administrative enforcement case may result in criminal proceedings, investigations, prosecution, and trial. The administrative and criminal investigations may then overlap, temporally, functionally, and otherwise, and the information found in the administrative case may be used as evidence in the criminal case. The point of departure, however, is that these processes are generally different and separated.

Criminal and administrative enforcement involve different investigatory instruments, have different functions and aims, and are often conducted by different authorities. Administrative enforcers have a different function and approach than detecting and proving crime. Their main goal is preventive and reparatory action, and they will steer the actor, through communication of information and advice, and enforcement orders. This entails more direction of the actor's behaviour, rather than focusing on culpability. Administrative enforcers have powers of entry, allowing them to enter the property of the activity to make inspections. They may investigate technical equipment and machinery, and so on, even without the owner's consent. In this exercise of authority, they may be assisted by police, but only to protect the enforcers in order to facilitate inspection. Only such measures may be taken that are necessary for the enforcement authority's exercise of its administrative tasks.¹⁵²⁷ These powers are in many ways less extensive and intrusive than those of criminal investigators, who may interrogate individuals, search homes and seize property.

The different and separate enforcement functions are often reflected in the institutional organisation. In the Swedish legal order prosecution for criminal offences is the exclusive competence of the Swedish Prosecution Authority, through the different regional Public Prosecuting Offices. The criminal cases are tried in the general court system, not in environmental courts. The responsibilities of the administrative enforcement authorities are basically limited to reporting the factual circumstances amounting to a suspected criminal offence to the police or the prosecutor's office (MB 26:2).¹⁵²⁸

Dutch law has an organisational structure similar to that of Sweden.¹⁵²⁹ As described in Chapter 4, the English system, however, very much focuses on criminal enforcement. Also the administrative enforcement authorities prosecute. This means that the same authority carries out the different procedures. Enforcement authorities generally have wide powers of entry and investigation of premises for the purpose of carrying out their functions

¹⁵²⁷ Prop. 1997/98:45 Part 2 p. 293.

¹⁵²⁸ Prop. 1997/98:45 Part 2 p. 267.

¹⁵²⁹ Blomberg, A., and Michiels, L., *Between Enforcement and Toleration of Breaches of Environmental Law – Dutch Policy Explained* p. 182.

within administrative enforcement.¹⁵³⁰ As they start to suspect a criminal offence and begin investigating it with a view to future prosecution, they will have to follow the rules of criminal proceedings – for example, cautioning the suspect, and allowing them legal assistance. However, the administrative enforcement work may continue. A person cautioned on suspicion of a crime, and not having to make sworn statements, and so forth, may still be ordered to produce documentation and other information in the parallel administrative enforcement procedure.¹⁵³¹

Notwithstanding the fundamental comparative differences, administrative and criminal investigation and enforcement procedures are also inherently connected in the Swedish enforcement system.¹⁵³² The Swedish enforcement authorities are under duties to cooperate for effective and relevant enforcement. The preparatory works emphasise strongly that the administrative enforcement authorities and police and prosecutors should coordinate their resources and cooperate to ensure the most effective possible enforcement with regard to offences against the environment.¹⁵³³ Administrative enforcement and criminal processes are connected in practice too. Environmental offences are discovered, and also investigated by the inspectors of the administrative authorities. Most offences are discovered through pre-announced inspections and the study of the actor's reports to the enforcers.¹⁵³⁴ From the perspective of the addressee of enforcement and a potential suspect of environmental crime, the procedural orders are interconnected. He or she may find the legalistic separation of the functions and rules fictive, and as a way around the rights of the individual. Such arguments have been advanced in case law.¹⁵³⁵

¹⁵³⁰ See: Sections 4.5.8, and EPA 1990 Sch. 3 Para. 2, the Water Resources Act 1991 Section 161, and the Environment Act 1995 Section 108.

¹⁵³¹ This was the situation in the Green case (*R v. Hertfordshire County Council, ex p. Green Environmental Industries Ltd & Another* [2000] Env. L.R. 426) which will be further discussed in Section 7.7.6.

¹⁵³² Prop. 1997/98:45 Part 1 p. 495, in describing the reporting of a suspected crime to police and prosecutor as inherent in the administrative enforcement activities/work. The importance of cooperation between administrative enforcers, police and the prosecuting offices, is also explicitly emphasised.

¹⁵³³ MB 26:6, Prop. 1997/98:45 Part 2 p. 270, NVV General Guidance NFS 2001:3 p. 5, on MB 26:1. See, also: FL Section 6, stating that an administrative authority shall within its field of responsibility, provide assistance to another authority.

¹⁵³⁴ SOU 2004:37 p. 318; and BRÅ Webbrapport 2006:5, Skagerö, A., and Korsell, L., *Är vi bra på miljöbrott?* pp. 22 and 26–27.

¹⁵³⁵ In MÖD 2004:64, the appellant argued that the order was in fact a consequence of an inspection visit to the site of the operation, in the company of police. (Obviously the appellant suspected that the enforcers were helping police and acting as criminal investigators). In RÅ 1996 ref. 97, the appealing addressee of the tax authorities auditing measures argued that the measure was in fact due to suspicion of criminal offences, and that the investigatory measures by the tax authority were in reality a hidden criminal investigation, and he should be protected by the fair trial guarantees of criminal procedures, as described in Art. 6 of the ECHR. In the English Green case the administrative order to submit information was argued to be used as “a device to bypass the rules against self-incrimination”.

As thoroughly described in this chapter, the actor has wide information duties in the Swedish system, and a lot of the information can prove incriminating, at least in future. To a great extent the function of the actor's information duties is to show that they are adhering to law. The environmental reports are, for example, supposed to show in some detail that permit conditions are being followed and how. As breach of permit conditions and operating outside the permit is generally criminalised in all the studied legal orders, there is a connection with the reported information and any criminal investigation. In this way a defendant in criminal proceedings might at some point in time be providing evidence against himself, by obligation of law and orders of state authorities. This can be challenged on the grounds of human rights and the right to a fair trial.¹⁵³⁶

The fair trial right to remain passive will be further discussed under Section 7.7.6. The fair trial rights mainly apply to criminal procedure, and not the administrative enforcement procedure. The matter has, however, been developed in the case law of the European Court of Human Rights so as to apply also to administrative procedure, under certain circumstances. This case law holds that the categorisation of a procedure as criminal is independent of the terminology and organisation of the national legal order. It is to be interpreted functionally.¹⁵³⁷ Also national case law states generally, with reference to European law, that the relevant fair trial rights may also be applicable in an administrative procedure.¹⁵³⁸ Much of this discourse relates to the connection between the administrative procedure and criminal prosecution. Typically, the investigations are conducted parallel to each other, or the administrative enforcers will report to the police, and supply their investigation as evidence in any consequent criminal procedure. This connection thus leads to application of the individual's right to remain passive, already in the administrative procedure.¹⁵³⁹

In summary, the connection to criminal procedure and criminal sanctions warrant extended safeguards of legal certainty. This may entail subsequent challenges to the enforcement of actor responsibilities for information. This aspect is certainly relevant in a legal order such as the English one, where

¹⁵³⁶ ECHR Art. 6, Darpö, J., *Miljö rätt och Europakonventionen* pp. 80–97, Lundin, O., *Officiälprincipen* p. 183

¹⁵³⁷ *Funke v. France*, Judgment of 23 February 1993; and *Bendenoun v. France*, Judgment of 24 February 1994. See, also *Deweert v. Belgium*, Judgment of 27 February 1980; and *Serves v. France*, Judgment of 20 October 1997.

¹⁵³⁸ NJA 2001 p. 563, RÅ 1996 ref. 97, MÖD 2004:64 (Sweden); *R v. Hertfordshire County Council, ex p. Green Environmental Industries Ltd & Another* [2000] Env. L.R. 426 [1998] Env. L.R. 153 (UK); Hoge Raad 19 September 2006, nr. 00895/05 E, AB 2007, 2 (The Netherlands).

¹⁵³⁹ Compare also the reasoning in legislative preparations in tax law: Prop. 1997/98:10 p. 62, and SOU 1996:116 (esp. p. 146), where the impact of ECHR Art. 6 was investigated. The tax administration's considerations of Art. 6 were mainly motivated by the close connection to and communication with a parallel criminal procedure. The preparations led to a prohibition on coercive administrative measures when there is also a criminal suspicion.

enforcement is very much focused on criminal law enforcement, and non-compliance with administrative orders is often criminalised. There are also different kinds of administrative sanctions in all the described environmental law enforcement systems. These will be discussed next.

7.7.3 Administrative Sanctions

Environmental law is mainly enforced through the administrative procedures, and with the help of administrative coercive instruments and sanctions, which can be heavy. The question is whether the threat of administrative sanctions, and the enforcement thereof, can be compared to that of criminal sanctions, which has been described as the most serious and intrusive exercise of public authority, thus warranting further safeguarding of legal certainty. The matter has been discussed in the Swedish discourse. Already in 1977 Petréén discusses the "tendency in newer legislation" to replace criminal sanctions with administrative fees, for example, in tax law. Petréén argued that these cases must state the same demands on evidence as in the criminal procedure, as they are, as he put it, in reality in a simplified such procedure.¹⁵⁴⁰ Other commentators argue that administrative sanctions cannot be paralleled to criminal sanctions, as they do not have the penal function of claiming liability for guilt, or culpability. The function of administrative sanctions is focused on upholding something that the public law rules are set to protect, or secure.¹⁵⁴¹

The legal discourse to some extent parallels criminal and administrative sanctions, even though it is not always that clear when and how far this analogy applies. Such analogy would in general entail that the procedural safeguards for the criminal suspect are applicable in procedures that involve administrative sanctions.¹⁵⁴² This could, for example, influence the burden and standard of proof in the administrative enforcement situation, and entail even further application of the typical fair trial rights. These influences may thus challenge a reliance on actor responsibility for information in administrative enforcement, when such enforcement depends on the threat of sanctions. The term sanctions can, however, be used in different ways and often carries strong connotations of criminal punishment by imprisonment or fines. However, for the sake of this analysis, I refer to the term widely. Sanctions in the context of enforcement of environmental law, may involve:

¹⁵⁴⁰ Petréén, G., *Om förvaltningsdomstolarnas utredningsplikt* p.160. Petréén argues that the court's investigatory duties of the inquisitorial principle is modified by the influence of the investigatory principles of the criminal procedure. Petréén does not specify what kind of administrative sanctions he is referring to. Notably, however, administrative sanction fees were introduced in tax law in 1971. The construction has since become common in various fields of Swedish law.

¹⁵⁴¹ Von Essen, U., *Processramen i förvaltningsmål* pp. 27–29.

¹⁵⁴² RÅ 1993 ref. 76 (about revocation of a driver's licence which was held a measure close to criminal enforcement); von Essen, U., *Processramen i förvaltningsmål* pp. 41–42, and 104.

criminal sanctions, administrative fines of different kinds and purposes, and perhaps also other detrimental authoritative decisions. These functions and their purposes have been discussed under the country reports in Part II.

Criminal sanctions will have a punitive function. They aim at punishing unwanted behaviour, criminalised in general regulation. Administrative sanctions may involve such functions, even though they are generally milder than criminal sanctions, and not based upon culpability. They do not include imprisonment, which is the most intrusive sanction. Administrative penalties are found in the Swedish environmental sanction fees, but have also recently been widely introduced in the Dutch *bestuurlijke boete*, and the monetary penalties in English Civil Sanctions. These sanctions involve simpler and faster procedures than criminal sanction. They are effective in terms of enforcement of breaches of law. This kind of system furthers the preventive purposes of sanctions, as the immediate reactions of the administrative enforcers communicate non-acceptance and directs the actor more clearly.

Administrative fines may also be conditional, such as the Swedish conditional fine (“vite”), and the Dutch *dwangsom*. Here, punishment of offences is not the intent. The aim is to change the behaviour of an actor under the threat of financial penalty.¹⁵⁴³ The fine is always preceded, in the individual case, by a sort of warning, directing the addressee as to what to do to avoid the fine. Apart from these sanctions, the administrative competence to stop, suspend, prohibit, or even to revoke or review the permit of an actor, may actually function very much like a sanction. To some extent, the taking of such enforcement action may call for consideration of more extensive *Rechtsstaat* considerations comparable to the criminal procedure.¹⁵⁴⁴ This kind of administrative sanction is, however, also an expression of the public task of ensuring proper professional conduct to protect the interests of the public. This applies to the revocation of permits to practice medicine, to drive a car, or to operate a factory that involves potential health hazards to the surrounding population, etc. Revocation thus entails the calling back of an authorisation, but at the same time it can be seen as a disciplinary action against culpable behaviour.¹⁵⁴⁵

¹⁵⁴³ Prop. 1997/98:45 Part 2 p. 275; and SOU 1996:103 Part 2 p. 308, on the purpose of the conditional fine in MB 26:14. See, also: von Essen, U., *Processramen i förvaltningsmål* pp. 27–28, arguing that the conditional fine and the awarding thereof cannot be paralleled to a criminal sanction; Sundberg, H., *Allmän förvaltningsrätt* p. 677. Compare, however: Lavin, R., *Förvaltningsprocessen inför 2000-talet* pp. 453–454, and 458 arguing that conditional fines are so similar to penal fines that they should be handled more like criminal cases.

¹⁵⁴⁴ See: NJA 2006 p. 310, where the Supreme Court argued stricter demands of legal certainty in the context of criminal sanctions, but also of the possibility of permit revocation.

¹⁵⁴⁵ Von Essen, U., *Processramen i förvaltningsmål* pp. 38–41 on the evidence issues. For examples in case law, see: RÅ 2001 ref. 26 (on a prohibition to take in children in a private home, not as a punishment for culpable behaviour but as future protection of the health and welfare of children); RÅ 2002 ref. 25 (arguing the revocation of a driver’s licence after conviction of a crime as an administrative safety measure, and not a criminal penalty. Nonetheless, the measure could be seen as criminal enforcement in view of the ECHR).

In summary, the notable differences are between punitive sanctions and the more direct steering of the individual actor's behaviour. Moreover, criminal punishment should be harsher, and may include imprisonment. Criminal punishment is also normally, but not always, founded on subjective factors such as culpability. Environmental law can be said to involve a glide in this aspect because of its ties to the objective results in the environment. This is certainly true in the English system, which applies a kind of strict or "absolute" culpability in environmental crimes.¹⁵⁴⁶

7.7.4 To What Extent Do Criminal Procedural Safeguard Apply to Administrative Sanctions?

7.7.4.1 Prerequisite of the Criminal Charge

To some extent, criminal procedure may apply to administrative sanctions. The legal discourse, which is rooted in the case law of the European Court of Human Rights, has certainly involved claims that administrative enforcement procedures may necessitate safeguards connected to the criminal trial. Much of this discourse relates to the connection between the administrative procedure and criminal prosecution, as discussed earlier. However, analogous application to administrative forms of sanctions has also been discussed. Some of the discourse will be referred to here.

First of all, it has been pointed out in case law that the formal label or legal context of the sanction is not decisive as such. An early case on the matter, *Öztürk v. Germany*,¹⁵⁴⁷ stated that decriminalisation of an offence did not automatically entail that the relevant criminal procedural safeguards stated by the ECHR could be disregarded. The judgment was motivated by the functional and autonomous interpretation of the term "criminal charge", independent of the national organisation and terminology. The Court stated that the relevant administrative sanction, which had replaced an earlier criminalisation of a traffic violation, had a deterrent and punitive purpose. It was therefore viewed as criminal punishment. Other criteria that have been used to categorise a sanction, and the procedure leading up to it, as criminal within the terms of the ECHR, are the severity of the sanction (generally the size of the monetary amount), the lack of rules to delimit it, and the fact that it could be transformed into a prison sentence, the general application of the regulation. The Court has argued that the collected assessments of these cri-

¹⁵⁴⁶ For further comparative analysis in the ENFORCE-project, of the criminal enforcement system, see: Jönsson, S., *Miljöstraffrätt – ett sätt att genomdriva lagstiftningens mål?*

¹⁵⁴⁷ *Öztürk v. Germany*, Judgment of 21 February 1984. See, however: *X and Y v. Germany*, Decision of 17 December 1966, and Mårsäter, O., *Folkrättsligt skydd av rätten till domstolsprövning* p. 39, on earlier law on the matter.

teria, and different factors, seemed decisive in different cases.¹⁵⁴⁸ However, the deterrent and punitive function is central, especially when coupled with heavy sanctions.¹⁵⁴⁹ The possibility open to transform the sanction into a prison sentence is expressly stated as being unnecessary.¹⁵⁵⁰

7.7.4.2 Administrative Sanction Fees – Punitive Purpose

The punitive aspect appears to be a crucial functional characteristic. A punitive sanction is repressive, in its purpose and severity. It punishes unacceptable behaviour. This seems the harshest and most intrusive exercise of public authority against the individual. Therefore, administrative fines of such punitive character would be covered. The increasing number of administrative sanction fees has also been paralleled to criminal sanctions.¹⁵⁵¹ In Swedish law, different kinds of sanction fees have been widely used since the additional taxation fees (“skattetillägg”) were introduced in 1971. Their benefits in terms of effectiveness and the possibility available to tailor their application and contents to the relevant situation have led to their introduction in many different areas of law.¹⁵⁵² Their consequences and potential conflicts with principles of legal certainty and human rights have been debated, especially in relation to the ECHR and the *ne bis in idem*-discussion.¹⁵⁵³ In a re-

¹⁵⁴⁸ See: *Garyfallou AEBE v. Greece*, Judgment of 24 September 1997; *Inocencio v. Portugal*, Judgment of 11 January 2001; *Salabiaku v. France*, Judgment of 7 October 1998; *Bendenoun v. France*, Judgment of 24 February 1994, *Lauko v. Slovakia*, Judgment of 2 September 1998; *Kadubec v. Slovakia*, Judgment of 2 September 1998; *Janosevic v. Sweden*, Judgment of 23 July 2002; and *Västberga Taxi AB and Vulic v. Sweden*, Judgment of 23 July 2002. Compare: Mårsäter, O., *Folkrättsligt skydd av rätten till domstolsprövning* pp. 40–42.

¹⁵⁴⁹ Compare: Warnling-Nerep, W., *Sanktionsavgifter: Sanktioner i gränlandet mellan straffrätt och förvaltningsrätt*, pp. 492–493; and *Sanktionsavgifter – ”criminal charge” under Art. 6?* pp. 565–567.

¹⁵⁵⁰ See, for example: *Lauko v. Slovakia*, Judgment of 2 September 1998; *Kadubec v. Slovakia*, Judgment of 2 September 1998.

¹⁵⁵¹ For example, in: SOU 2002:50 p. 224; SOU 2004:37, p. 59; but also on tax law administrative fee (“skattetillägg”): NJA 2000 p. 622; and Prop. 2002/03:106 p. 80. See, also: Warnling-Nerep, W., *Sanktionsavgifter: Sanktioner i gränlandet mellan straffrätt och förvaltningsrätt*, esp. pp. 496–497; “Sanktionsavgifter” – “criminal charge” under Art. 6? p. 567; and Zila, J., *I stället för straff – sanktionsavgifter som kriminalpolitiskt medel mot bagatellbrottslighet*.

¹⁵⁵² Apart from the environmental sanction fees in the Environmental Code Chapter 30 and additional taxation fees in the Taxation Code (SFS 1990:324) Chapter 5, also for example, the sanction fee in professional fishing in the Fisheries Code (SFS 1993:787), the special fee according to the Animal Welfare Code (SFS 1988:534), and the marketing disturbance fees in the Marketing Code (SFS 2008:486).

¹⁵⁵³ ECHR Protocol 7 Art. 4.1. The matter has been heavily debated in Sweden, in the context of parallel administrative sanction fees and criminal prosecution; see, for examples: NJA 2010 p. 168; NJA 2000 p. 622; RÅ 2000 ref. 65; SOU 2001:25 p. 206; SOU 2002:50 pp. 223–224. and 245, SOU 2004:37 p. 74 and onward; Prop. 2005/06:182 p. 244–245, Cameron, I., *Högsta domstolens beslut om dubbelbestraffning ur ett konstitutionellt perspektiv*; Palm, E., *Dubbelbestraffning och Europadomstolens praxis*; and Åhman, K., *Europakonventionen och förbudet mot dubbelbestraffning*. See, also: Darpö, J., *Miljö rätt och Europakonventionen* pp. 101–116, with many references to the tax law discourse.

view of the environmental law sanction system, the rules on fair trial drawn from European law were also considered applicable for environmental sanction fees.¹⁵⁵⁴ They are stated to be similar to a criminal sanction in relevant aspects, mainly their punitive function and potentially quite high fees.¹⁵⁵⁵ Even though they are inherently different and should have different functions in the enforcement system, they require similar considerations of the rights of the individual.¹⁵⁵⁶

The general view in Swedish legal discourse thus seems to be that the administrative sanction fees should fall under the extended procedural safeguards in criminal procedures, mainly in view of Art. 6 of the ECHR. Also in the Dutch and English systems, where similar kinds of administrative fines have recently been introduced, should these be covered by the fair trial rights in criminal procedure.¹⁵⁵⁷ Notably, the English and Dutch orders also involve flexible monetary sanction fees, where the culpability of the offender, and the seriousness of the offence, and so on, determines the seriousness of the sanction. This gives the sanctions an even further punitive character. In the English order, sanctions are also linked to the extensive criminal enforcement order, as administrative penalties serve as alternative sanctions for criminal offences. In the Swedish and Dutch orders, these systems are separated. Nevertheless, all the involved systems entail extended procedural safeguards of legal certainty, and rules to avoid double jeopardy.

7.7.4.3 Further Analogy with Administrative Sanctions?

Does the described influence from criminal procedure then reach even further within administrative enforcement law? Does the context of the threat of other kinds of administrative sanctions influence the procedural safeguards of the rights of the individual, and the enforceability of actor responsibilities for information? Generally, the legal sources do not support such application of the criminal procedural principles and thus distinguish between conditional fines and sanction fees, because of the different purpose and functions.¹⁵⁵⁸ But one suspects that the separation of the different functions and purposes of the administrative sanctions is not always particularly clear.

¹⁵⁵⁴ SOU 2004:37 p. 59. The Committee made similar statements in SOU 2002:50 p. 224.

¹⁵⁵⁵ SOU 2004:37 pp. 64–65.

¹⁵⁵⁶ The Environmental Code Committee summarises their quite extensive investigation of the matter that, in a comprehensive evaluation, the reasons weigh heavier for the environmental sanction fees being perceived as a reaction to criminal offences, within the meaning of the ECHR, and that they should therefore be covered by Art. 6 (see SOU 2004:37 p. 65).

¹⁵⁵⁷ These orders have been discussed in the country reports of Part II. See: Sections 3.5.6 (Sweden); 4.5.3.4, 4.5.6, and 4.5.8.4 (the UK); and 5.5.8 (the Netherlands).

¹⁵⁵⁸ Prop. 1997/98:45 Part 2 p. 275; and SOU 1996:103 Part 2 p. 308, on the purpose of the conditional fine in 26:14 of the Environmental Code. See, also: von Essen, U., *Processramen i förvaltningsmål* pp. 27–28, arguing that the conditional fine and the awarding thereof cannot be paralleled to a criminal sanction; Sundberg, H., *Allmän förvaltningsrätt* p. 677. Compare, however: Lavin, R., *Förvaltningsprocessen inför 2000-talet* pp. 453–454 and 458.

In the Swedish discourse on sanction fees, an important argument has been that the legislator hides behind a construction of directing the addressee's actions, and of profit elimination. In fact the sanction fee entails a sanction, with the function of trying to coerce an actor into acting in the desired way, or to refrain from acting in an unwanted way, and that a financial punishment is imposed should such threat not have the desired effects.¹⁵⁵⁹ This description seems equally valid for conditional fines. The central difference is only the individual direction, instead of general criminalisation or the like. And certainly, in the perspective of the general public there is no relevant difference between criminal law fines and administrative fines (whether they are conditional or punitive).¹⁵⁶⁰ The person addressed with a fine will probably not always see the difference. In the above mentioned case MÖD 2004:64, the parties, and the lower Courts argued that the qualifying expression of criminal suspicion covers both punitive and conditional fines (“böter och viten”), and other similar punishments, suggesting a wider influence of criminal procedural rights. This shows that even though the primary aim and function of conditional fines is preventive and reparatory, rather than punitive, they are sometimes referred to as instruments of punishment.

Other indications of a wider analogy to criminal sanctions in the administrative enforcement system, is that of the Swedish principle that criminal enforcement and a conditional fine cannot be imposed for the same offence. This order is complex today; with several areas of law making such double enforcement possible.¹⁵⁶¹ Administrative sanction fees may, moreover, not be collected if the sanctioned action is covered by an order coupled with a conditional fine.¹⁵⁶² This involves conditional fines in the protection against double jeopardy. The principle of protection against double jeopardy is, however, only relevant if the punished action is actually the same.¹⁵⁶³

Apart from monetary sanctions, detrimental decisions by supervisory and enforcing administrative bodies may also be paralleled to criminal sanctions.

¹⁵⁵⁹ Warnling-Nerep, W., *Sanktionsavgifter: Sanktioner i gränslandet mellan straffrätt och förvaltningsrätt* p. 497, with reference to Bohlin, A., and Warnling-Nerep, W., *Förvaltningsrättens grunder* pp. 199–200.

¹⁵⁶⁰ This could be explained by the fact that the term “vite” for conditional fines, is an old word for fines under criminal law, and these conditional fines could for a long time be turned into prison sentences.

¹⁵⁶¹ MB 29:11; Prop. 1984/85:96 p. 101, referring to NJA 1982 p. 633; Lavin, R., *Viteslagstiftningen, en kommentar* pp. 81–89. See, also Bohlin, A., and Warnling-Nerep, W., *Förvaltningsrättens grunder* p. 201, for a short presentation on the development of the principle.

¹⁵⁶² Environmental Code 30:4.

¹⁵⁶³ See, also: MÖD 2007:41. The case concerned the use of both environmental sanction fee and conditional fine, and whether this was to be seen as punishing the same offence twice. The Court found that this was not the case here; essentially because the offence of not fulfilling the reporting duty (turning in the annual environmental report, which is to be produced by specified date) was not the same as the offence of not abiding by the order to turn a report in later. However, the Court was also motivated in its decision with the argument that the instruments had different functions (sanction and positive coercion). This argument, of course, may be stated quite generally for these forms of sanction.

Revoking or suspending a driver's licence in response to traffic law violations, for example, has been argued as being similar to a criminal sanction – despite its main purpose of traffic safety.¹⁵⁶⁴ This could well be compared to a stop order, a prohibition, a revocation or suspension of a permit. This can be argued to be a punishment for violation of rules and regulations, even though it fundamentally has the function of authorising a specific activity based upon one's proved capabilities to perform it safely and according to law. The European Court, however, held in *Tre Traktörer v. Sweden*,¹⁵⁶⁵ concerning the withdrawal of a permit to sell alcoholic beverages, that this decision was not to be regarded as a decision on criminal sanction, despite its severity in the context of the effects on the permit holder's exercise of her civil rights. The fact that the decision to revoke was linked to the permit holder's behavior did not change this. It was part of the legal preconditions for the permit.¹⁵⁶⁶

Conditional fines, and other administrative coercive sanctions (or negative orders in general) are something quite different from criminal sanctions. Predominantly, they have different functions and purposes from the punitive aspect of law. The procedural safeguards of such punitive sanctions are not applicable. However, the distinction is not that clear in practice. It could well be argued that the administrative decision-maker will also have to consider carefully the rights of the individual in the preparation of administrative sanctions of different kinds. But thus is more a question of a sliding scale of appropriate procedural safeguards, based upon the intrusiveness of the administrative use of authority, rather than a question of criminal procedural safeguards being applicable or not. A flexible approach may more appropriately be drawn from the expression of administrative law principles of due procedure, and burdens of investigation and proof, in all the compared legal systems.¹⁵⁶⁷ It is held that the concrete meaning and application of the procedural duties, and burdens of investigation and proof, vary in different kinds of case. Cases that involve strict sanctions will require extensive investigatory duties, or a high standard of proof from the administrative authority.¹⁵⁶⁸

In conclusion, criminal procedural requirements are applicable for some administrative sanctions, generally those of a penal purpose, but not for all. The severity of the decision against the individual will, however, with the general conception of a flexible expression of the principles of due care,

¹⁵⁶⁴ RÅ 2000 ref. 65; JO 1998/99 p. 179.

¹⁵⁶⁵ *Tre Traktörer v. Sweden*, Judgment of 7 July 1989.

¹⁵⁶⁶ Compare: Mårsäter, O., *Folkrättsligt skydd av rätten till domstolsprövning* p. 42.

¹⁵⁶⁷ See: Section 7.2, and earlier in Section 2.2.3.1.

¹⁵⁶⁸ SOU 2010:29 pp. 416–417; Petré, G., *Om förvaltningsdomstols utredningsplikt* p. 156 where the need for guidance through precedents is argued, followed by analysis at pp. 158–166. See, also: Lundin, O., *Officialprincipen* pp. 171 and 175–179; and Sundberg, H., *Förvaltningen och rättssäkerheten* p. 328. For similar statements on Dutch and English law, see: Wade, W., and Forsyth, C., *Administrative Law* pp. 291 and 294–295; and Damen, L.J.A., et.al., *Bestuursrecht 1* p. 637.

influence the requirements of the procedure. The context of sanctions will thus influence the distribution of responsibilities of information in the enforcement procedure.

7.7.5 Investigation and Proof in the Context of Conditional Fine

Building on the above argued influence of the context of sanctions on the distribution of information responsibilities, the question arises whether the actor's information responsibilities are influenced in view of a treat of administrative sanctions and if so, how. In criminal procedure the criminal investigation, and the onus of proof is on the prosecutor, and the general standard is that the offence should be proved beyond reasonable doubt. In the administrative procedure, however, many different expressions are used to express the standard of proof, and the different aspects of evidence and investigation, and also of deciding on the appropriate outcome. They are all intertwined. It is therefore not possible to say exactly what standard of proof applies in the different cases. It is more a case of a sliding scale.¹⁵⁶⁹ There is no explicitly stated rule or yardstick for such considerations in Swedish administrative law. The inquisitorial principle applies as described in the above, stating the authority's responsibility for the decision-making materials, and also a principal burden of proof, which are more extensive in the context of sanctions. An important question to ask in the environmental enforcement case is whether the severity of the decision for other concerned parties, and legitimate interest, will validate a corresponding influence of the actor's responsibilities. These aspects will be discussed next.

The evidence rule of the MB 2:1 suggests that actors have to show that they are living up to their duties that follow from the general rules of consideration. This could apply also to proving adherence with an order, even if it is coupled with a fine. The wording of the rule, moreover, suggests that it should be applied in a wide context of administrative enforcement ("vid tillsyn"). It is stated not to apply in the criminal procedure, or in relation to cases of tort law, but seems extensively applicable within the administrative enforcement procedure. Administrative enforcement includes not only monitoring compliance with the law, but also the taking of necessary measures to correct non-compliance (MB 26:1).

A criminal burden of proof would, according to the above discussed law, be analogously applicable to the environmental sanction fee procedure. In the procedures leading up to a conditional fine, the matter will, however, be handled in the administrative enforcement procedure discussed earlier in this chapter. This procedure falls back to the above discussed coordination of the authority's responsibilities in the inquisitorial procedure, and the actor's

¹⁵⁶⁹ Diesen, C., and Lagerqvist Veloz Roca, A., *Bevisföring i förvaltningsmål* pp. 92–93 and 112–114.

burden of proof. In the environmental law enforcement case, the former includes proving relevant risk, and the latter proving appropriate risk management under the law. The flexibility in the concrete distribution of these responsibilities suggests a gradual shift in the burden of proof in cases of detrimental decisions against the addressee. The context of sanctions may adjust the standard of proof in favour of the addressee, but it would not change his principal duty to prove compliance with his responsibilities under the Environmental Code. This suggests a shared investigatory duty, and actor burden of proof, but an easier task of shifting the initiative back to the authority. This, however, refers to the flexible expression of the inquisitorial procedure, and consideration of any detrimental effects on the addressee. It will not entail a criminal procedural burden of proof. Case law will, however, sometimes reflect a tendency to discuss evidence in a way that reflects attraction towards criminal procedural considerations. It should be kept in mind that there are separate procedures for the review of the actual enforcement order, and for the imposing a sanction. I would, however, like to contend, that this distinction is not always kept clear. The assessment of the appropriateness of the order will include considerations of the sanctions context, and the imposition of a sanction will include assessment of the appropriateness for the preceding enforcement order.

The case of MÖD 2006:18, regarding the awarding of a conditional fine against a car breaking firm, provides illustrative example. The underlying order related to the handling of different hazardous waste products. The Environmental Court had argued in the appealed judgment that the enforcement authority had to show that the addressee had breached the order. It held that it was for the authority to show that the offence – the breach of the order – had been committed, in an objective sense. The local environmental board appealed and argued the actor's responsibility for proving in the enforcement situation that the substantive law, essentially MB 2:3, had been followed. The Environmental Court of Appeal did not discuss the burden of proof explicitly, but seemed to rest on the same idea as the Environmental Court, laying heavy burdens of investigation and proof on the enforcers.

The enforcers had inspected the facilities where 400–500 cars were stored, and found that there were breaches or the regulated routines and rules. These routines related to the processing of scrap cars, involving the removal of fluids and components, such as oil filters, that could entail environmental hazards. Before such steps are taken, cars are stored on a hard surface, so as to prevent pollution. The inspectors had not investigated all the cars but had found three cars that were not processed. Also, most of the 400–500 cars still had their windows, which indicated that their processing had not been finalised. It seemed the cars were not stored and processed according to an orderly and systematic routine, but randomly, which was obviously considered to be serious offence.

The Court, however, was not happy with the evidence on which the order was based. It found that only a couple of cars had been proved to be in breach of the rules. However, this was not a trial of the order on appeal, but on the awarding of the subsequent fine. Therefore the Court met the lack of decision-making information through an adjustment of the conditional fine to a very low level, from the original 100 000 to 1 000 SEK. As it was not proved that the status of the inspected cars was representative of them all, the Court found it unreasonable to award the higher sum. It should be noted that these changes should have been made in the appeals procedure. Adjustment at this stage is only intended to be used as an exception – for example, when the decision-maker has not considered the financial situation of the addressee.¹⁵⁷⁰ A practice of making such adjustments has, however, long since been noted.¹⁵⁷¹ The procedural order, however, seems unsatisfactory.

This may be compared to the earlier discussed case law that requires the enforcer to show evidence to indicate a relevant environmental risk in order to activate the actor's burden of proof for adhering to the environmental law requirements. The standard of evidence is thus somewhat low, only "indicating a risk"; for example, an isolated incident that is stated to typically indicate functional problems in an installation that has been seen sufficient for the actor's burden of proof to be triggered. Moreover, in the above stated case of the flooded sewerage system,¹⁵⁷² this one flooding incident was seen as a "typical" indication of malfunction, and a potential environmental risk. Having thus established a risk, the actor had the burden of proving that he had taken reasonable precautionary measures, and that his control of the system to be enough. The car breakers case (MÖD 2006:18) illustrates a stricter view of evidence in a case when sanctions are being imposed. This context may also be understood as influencing the preceding investigatory burdens of the authority, and the possibilities open to them to rely on the actor's information duties, including the burden of proof. This stricter procedural view might be related to the context of sanctions, and the legal certainty of the individual threatened with a sanction. However, nowhere, in this case is the weight of the legitimate interests, or protection of other concerned parties, considered in the assessment of legal certainty in the procedure. A criminal procedural presumption of innocence seems to be brought into the administrative enforcement situation, even in context of a conditional fine, which is not primarily a punitive sanction. This reflects potential over emphasis on the protection of the addressee of enforcement action, at the expense of the protected environmental interests.

There have also been arguments in Swedish case law of the mere potential future recourse to sanctions influencing procedural safeguards. This may be

¹⁵⁷⁰ Prop. 1984/85:96 p. 56; Lavin, R., *Viteslagstiftningen. En kommentar* p. 211.

¹⁵⁷¹ Lavin, R., *Viteslagstiftningen. En kommentar* p. 215.

¹⁵⁷² Judgment of the Environmental Court of Appeal on 29 December 2006, case M 169-06.

seen in cases on the access to appeal of decisions, making the actors aware of the coercive powers of the enforcement authorities.¹⁵⁷³ It may also be seen in cases on specification of enforcement orders, where the awareness of the authorities' subsequent enforcement competences is argued to also necessitate precision of orders in the precedent non-sanctioned order, or even in the pre-enforcement information.¹⁵⁷⁴ In such case, the context of sanctions would influence actor responsibilities even further. One could well argue in this context that the safeguards against public sanctioning of the individual, belongs in that procedure. They do not have to be assured in advance, in anticipation that there will be talk of sanctions. Additionally, such far-reaching assurances challenge the whole environmental law structure of reliance on actor responsibilities as the foundation for allowing hazardous activities.

7.7.6 Fair Trial and the Right to Remain Passive

7.7.6.1 Fair Trial Challenging the Enforcement of Information Duties

In this chapter, the grounds and limits of responsibilities for information in the enforcement procedure have been investigated. It has been found that the responsibilities are shared in the enforcement of environmental law. While the authority is responsible for proper procedure, and cannot lay that responsibility on to the actor, the actor is responsible for controlling his own activity. Actor control includes gathering a lot of information, and reporting it to the authority, and to be actively involved in the administrative control procedure. I have argued that the actor's responsibilities should influence the actual distribution of the burdens of investigation more. In this section, however, the reliance on actor responsibility for information will be studied from another perspective, namely that of potential self-incriminating effects on the actor, and how such effects may influence the order of enforced self-control. The central issue here is that the information that actors provide may be used against them in a following trial. This matter will be investigated in the context of the right to a fair trial, which includes a presumption of innocence, and protection against self-incrimination¹⁵⁷⁵ These aspects have been developed by the European Court of Human Rights as a right to remain silent and to not be forced to incriminate oneself in criminal proceedings. It will be referred to here, as the right to remain passive.

¹⁵⁷³ See, for examples: NJA 1990 p. 705; and RÅ 1996 ref. 43. These cases concerned – respectively – liability for faults in the exercise of authority, and appealability, regarding communication of information and advice. The formulation of the communication was deemed to communicate authority, even though they were not legally binding orders *per se*.

¹⁵⁷⁴ See, for examples: JO 1997/98 p. 418; and in JO 1990/91 p. 270, and JO 1991/92 p. 324, and further discussion in Section 8.6.6.4.

¹⁵⁷⁵ Expressed in the legal maxim of *nemo tenetur armare adversarium contra se* (no one is bound to arm his adversary against oneself).

The right to trial, and to fair procedure, is part of the Rechtsstaat, as a way to guarantee the lawful exercise of public power, and control of proper procedures for that purpose.¹⁵⁷⁶ It is a general legal principle and part of the legal traditions of all the studied legal orders. It has been developed in documents of international law, such as the UN Covenant on Civil and Political Rights,¹⁵⁷⁷ and extensively in European law, most significantly through the European Convention on Human Rights. The legal debate of fair trial is very much founded on European Law, especially Art. 6 of the European Convention on Human Rights (ECHR). The following investigation will therefore also focus on the ECHR right, as developed in case law, and its expression in the legal discourse of Sweden, the United Kingdom, and the Netherlands. Some case law from the ECJ is also referred to. In the following, some central case law and other sources of legal discourse will be presented, followed by a discussion on the relevance and effects this discourse may have on the administrative enforcement of environmental law. Environmental law cases on the matter are few, but parallels can be made to sources of financial law, which also involve actor responsibilities for information.

7.7.6.2 Fundamentals and Expressions in the Legal Discourse

7.7.6.2.1 European Law

The studied countries are bound by the European law on fair trial. According to the ECHR Art. 6 (1), everyone is entitled to a fair a public hearing by an independent and impartial tribunal, and within a reasonable time. para. (2) of the same article establishes the presumption that anyone charged with a criminal offence shall be presumed innocent until proved guilty, and para. (3) lists minimum rights available for any person accused of a crime, from the pre-trial stage of investigation; to be informed of the charges; to be allowed to defend oneself, and be afforded the proper means for doing so.

The right to a fair trial has a been developed in the case law of the European Court, so as to include a right to not have to submit to self-incriminating information. The right to silence, and the right not to incriminate oneself, are based upon the protection of the accused against improper compulsion by the authorities, and are meant to contribute to the avoidance of miscarriage of justice and to the fulfilment of the aims of Art. 6. An essential idea is that the prosecution in a criminal case shall seek to prove its case against the accused, without resort to evidence obtained from the accused through methods of coercion or oppression in defiance of the will of the accused. This links the right to the presumption of innocence,¹⁵⁷⁸ and

¹⁵⁷⁶ See: Section 2.2.3.3.

¹⁵⁷⁷ Art. 14 (3.7) of the United Nations International Covenant on Civil and Political Rights (1966).

¹⁵⁷⁸ *Saunders v. the UK*, Judgment of 17 December 1996, para. 68. Confirmed in: *Quinn v. Ireland*, and *Heaney and McGuinness v. Ireland*, both of 21 December 2000, para. 40.

means that the burden of proof is on the prosecution.¹⁵⁷⁹ This may potentially conflict with actor responsibility in the administrative enforcement situation. The Court has nevertheless also stated that the right to remain silent and not to incriminate oneself are not absolute rights, but can be restricted in the public interest.¹⁵⁸⁰

The right to remain passive is basically prescribed for the criminal procedure – or rather when there is a “criminal charge”. As discussed in Section 7.7.4, the procedural standards and rights prescribed for these cases may also apply in the administrative enforcement case. An important judgment on this matter was made in 1993 by the European Court in *Funke v. France*.¹⁵⁸¹ The issue was whether French authorities could force Funke, under the treat of sanctions, to provide documents containing information about his foreign bank accounts. Funke was suspected of tax fraud, and had admitted to having assets abroad. He was not prosecuted but subject to other kinds of coercive instruments in the pre-trial administrative procedure. The Court found that he had, in this procedure, the right to remain silent and to not contribute to incriminating himself. This applied despite the national categorisation of the customs law procedure. This autonomous interpretation of the Art. 6 prerequisite of “charged with a criminal offence” has subsequently been further acknowledged in several cases.¹⁵⁸²

The case of *Saunders v. Great Britain*¹⁵⁸³ is often referred to in the discourse of the right to remain passive. Saunders had been convicted and sentenced to a term of imprisonment. The case concerned the use, in criminal proceedings, of transcripts of interviews with the suspect in the preceding investigation. The interviews had been conducted by a department of government in its investigation of insider affairs, and under coercive circumstances. The use of the transcripts was deemed to be in breach of Art. 6, mainly due to the way they were used in the trial, as a main part of the evidence, and used to prove Saunders’ character and fault, not just as evidence of factual circumstances. Art. 6 was not seen as being generally applicable in

¹⁵⁷⁹ Werlauff, E., *Common European Procedural Law; European Law Requirements Imposed on National Administration of Justice* pp. 200 and 221. See: *Funke v. France*, Judgment of 23 February 1993.

¹⁵⁸⁰ *John Murray v. the UK*, Judgment of 8 February 1996, esp. at para. 47. See, also: *Quinn v. Ireland*, and *Heaney and McGuinness v. Ireland*, both Judgments of 21 December 2000, in para. 47.

¹⁵⁸¹ *Funke v. France*, Judgment of 23 February 1993.

¹⁵⁸² See, for example: *Bendenoun v. France*, Judgment of 24 February 1994. In this case, the issue was not investigative measures of the administrative enforcers, but rather whether Bendenoun had received a fair trial, despite not having access to all the documentation. However, the Court found, relevantly for this study, that Art. 6 also applies to cases concerning the administrative sanctions of French tax law. It should be noted, however, that there were also parallel criminal and customs proceedings in the Bendenoun case. See, also: *Deweert v. Belgium*, Judgment of 27 February 1980; *Serves v. France*, Judgment of 20 October 1997; *J.B. v. Switzerland*, Judgment of 2 May 2001.

¹⁵⁸³ *Saunders v. UK*, Judgment of 17 December 1996.

the preceding administrative investigation, but the use of the information was in this case deemed to render the following criminal procedure unfair.¹⁵⁸⁴

The law of the European Union also refers to human rights and the fair trial principles.¹⁵⁸⁵ The ECHR therefore comes into national law both through direct implementation of the convention and through the application of the case law of the ECJ, as well as the Charter of Fundamental Rights,¹⁵⁸⁶ where the fair trial rights are regulated in Art. 47–50. An interesting ECJ case stating the authority of the right to fair trial within European law, is the *Kadi Al Barakaat* case. In this case the right to a fair trial is upheld, even for those subject to UN sanctions because of suspicion of offences tied to terrorism.¹⁵⁸⁷ Some case law from the ECJ has dealt with the right to remain passive – for instance, the competition law case of *Orkem v. Commission*.¹⁵⁸⁸ The case concerned compliance with Art. 6 of the ECHR of the Commission’s powers to demand information of market actors in order to facilitate the regulation of so-called price-fixing. The commission argued that the individual’s information duties also covered such information that might prove to be incriminating for him in future criminal proceedings. The ECJ found that the fair trial rights allowed such information duties with regard to factual circumstances, but not for any information that may be perceived as admissions of any offence. That is for the Commission to prove.¹⁵⁸⁹

7.7.6.2.2 Sweden

The ECHR is incorporated in Swedish law,¹⁵⁹⁰ and protection against self-incrimination is confirmed by Swedish case law from the Supreme Court and the Supreme Administrative Court, as well as from the Environmental Court system.¹⁵⁹¹ In the recent constitutional reform, an explicit statement of the right to fair trial was established in the Instrument of Government’s chapter on fundamental rights and freedoms (RF 2:11 para. 2).¹⁵⁹² Apart from this, there are more specific statutory rules to ensure fair trial, for example, in procedural legislation.¹⁵⁹³ The issue of actor duties for information in relation

¹⁵⁸⁴ *Saunders v. UK*, Judgment of 17 December 1996, p. 337 para. 67.

¹⁵⁸⁵ See: Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council and Commission* para. 8.

¹⁵⁸⁶ The Charter of Fundamental Rights (2007/C 303/01).

¹⁵⁸⁷ Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council and Commission*.

¹⁵⁸⁸ Case 374/87, *Orkem v. the Commission*.

¹⁵⁸⁹ Case 374/87, *Orkem v. the Commission*.

¹⁵⁹⁰ Lagen (SFS 1994:1219) om den europeiska konventionen angående de mänskliga rättigheterna och de grundläggande friheterna. The ECHR also has a kind of indirect constitutional status through the prohibition in RF 2:19 against legislation conflicting with the convention, including case law of the European Court of Human Rights.

¹⁵⁹¹ NJA 2001 p. 563, RÅ 1996 ref. 97, and MÖD 2004:64.

¹⁵⁹² See: Prop. 2009/2010:80 Section 9.3; and SOU 2008:125 Chapter 27.

¹⁵⁹³ General Court Procedural Code (SFS 1942:740) (“Rättegångsbalken”), for example 23:12 and 16 on coercion in the criminal investigation, 23:18 on being cautioned on criminal suspi-

to consequential criminal procedures, and the administrative authorities' competences of enforcement in this context, has been discussed in legislative preparations. Certain legislation has also been amended to guarantee the rights of the individual, such as in tax law where conditional fines are prohibited when there is also a criminal suspicion.¹⁵⁹⁴

The Swedish case law on the right to remain passive and ECHR Art. 6 covers different kinds of administrative procedures in different areas of law. In a criminal case before the Supreme Court,¹⁵⁹⁵ a person under a duty to give sworn statements in a bankruptcy procedure was deemed to have had the right, under Art. 6 of the ECHR, to refuse such statements, and also that the false statements given were legitimately excused in the following criminal procedures. The Court held that an obligation under threat of sanctions, to give information revealing that he has committed a crime, and which can be used in a forthcoming trial against him, was not in adherence with Art. 6.¹⁵⁹⁶

A few years earlier, the Supreme Administrative Court had tried the investigatory measures of the tax authorities within the tax auditing procedure.¹⁵⁹⁷ The tax authority's staff had gained entry to the addressee's offices and home, to retrieve documentation which he had been ordered to submit, but had refused to. The addressee argued that the information in the documents could incriminate him, and that the tax authority's enforcement of access to such information was in fact a criminal investigation. Secondly, even if it was not so categorised, the right to remain passive was applicable because of the use of the very intrusive enforcement of the authorities gaining access and retrieving the relevant documentation, and thus comparable to administrative sanctions. The Court found that the enforcement measures were acceptable in view of Art. 6 of the ECHR, as there were no criminal charges, but the Court commented on the difficulties of drawing the line of the reach of the right to remain passive. The decisive factor in the relevant case was that the addressee had not been coerced into producing the information, and that the powers of the authorities to gain access to them could not be seen as analogous to coercion of the actor's cooperation. Furthermore, the procedural safeguards of such measures were quite extensive; the tax authorities had to apply to the courts for access, etc.

cion, and 36:1 on the interrogation of witnesses, including the right of a witness to remain silent in order to not incriminate oneself or a close relation. Such circumstances also constitute a legitimate defence in the prosecution of a person's silence or false statements, mainly the offence of perjury (Criminal Code (1962:700) 15:4).

¹⁵⁹⁴ Taxation Act (SFS 1990:324) 3:5; SOU 1996:116, and Prop. 1997/98:10 esp. pp. 59–66; Prop. 2001/02:25 p. 206 (see, also: pp. 349–350, for the Legal Council's statement); Prop. 2002/03:106 p. 80 and 178–179. For discussion within the field of environmental law see: SOU 2004:37 Chapter 6.

¹⁵⁹⁵ NJA 2001 p. 563. Notably, this judgment marked a changed practice, in comparison with earlier case law, from before the ECHR was incorporated (see NJA 1991 p. 123).

¹⁵⁹⁶ The Court considered the cases of: *Saunders v. the UK*, Judgment of 17 December 1996; *Heaney and McGuinness v. Ireland*, and *Quinn v. Ireland*, Judgments of 21 December 2000.

¹⁵⁹⁷ RÅ 1996 ref. 97.

In preparation of tax law amendments, the ECHR and the fair trial right have been investigated and discussed. The purpose of the tax investigation was then held to be ascertaining good decision-making materials in the matter of taxation. This investigation was argued not to be a criminal procedure and that there was nothing to support the view that the tax procedure was in itself subject to the demands of Art. 6 of the ECHR. However, some exceptions to the actor duties to cooperate might be needed, in consideration of the demands of a proper criminal procedure in view of legal certainty. It was argued that this would only delimit the possibilities of the enforcers to coerce the addressee to cooperate in a criminal investigation against oneself. Therefore, the competence to couple orders to submit information with conditional fines was limited.¹⁵⁹⁸ Notably, however, the Government argued in the final Bill that there was nothing to suggest that the European Court would consider the addressee not to have a general responsibility to cooperate in the taxation investigation.¹⁵⁹⁹ Thus, the view is that the general actor responsibility for information and active cooperation is not affected per se.

Swedish environmental law is largely silent on the matter, even though it relies heavily on the actor responsibility for active participation and production of information. The MB preparatory works¹⁶⁰⁰ provide no guidance as to the relationship or potential conflicts with ECHR in the administrative enforcement of Swedish environmental law, even though the convention was at the time of the Environmental Code reform, incorporated into Swedish law.¹⁶⁰¹ However, in 2004, the Environmental Court of Appeal found that an enforcement order (here requiring measuring the extent of a quarry) was normally not in breach of the right to remain silent under ECHR Art. 6 – either generally or in the specific case.¹⁶⁰² There was, in the case, a suspicion of a criminal offence, and there had been contacts with the police, who had carried out some investigation. The Court considered a wide range of legal sources on the matter,¹⁶⁰³ and concluded that the law on fair trial did not limit the actor's duty to cooperate in the investigation itself. It only limited the

¹⁵⁹⁸ Prop. 1997/98:10 p. 62, SOU 1996:116. See, further: SOU 2001:25, and Prop. 2002/03:106.

¹⁵⁹⁹ Prop. 1997/98:10 p. 62.

¹⁶⁰⁰ Prop. 1997/98:45; and SOU 1996:106. See, also: Prop. 2001/02:65 pp. 37–39, on the actor's investigatory duties in the permit revocation and review proceedings.

¹⁶⁰¹ The issue was investigated by the Environmental Code Committee in the context of the reform of the sanctions system (see: SOU 2004:37), but their suggestions did not lead to any subsequent legislative changes or clarifying statements in the following preparatory works. The weight of the committee's investigation as a source of law and as interpretative support is hence debatable. However, the Environmental Courts made references to the report in MÖD 2004:64, described in the following.

¹⁶⁰² MÖD 2004:64.

¹⁶⁰³ The Courts refer to European Court cases, such as *Saunders v. the UK*, Judgment of 17 December 1996; *Funke v. France*, Judgment of 23 February 1993, and more. They also considered the English Green case, which will be described next, and they made comparisons with tax law and looked at ongoing legislative work.

authority's powers to coerce the addressee through orders coupled with sanctions. Such coercion was not used in the relevant case. The Court emphasised, with support of case law from the European Court, the importance of a functioning enforcement. It found there was nothing to support the view that individuals may generally make demands under Art. 6 within the context of environmental supervision and enforcement.

7.7.6.2.3 *The United Kingdom*

Freedom from self-incrimination and the right to remain silent count as fundamental legal principles at common law, under the law on natural justice and fairness.¹⁶⁰⁴ The principles are supported by domestic statutory law, centrally the Police and Criminal Evidence Act 1984. The matter has received treatment in the light of international human rights law, made applicable to the English courts first indirectly through EC law, and then through the implementation of the ECHR, via the Human Rights Act 1998.

In the so called Green case from the House of Lords,¹⁶⁰⁵ the question of self-incrimination in the context of the enforcing authority's investigative powers was handled both as a principle of common law, and as an established principle under ECHR Art. 6.¹⁶⁰⁶ The Green case concerned waste law. A supervising and enforcing authority had discovered lorry trailers containing clinical waste, which appeared to have been stored illegally. The authority suspected that Green Environmental Industries Ltd (Green) was responsible for this and wanted to investigate further. They therefore invited an officer of the company to be interviewed under caution in accordance with the Police and Criminal Evidence Act 1984. They also required information in accordance with investigative powers today covered by Section 108 in the Environment Act 1995. Green wanted confirmation that the requisitioned information would not be used as evidence in future prosecution, and argued that the use of the power to require information was merely a device to bypass the rules against self-incrimination and the right to remain silent under the criminal procedural rules. The authority would give no such guarantee and threatened to prosecute Green for failure to respond to the requisition.¹⁶⁰⁷

¹⁶⁰⁴ See: Section 4.2.5.2.

¹⁶⁰⁵ *R v. Hertfordshire County Council, ex p. Green Environmental Industries Ltd & Another* [2000] Env. L.R. 426 (House of Lords), [1998] Env. L.R. 153 (Court of Appeal, Civil Division).

¹⁶⁰⁶ In this case the European Convention and the case law of the Strasbourg Court was considered as a part of EC law, and therefore applicable in this case, because of the relevant provisions implementing EC environmental law. However, today, and by the time of the judgment from the House of Lords, the Human Rights Act 1999 would make the Convention rights and the Strasbourg case law directly applicable.

¹⁶⁰⁷ As non-adherence of administrative enforcement orders often constitutes an offence in the English legal order, refusing to submit thus ordered information is subject to criminal sanction. At the same time, the information can lead to the discovery of other environmental offences, and could provide the enforcement authorities with evidence of that. By the time this case was heard by the House of Lords, the company and the director (and sole shareholder),

They served a further notice requiring the production of documentation on the transport of the waste. Green refused to answer both requisitions and was prosecuted on the failure to do so without reasonable excuse. Green applied for judicial review, with regard to the use of powers contrary to protection against self-incrimination and the right to remain silent, under English and European law. This application (and the appeals) was dismissed, as the investigative powers of the administrative enforcers were seen to exclude, in the public interest, the freedom from self-incrimination, and thus delimit the reach of the right to fair trial in the pre-trial context.¹⁶⁰⁸

In the case of *Brown v. Stott*¹⁶⁰⁹ heard by the Privy Council, the public interest argument which was made in *Green*, took centre stage. In this case, police had been called to a supermarket to deal with the theft of a bottle of gin. On arrival the police found that the suspect had been drinking, and that she had arrived at the store by car. The suspect was charged with theft and taken to the police station where she was asked to tell the police who had been driving the car. She admitted that she had herself been the driver and was subsequently tested for breath alcohol level. The suspect raised the question of the compatibility of the prosecutor's reliance at her trial, on her admission, which was obtained compulsorily, with the right to a fair hearing under ECHR Art. 6. The Privy Council, with the support of European law, assessed the balance between the public purpose (furthering traffic safety) and the individual's right, and the proportionality of the investigatory measures involved in the case, and found that it was quite appropriate.¹⁶¹⁰

In summary, English case law, here represented by *Green* and *Brown v. Stott*, held that the relevant principles, while fundamental in domestic and European Law,¹⁶¹¹ were not absolute, but required balancing against other interests, and limitation as to the procedural context.¹⁶¹² The House of Lords

had already been prosecuted for the relevant waste law offence. The director had pleaded guilty on two accounts, and was waiting to serve his prison sentence (after serving a sentence for tax crime). But he remained liable for prosecution for the failure to provide the requested information if the judicial review resulted in a conclusion that he was bound to answer.

¹⁶⁰⁸ A comparative note here is that the English enforcement authority runs both criminal and administrative enforcement procedures at the same time. This can be compared with the Swedish – and Dutch systems – where the procedures are conducted by different authorities and thus fundamentally separated. While the Swedish case of MÖD 2004:64 discussed a suspicion from the addressee that the authority sought evidence for the criminal prosecutor, such order is inherent in the administrative organisation in the UK.

¹⁶⁰⁹ *Brown v. Stott (Procurator Fiscal, Dunfermline) and Another* [2003] 1 A.C. 681.

¹⁶¹⁰ *Brown v. Stott (Procurator Fiscal, Dunfermline) and Another* [2003] 1 A.C. 681, pp. 720–722.

¹⁶¹¹ In the Court of appeal, the European law on human rights is applied through EC law, with reference to the ECJ case 374/87 *Orkem v. Commission of the European Communities*. In the House of Lords the Human Rights Act had entered into force, making the European Convention directly applicable.

¹⁶¹² *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, at 433–434 (House of Lords). *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [1998] Env. L.R. 153, departing from pp. 167–168 (Court of

concluded in *Green* that as a matter of English law the investigative powers in questions excluded the right to rely on self-incrimination. The powers have a public purpose besides gathering evidence for future prosecution, and this purpose would be frustrated if the addressees could refuse to answer. Fundamental to the assessment was the fact that the investigative powers were found at a procedural stage which was far from a trial, and in a trial their rights were protected by the judge's power to exclude evidence obtained unfairly. The use of compulsory powers was therefore concluded to be permitted during the investigation stage, and the procedure did not fall within Art. 6 of ECHR.¹⁶¹³ Furthermore, the requests in question were for factual information and not any admissions of wrongdoing. The addressees were therefore obliged to answer.¹⁶¹⁴ In *Stott*, the information was given to the police in their criminal investigation, and in effect contained admission of committing an offence. However, the public purpose of traffic safety motivated some investigation, and the simple asking of a question was deemed proportionate to this action by the police.

Legal debate following these cases has stated that protection, outside the criminal trial, against self-incrimination under Art. 6, is not an absolute but a qualified right where derogations from, or limitations on this privilege, may be justified in the pursuit of the legitimate aim of the public interest. However, such derogations must be proportionate to this purpose.¹⁶¹⁵

7.7.6.2.4 *The Netherlands*

Dutch domestic law on court procedure states the fundamental principle of *nemo tenetur* – or protection against self-incrimination – as the rule that a suspect cannot be under the duty to make any witness statement about their involvement in the circumstances of a criminal case.¹⁶¹⁶ This also includes producing written information, as in environmental reports and other documentation. The criminal law chamber of the Supreme Court (“Strafkamer” of the “Hoge Raad”) tried the extent of the responsibilities for information against the right to have to incriminate oneself, in an important case.¹⁶¹⁷ The case concerned the use of information submitted to the enforcement authorities in “sewage water reports” (BAWR), as evidence in a subsequently initi-

Appeal); and *Brown v. Stott (Procurator Fiscal, Dunfermline) and Another* [2003] 1 A.C. 681, p. 702, and 704.

¹⁶¹³ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, at pp. 436–437.

¹⁶¹⁴ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, p. 427.

¹⁶¹⁵ See for example: Ward, T., and Gardner, P., *The Privilege Against Self Incrimination: In search of Legal Certainty* p. 398; Marshall, G., *Things We Can Say about Rights* pp. 207–209; and Ward, A., *European Prohibitions on Self-incrimination: Can They Thwart the Enforcement of Environmental Standards?* at p. 105.

¹⁶¹⁶ Art. 29 *Strafvordering*.

¹⁶¹⁷ Hoge Raad 19 September 2006, nr. 00895/05 E, AB 2007, 2.

ated criminal procedure. The reports were regulated in the permit conditions, and based upon statutory regulation of sewage water. The Supreme Court judgment stated that the use in the context of punitive sanctions, of information gathered by the actor himself in a sewage water report, did not conflict with Art. 6 of ECHR. Similarly, it was not perceived to be in conflict with the Dutch procedural law principle. The Court acknowledged the principle, but stated that it was not absolute or unconditional. The public interest, through the protective purpose of the environmental legislation involved, is said to motivate the administrative demands for information here. The subsequent use of the information as evidence in criminal proceedings is deemed not to be covered by the protection against self-incrimination, which the Court connected to the criminal procedure. The administrative procedure for supervision and control is thus separated from the criminal procedure, also when this can be followed by criminal sanctions.

7.7.6.3 Summarising the Problem

Having thus described the fundamentals of the protection of a right to remain passive, under the right to fair trial, it is now appropriate to return to the here investigated problem. In the environmental law system, as well as in other areas of administrative regulation, the addressee of enforcement measures has often been obliged to cooperate in the investigation of the case through producing information to the enforcement authority. It might be suggested that the right to be passive, under the principal right of fair trial, could overtake, or even prohibit such obligations, or conversely that the ordering of investigations will prohibit subsequent possibilities of criminal charges.¹⁶¹⁸ The right to be passive is not an absolute right in the pre-trial proceedings. The reach of this right is limited, and assessed, generally through balancing the public interest and the rights of the individual. The purpose of functional and effective enforcement is emphasised. In this balancing act of evaluating the reach of the fair trial rights, different criteria, or aspects are considered, and in the end, a case by case assessment of the circumstances as a whole, in order to ascertain whether the right to remain passive, should apply. The point of departure is the question of when in the procedure the information is requested. This links to the legal prerequisite of “criminal charge”. Before there is such a criminal charge, the criminal procedural safeguards are not applicable. The matter is nevertheless more complex than this, and there are other aspects that may support a right to remain passive. These aspects are

¹⁶¹⁸ Darpö, J., *Miljö rätt och Europakonventionen* pp. 81 – 82; discussing also the suggestion made in Pagh, P., *Jordurensningsloven med kommentarer*, esp. pp. 240–243. It should be noted that in Section 7.7.4, the application of the fair trial rules to administrative sanction has been discussed. It has been argued that the criminal procedural safeguards for fair trial can apply directly to administrative sanctions of penal character. The discussion of this current section is different from that one. Here, the influence of the right to fair trial in an earlier procedure will be discussed.

related to the kind of information the actor has to provide, and for what purpose, and also whether the demands were made with coercive means, and the challenges that these rights pose to the enforcement of actor responsibilities for information. These aspects, or criteria for determining the reach of the right to remain passive, will one by one be investigated next.

7.7.6.4 When in the Process? Prerequisite of the Criminal Charge

7.7.6.4.1 Introduction

One aspect of the reach of the right to remain passive, and its relationship with actor responsibility for information, is when – at what point in the procedure – the incriminating information is produced. An environmental actor investigates, improves their expertise, and reports to the authorities all the time. However, the right to remain passive in Art. 6 of the ECHR generally applies only to a person already charged with a criminal offence. Basically, the idea, as reflected in the Swedish discourse, is that the public authority's investigation follows a kind of procedural time line or order, starting from the fundamental reporting of facts, and more supervisory and preventive or proactive steering measures by the administrative enforcer, which at some point lead to concrete criminal suspicion and charges. After that point, the individual has more extensive fair trial rights. The procedural steps of the criminal charge thus delimit the reach of the relevant rights.

According to the European Court, the procedural delimitations of the application of Art. 6 is autonomous for that regulation, and not decided by categorisation or institutional organisation of the pre-trial procedure in the different legal orders. The fact that a sanction is handled by an administrative authority, or in a procedure which is not labelled criminal in the national legal order, does not affect the application of Art. 6.¹⁶¹⁹ As discussed already in Section 7.7.4.1, this prerequisite is interpreted in a more functional manner, independent of procedural organisation. The notification of the addressee of criminal charges is a formal indicator, but the reasoning is based upon establishing when the authorities have taken measures entailing that the situation of the individual is significantly influenced by the fact that there is a suspicion against him.¹⁶²⁰

¹⁶¹⁹ *Funke v. France*, Judgment of 23 February 1993; *Bendenoun v. France*, Judgment of 24 February 1994. See, also: *Deweert v. Belgium*, Judgment of 27 February 1980; *Serves v. France*, Judgment of 20 October 1997; *Quinn v. Ireland*, Judgment of 21 December 2000 para. 41–42; and *Heaney and McGuinness v. Ireland* Judgment of 21 December 2000. Moreover: SOU 1996:116 pp. 108–109; and SOU 2004:37.

¹⁶²⁰ See: *Serves v. France*, Judgment of 20 October 1997; and *Janosevic v. Sweden*, Judgment of 23 July 2002.

7.7.6.4.2 *Specifically, What Does the Question "When?" Imply?*

The question that follows is this: When, more specifically, does the individual actor's right to be passive emerge, and subsequently delimit the competence to enforce information duties? The most extensive interpretation of the right to be passive would cover all the produced information, even in view of a very abstract threat of sanctions, especially if administrative sanctions are paralleled to criminal sanctions. The duty to produce information could always be hypothetically argued as potential participation in a criminal investigation against oneself, at least in the eyes of the actor having to produce the information. However, there is no support for such an extensive interpretation and application.¹⁶²¹ There needs to be some objectively qualified suspicion of a criminal offence, directed at that specific addressee. The actor should not be able to refuse to comply with their information obligations, by stating the abstract defence that the information could potentially – or hypothetically – be used against him in any future procedures against him or her.¹⁶²² Actor responsibilities are therefore basically legitimate, even if their potential enforceability is limited by the procedural safeguards of legal certainty once there is a more concrete criminal suspicion.

The Swedish legal discourse, often in the form of legislative preparations, has involved intricate discussion on the legal qualification of criminal suspicion (generally the degree of suspicion) and the legal technical solution in the regulation of this point in the process.¹⁶²³ Typically, it is argued that there should be concrete suspicions at least in that they involve the relevant addressee, and not only a general suspicion of criminal activity. Suspicion should, moreover, be somewhat qualified and not mere loose speculation. Some indication of a criminal charge, within the meaning of Art. 6, could be at the point where the duty arises to report suspected criminal offences, or similarly, when the duty arises to communicate an intention to impose administrative sanctions. Such tangible indications are practical in administrative reality. Even though the authority still has the problem of deciding when those indicating duties emerge, at least it brings some consistency to the system. Nevertheless, the point in time when a criminal charge arises still has to be decided case by case, and pin-pointing the degree of qualification is difficult.¹⁶²⁴ There is a perception of a procedural step of a qualified suspi-

¹⁶²¹ See, for example: Hoge Raad 19 September 2006, nr. 00895/05 E, AB 2007, 2 (Netherlands), and *Saunders v. the UK*, both explicitly accepting far-reaching actor involvement in the preceding administrative investigation.

¹⁶²² SOU 2004:37 pp. 297–298 (compare: Prop. 2002/03:106 pp. 80–81). See, also: SOU 1996:116 p. 151; and Prop. 1997/98:10 at p. 62 concerning the general duty to cooperate in the taxation procedure.

¹⁶²³ See, for example: SOU 1996:116 pp. 149–152; Prop. 1997/98:10 at pp. 63–66; Prop. 2002/03:106 p. 80. See, also: SOU 2004:37 at pp. 298–299.

¹⁶²⁴ The range of suggested criteria include for example “reason” and “probable cause” (“anledning anta” and ”skäligen”) for suspicion, or “concrete” or “well-founded” suspicion entailing evolved doctrines of legal meaning and connotation.

cion of a criminal offence that delimits the reach of the relevant fair trial rights. There is, however, no clear statement of specifically and concretely when and where this limit is drawn. Importantly, the administrative enforcers may have to apply the fair trial rights in their investigation also, as will be seen in the following presentation of the case law of the compared legal orders. The difficulties lie in assessing when to do so. A few court cases from the national courts have been comparatively studied, in order to understand this assessment of when a right to remain passive arises.

7.7.6.4.3 Sweden and the Netherlands: Recognition of Fair Trial, and Actor Responsibility – But Avoiding Specific Direction

The Swedish Courts have discussed the reach of the right to remain passive outside the actual criminal procedure. Notably, the Supreme Court stated in NJA 2001 p. 563 a right to refuse sworn statements in bankruptcy proceedings, when the information could be used as evidence in a forthcoming trial, and also to provide legitimate defence against charges of perjury.¹⁶²⁵ The Supreme Administrative Court in RÅ 1996:97 analysed and passed judgment on the issue of where in the process the appealed measures were taken. An important reason for accepting the tax authority's investigations was that there was nothing to support the suspicion of an offence under penal sanction. The Court nevertheless acknowledged, based upon the autonomous interpretation by the European Court, that the relevant rights may apply to a wider range of situations than formal criminal procedures. The administrative authorities may also have to assess their investigative measures in coercive administrative enforcement procedures. This was nevertheless not the case here, the Court argued; where the actor's active cooperation was not coerced. The tax authorities had gained access to the information itself through inspections.

The Court commented further on the uncertainty of the actual reach of the right to be passive under the relevant European law and stated that there at least had to be probable cause for suspicion of a breach against some statutory regulation, or that the authority had acted in response to such a breach. It was not enough that the authorities decided on an inspection, even a more extensive one, as the audit relevant in this case. Nonetheless, they backed up this judgment within an admittedly unclear regulation, with the argument that there was no coercion, so the right to remain passive was not applicable anyway. Interestingly, the Court circumvented, to some extent, the issue of when a criminal charge was perceived to arise, by focusing on the question of coercion. This approach is found elsewhere in the Swedish discourse and could be argued to solve the practical difficulties for enforcers. By avoiding administrative coercion of the addressee, there is no need to assess at what point in the process the addressee could be viewed as having to incriminate

¹⁶²⁵ NJA 2001 p. 563.

oneself. With this approach, the Environmental Court of Appeal in MÖD 2004:64 could argue a strong position for actor responsibilities for information in the enforcement of environmental law, mainly motivated by the purpose and function of the enforcement system. It claimed only a limited influence on administrative enforcement of information duties, of the fair trial rules of Art. 6 and the right to remain passive, even in this case where there was in fact a clear suspicion of a criminal offence, and the police had been involved in investigating the activity. The actor still had a responsibility to cooperate in the investigation, but the enforcers could not coerce such cooperation, by means of conditional fines, etc. This case therefore provides little guidance as to the limits of the criminal charge status.

In comparison, the Dutch Supreme Court¹⁶²⁶ makes a strong statement on reporting duties, distinguishing them from the criminal procedure. They depart from the prerequisite of the individual being under a criminal charge. These rights, the Court argues, are not applicable if there is no such status. Thus, actor responsibilities for information are not generally subordinated to the right to be passive, by themselves or as a result of the criminal sanctions tied to that legislation. The fact that information attained through the implementation of these information duties can lead to criminal charges being brought does not alter this view. The Court may then use the information obtained before the criminal charge is brought, and the fact that the suspect himself has produced the information does not change this. This distinction of the administrative regulation from criminal procedure seems very simple and categorical, which might be due to the fact that the case concerns pre-regulated reporting duties stated as permit conditions. It supports the idea of the fundamental actor duties for information being accepted per se. However, the case provides little guidance as to the right to remain passive in an individual case against oneself, involving administrative investigation of suspected offences and necessary measures in response.

7.7.6.4.4 *United Kingdom; Leaving Protection of Fair Trial to the Trial Judge*

In the English Green case, Lord Hoffman in the House of Lords¹⁶²⁷ distinguished the different procedures. He pointed out¹⁶²⁸ that the privilege against self-incrimination or the right to silence are expressions used for many loosely-linked rules on assuring fair trial, but the case at hand did not concern trial proceedings. Lord Hoffman consequently moved to the associated, but thus distinguished, rules on the right to be passive in pre-trial investigations, which serves to inhibit abuse of power by the investigatory authorities,

¹⁶²⁶ Hoge Raad 19 September 2006, nr. 00895/05 E, AB 2007, 2.

¹⁶²⁷ Today: the Supreme Court.

¹⁶²⁸ Also referring to Lord Mustill in *R. v. Director of the Serious Fraud Office, ex p. Smith* [1993] A.C. 1.

and to preserve the fairness of the trial by preventing evidence which may have doubtful probative value. He also referred to a general privilege not to be compelled to answer questions from those in authority. These principles were subsequently stated to be subject to exceptions, mostly through statutory provisions – for example, in the rules on cross examination at trial. Whether a rule on an investigative power excludes the privilege against self-incrimination must therefore be concluded from the wording, purpose and intention of the statute.¹⁶²⁹ Lord Hoffman argued that Parliament was more likely to have intended that the question of whether the obligation to provide information had caused prejudice to the defence in a following criminal trial be left to the judge at that trial, rather than delimiting the investigatory powers of the administrative enforcers.¹⁶³⁰

The relevant European law on fair trial was found not to alter the view on the legality of the administrative investigative procedure.¹⁶³¹ The Lords considered the Saunders case,¹⁶³² but did not find it applicable as grounds for refusing to provide the information. The Saunders case involved transcripts from interviews being used as evidence in a criminal trial, and no such evidence was used here. The Green case concerned the propriety of use of compulsory powers at the examination stage, on which, Hoffman argued, the European Court clearly did not cast any doubt.¹⁶³³ The request for information therefore could not be seen as adjudication, either in form or substance. The Lords thus held the European jurisprudence to be firmly anchored in the fairness of the trial and not concerned with extra-judicial inquiries, such as the requirement to produce documentation of information in environmental law. Such impact that Art. 6 may have on the use of evidence, was thus deemed to be related to the actual criminal trial.¹⁶³⁴

Arguably, the Green judgment would entail a clear distinction between the criminal trial and pre-trial administrative investigation, and that the right to remain passive, and the fair trial rules in general, would not influence the investigatory powers (including coercive such powers, and sanctions) and the duties of the actor in the administrative enforcement procedure. Such rights are safeguarded by the justices of the courts through the rules of evidence, and so on, in the criminal court trial. In conclusion, the Court ruled that there was no abuse of power or prejudice for the fairness of a possible

¹⁶²⁹ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, p. 433.

¹⁶³⁰ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, p. 434.

¹⁶³¹ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, pp. 436–437.

¹⁶³² *Saunders v. UK*, Judgment of 17 December 1996.

¹⁶³³ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, at p. 437, referring to *Fayed v. the UK*, Judgment of 21 September 1994.

¹⁶³⁴ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, p. 437.

trial.¹⁶³⁵ This could suggest a potential acceptance, in English law, of extensive use of information duties, even in a case of both criminal and administrative investigation being carried out simultaneously by the same authority.

The Swedish lawyer should, however, argue carefully the law of the House of Lords, seeing how the legal systematic preconditions are different in terms of procedural law and theory on evidence. In the Swedish system, normally, any evidence is admissible in court proceedings and the court evaluates it freely. The common law system applies a more regulated evidence theory, and the courts can decide to allow or exclude evidence in accordance. Consequently, Lord Hoffman, in the Green case, argued that the question of whether the obligation to provide information had caused prejudice to the defence in a following criminal trial should be left to the trial judge, rather than delimiting the investigatory powers of the administrative enforcers.¹⁶³⁶ A Swedish court could normally not resort to this solution, as the evidence would always be admissible in a following criminal procedure. This could prompt the fair trial rights of Art. 6 of the ECHR to have a more extensive reach in its influence on enforcement of the actor's responsibilities for information.¹⁶³⁷ The right to remain passive has to be assured in the pre-trial gathering of information. When the case comes to trial and the actor is being punished for his or her offences, there is no way, at least formally, of ensuring that this information is not used in conflict with the rights under the ECHR.¹⁶³⁸

7.7.6.4.5 *Concluding Remarks*

The assessment of when a person is under criminal charge, in the view of the ECHR, will consequently have to be considered by the Swedish administrative enforcers. As these examples from the legal sources show, the characterisation of such a procedural status, or moment, is not that easy. The sources give little concrete guidance. The procedural order and domestic characterisation may serve as indicators, but their defining characteristics are debatable. When a suspicion of an environmental crime is reported to the police, the obligation to provide information and proof in the matter is generally reversed, but all the investigation in the matter held by the administrative enforcers may be used as evidence in such criminal proceedings. In this way the defendant in criminal proceedings might earlier have been providing evidence against himself, by obligation of law and orders of state authorities.

¹⁶³⁵ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, p. 435.

¹⁶³⁶ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, p. 434.

¹⁶³⁷ Compare to: Darpö, J., *Miljö rätt och Europakonventionen* p. 92.

¹⁶³⁸ In practice, of course, there would probably be limits to what kind of evidence a Swedish court would accept as well. Evidence gathered through torture would probably be disregarded by any judge. But the rule in fact is that any relevant evidence may be regarded.

Additionally, the enforcement authorities can carry on their administrative enforcement investigations after criminal suspicion, and charges. As argued earlier, this entails inherent problems in drawing a line between administrative supervision and control, and criminal investigation. To make the functional and autonomous interpretation of the individual's self-incriminating situation, other factors will have to be considered. The kind of information, and the purpose of its production, may thus help to characterise the procedure and the enforcement measures involved.

7.7.6.5 The Character of Information

In environmental law, the scope of the kind of information that can be incriminating is wide. Actors are under extensive information duties to show that they are taking the required environmental responsibilities. Polluting and otherwise damaging land, water and air is criminalised, and the potentially liable actor being obliged to investigate such damage in the surrounding environment, could very well be argued to generate many potential conflicts with fair trial and the right to remain passive. Nevertheless, the nature of the information provided has been argued to affect the assessment of an information duty as being self-incriminating under the fair trial rights. This was a key factor in the *Orkem* case concerning the Commission's powers to enforce the market actors' duties to provide information, even potentially self-incriminating information. The ECJ found that the fair trial rights allowed such information duties concerning factual circumstances, but not for information that may be perceived as admissions of any offence. That is for the Commission to prove.¹⁶³⁹

The concluding judgment of the House of Lords in *Green* refers to the fact that the relevant requests, ordered and enforced through the environmental authorities' investigatory powers, were for factual information and not any admissions of wrongdoing.¹⁶⁴⁰ This argument is not explicitly developed in the statements by the justices, even though apparently used as grounds for the addressee not being able to refuse to produce the information with reference to self-incrimination. It seems that not only distance in temporal and functional terms to the criminal court procedure is relevant, but also the substantive content of the information demanded from the addressee. The argument has a functional, purposive, perspective. The administrative enforcers are argued to only be looking for the facts of the case, not to culpability. The function is thus related to the environmental consequences, and doing something about it, not demanding admissions of guilt. These

¹⁶³⁹ Case 374/87, *Orkem v. the Commission*.

¹⁶⁴⁰ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, p. 427. The Swedish Environmental Court of Vänersborg (Judgment of 8 November 2004, Case no. M 112-02) also used arguments pertaining to the character of the information, in its judgment of the quarry case (MÖD 2004:64), where the enforcers asked merely for facts about the size of the quarry. They had also investigated the *Green* case.

arguments trail those of the ECJ Orkem case. The ECJ deemed the demand for potentially incriminating information not to be in conflict with the right to remain passive, if that information involved factual circumstances, and not admissions of infringements of law, which the Commission should prove. They exemplified the legally allowed demands for information as seeking factual clarifications to the subject-matter and implementation of these measures; asking for what meetings the actors had had; who had participated; and what methods for price setting the actors had used, etc.

The Saunders case also argued the difference between respecting the will of the accused, to remain silent, and to use materials which had an existence independent of the will of the suspect, even though the materials had been obtained from the suspect through the use of compulsory powers. The Court stated that the right not to incriminate oneself was primarily concerned with this will of the accused to remain silent. So information obtained in administrative investigations may very well be acceptable. However, in the Saunders case the transcripts of interrogation of the accused, notwithstanding their independent existence, were used in a way that undermined the right of the accused to remain silent. The transcripts spoke for him, and were used to show his intentions and character. Therefore, their use was deemed to be in conflict with the right to remain passive.

The Saunders case judgment may be interpreted as that of the right to remain passive, and its influence on administrative enforcement powers, covers only verbal statements.¹⁶⁴¹ However, documentation and written reports have, as presented here, also been perceived as problematic from the fair trial perspective. A more fitting interpretation would be to have the more functional approach to distinguishing the kind of materials.¹⁶⁴² Such an approach can be illustrated by the Dutch case AB 2007, 2, where the permit regulated general reporting duties were distinguished from the criminal procedure. It contained facts rather than admissions of guilt. In general, administrative enforcers investigate facts, not guilt, which would suggest that the conflict with the right to be passive is not that relevant.¹⁶⁴³ But that might not be so clear-cut either. Facts may imply guilt, certainly in environmental law where the criminal offences are often focused on a factual result. An investigation into causation would thus imply liability – for instance, in an investigation of soil pollution.¹⁶⁴⁴ It could be argued that forcing an actor to provide such objective facts that support criminal prosecution can also be incriminating. It is not always easy to predict that a piece of information will be incriminating, certainly in combination with other information that they have to provide. Actors produce a lot of information that might at some point

¹⁶⁴¹ See: Cameron, I., *National Security and the European Convention on Human Rights* p. 327.

¹⁶⁴² Compare: Darpö, J., *Miljörätt och Europakonventionen* pp. 92–93.

¹⁶⁴³ Darpö, J., *Miljörätt och Europakonventionen* pp. 95–97.

¹⁶⁴⁴ As noted also in Darpö, J., *Miljörätt och Europakonventionen* p. 97.

prove criminal offences, perhaps especially in the context of a wider information base. On the other hand, a general exemption of the duty to provide such facts because they may potentially support a criminal prosecution goes beyond the idea of a fair trial for the criminal suspect.

The presentation shows that distinguishing actor information as being of incriminating character is not that straightforward. The purpose of the demands for information, as well as the timing of those demands, should influence the assessment of the lawfulness of the administrative enforcement of actor responsibility for information. This is a comprehensive interpretation of the actor's cooperation as a whole, which complicates the administrative enforcers' investigation and choice of enforcement approach even further. Additionally, one could suspect that in practice, only the actor knows in advance what facts might incriminate him. (Unless the enforcers do not already suspect a criminal offence, in which case they should report this). Actors could just argue in every case that the information might be used against them.¹⁶⁴⁵ It is important that enforcers can meet such arguments.

7.7.6.6 The Purpose of the Investigation, and of the Regulatory System Generally

7.7.6.6.1 Basis for Considering Purposive and Functional Factors

In the assessment of the reach of the fair trial rights, the purpose, and indeed function, of the demands for information from the actor has been emphasised. As noted in the above, the boundaries of the application of Art. 6 are to be autonomous for that regulation, and not to rely on the structures of the separate national legal orders.¹⁶⁴⁶ The application is functionally based, with the perspective of ensuring the procedural rights of the individual under criminal charge. A functional approach to these procedural rights aids interpretation and application of the prerequisite of there being a criminal charge, and may reveal a concealed purpose or indirect function of the relevant enforcement measures. This functional approach is made both on the more general systematic level, and on the individual case level. The assessment of what kind of information is demanded and when, are thus interpreted in the light of asking about the function and purpose of the demands both in the individual case and in the enforcement system as a whole. In the evaluation of the reach of the right to remain passive in the administrative enforcement context, this opens up considerations of the function and purpose of the enforcement, including the information duties.

¹⁶⁴⁵ And apparently, they generally do argue in such terms.

¹⁶⁴⁶ *Funke v. France*, Judgment of 23 February 1993; *Bendenoun v. France*; Judgment of 24 February 1994. See, also: *Deweert v. Belgium*, Judgment of 27 February 1980; *Eckle v. Germany*, Judgment of 20 July 1982; and *Serves v. France*; Judgment of 20 October 1997.

In *Saunders v. Great Britain*¹⁶⁴⁷ the judgment seems to rest on such purposive arguments. The Court argued, with reference to earlier case law,¹⁶⁴⁸ the purpose of administrative procedure, as essentially investigative in nature. It stated that subjecting these administrative functions to the demands of Art. 6 would, in practice unduly hamper effective regulation in the public interest. This suggests that the demands for actor participation in the investigation of the regulating work of the administration are normally not in conflict with Art. 6. The Court noted the different purpose of seeking information within the administrative enforcement procedure. Even though the information thus attained could be used as evidence in criminal proceedings, the fair trial rights should, in the public interest of effective regulation, not reach that far. The Court's reasoning relates to both the function of the enforcement measures, and of the enforcement system as a whole. It also argued the public interest of effective enforcement.

It is not always easy to distinguish between the case law arguments on the purpose and function of administrative enforcement of information duties. On the one hand the enforcement measures are argued to be of such different functional character, having more preventive, reparatory and pro-active purposes, so that they are not covered by the fair trial rights. On the other hand, the function and purpose of the enforcement of these duties are of such weighty public interest that they motivate encroachment on the right to remain passive. These arguments are to a great extent used simultaneously, which shows the complexity of the assessment. It implies some inconsistencies in the discourse, which have to be accepted. Conscious of these complexities, I will present part of the case law discourse on the subject, noting the central awareness of several parallel, but not always consistent, lines of argument.

7.7.6.6.2 *Public Interests to Motivate Self-Incriminating Effects*

As a point of departure, the right to remain passive in the pre-trial procedure is not applied as an absolute right, but subject to proportionate infringements in the public interest. This means that the functional approach should entail the balancing of public interest and the rights of the individual. In this context, the interests of effective enforcement of environmental law, and actor responsibility, can be argued.¹⁶⁴⁹ Consequently, on a general level, the systematic function and purpose of enforcing actor responsibility for informa-

¹⁶⁴⁷ *Saunders v. UK*, Judgment of 17 December 1996.

¹⁶⁴⁸ *Fayed v. the UK*, Judgment of 21 September 1994.

¹⁶⁴⁹ Notworthy is that European case law on information duties mainly relates to financial law. From the environmental law perspective one could well advocate an even stronger case for actor responsibility. The environmental interests weigh heavily in the balancing against the interests of the individual, when the purpose and aim of the responsibilities are given a decisive role. To some extent the environmental cases from the different national courts show some weight being given to the purpose and interest of environmental protection.

tion may be basically acceptable, provided they are considered proportionate. Notably, the purpose of clarifying the factual circumstances necessary for the administrative enforcer's work is sometimes argued to legitimise, and to legalise, at least indirectly, the potential self-incriminating effects of the actor's responsibilities for information. The perspective is tied to the functioning of legal enforcement and actor responsibilities in general.

In this system, the responsibilities for information contain general responsibilities, independent of suspicions of crime. The general actor responsibilities are normally not in conflict with the right to remain passive, but even when they would be seen to have self-incriminating effects; this might be argued to be motivated in view of the environmental interests involved. In exchange for being allowed to use natural resources at the expense of others, to risk environmental harm, and even to pollute, actors have to take on certain responsibilities, which are part of the fundamental "rules of the game", based upon principles such as those on precaution and the polluter pays. The rules are applied generally on all relevant actors, and not just an addressee that is being investigated for suspected breaches of law.¹⁶⁵⁰ Without these information duties, the enforcement system may lose its effectiveness, as the enforcers would carry heavier burdens of information; gathering decision-making materials; and providing proof of breaches of environmental regulations, in order to be able to steer the actions of individual actors. Moreover, the regulatory approach should become stricter, entailing less acceptance in the authorisation procedure, as well as in the supervision of authorised activities. The authorities will have to apply a precautionary principle, and if they do not have the necessary information on which to base a decision to permit an activity, they may act on the side of caution and refuse a permit, or make it less extensive. Similarly, they may demand, in their administrative enforcement, more precautionary measures from an actor in an uncertain information situation. This is a logical consequence in the legal order founded on environmental law theory and principles, of an extensive interpretation of the right to remain passive.

7.7.6.6.3 Different Function and Purpose to Motivate the Non-Applicability of the Right to Remain Passive

The above argued motives for demanding actor involvement in the regulatory procedure, are perhaps more theoretical – or a matter of principle. On a more factual purposive note, the administrative enforcement of information duties often has a different function and purpose than a criminal procedure, and should therefore generally not be covered by fair trial rights relating to the criminal procedure. A central aspect of the argument is the administrative enforcers' wider functional role and task, certainly within an area such as environmental law. Their administrative assignment entails making actors

¹⁶⁵⁰ Compare to: Darpö, J., *Miljö rätt och Europakonventionen* p. 93.

act right, not merely to punish their wrongs, and even wider, to further long-term environmental improvements. This is reflected in the function and purpose of the enforcement instruments, and their use in individual cases, which then ties in again to the character of the demanded information, as discussed in the above. They ask for facts and investigation of cause and effect, to be able to prevent, or mitigate damage, or ways of repairing it. They are not focused on the culpability of the actor.¹⁶⁵¹ Yet, all enforcement involves distribution of legal and factual responsibilities, and liabilities, certainly in a system of enforced self-regulation, and in the context of PPP. The question of culpability is always relevant in the distribution of these burdens, if the burdens are connected to these responsibilities.

7.7.6.6.4 Case Law Discussion on Functional and Purposive Factors

These lines of argument may be seen in the case law of the compared legal systems. The Dutch Supreme Court¹⁶⁵² argues for the environmental protection purpose of the legislation. It points to the relevant reporting obligations, which had been regulated in the permit conditions. They had been stated in view of the supervision and enforcement of the adherence of the Surface Water Act and legally grounded permit regulations. The Court argued with reference to the environmental protective aims and interests of the Surface Water Law. These aims and interests are thus argued to legitimise supervision and enforcement in the relevant manner, and the use of thus received information in the decision on measures in response of breaches of these rules. The Court stated that nothing in Art. 6 ECHR contradicted this. The fact that the report information may subsequently give rise to a potential suspicion of a criminal act was explicitly stated not to influence the Court's decision, and neither had the fact that the suspect had himself gathered the relevant information. The Court explicitly stated having found no impediments in Art. 6 of the ECHR, for the enforcement of information duties, as well as the use of thus attained information in the assessment of consequential enforcement action. This case primarily concerned the general structural actor duties for information. The "ground rules", and the use of such obtained information in an individual case, was not the issue, even though the Court commented generally on its potential use as criminal evidence.

In 2004 the Swedish Environmental Court of Appeal held that an order for producing information for the purpose of enforcement was normally not

¹⁶⁵¹ In a way, the institutional or procedural location may therefore be important, even though European case law states that interpretation is freed from such labels. The question of who is carrying out the investigation will be decisive to the purpose and use of the authority, as it may have a limited constitutionally based task and role in the legal order. The problems for the involved actor may, however, arise when the information is passed over to another authority, typically the police and prosecutors.

¹⁶⁵² Hoge Raad 19 September 2006, nr. 00895/05 E, AB 2007, 2.

in breach of the right to remain silent under ECHR Art. 6.¹⁶⁵³ Even though there was in this case a suspicion of a criminal offence, the Court argued there was limited influence on the actor's responsibility for information. It emphasised, with support of the European Court in Saunders, the importance of a functioning enforcement, and state that exceptions to the duty to cooperate in the investigation should therefore only be made as specific exceptions, and only when this was motivated by the considerations that have to be made to the demands of a criminal procedure in line with legal certainty. The Environmental Court of Appeal found nothing to support the view that individual persons may generally make demands under Art. 6 in the context of environmental supervision and enforcement. Notably, however, the argument was backed up with the non-coercive character of the enforcement measures. This might suggest that the strong functional and purposive arguments for actor responsibilities are not that authoritative.

Statements on the purpose of actor responsibilities and enforcement measures are made in RÅ 1996:97 also. Notably, the Court of Appeal had discussed the purpose of actor responsibilities for cooperation and information in the administrative supervision and control context. It argued that too far-reaching of an application would impede the functioning of fair and effective supervision and control and could not have been the intent of Art. 6.

The English Green case discusses the purpose of the administrative enforcement power, and its application. The House of Lords in its judgment noted that the investigative powers had been used outside the criminal procedure. Hence the approach to the right to remain passive was different, protecting against abuse of powers or prejudice of a possible trial. This issue was more connected to the purpose of the investigation and the use of the authority's powers.¹⁶⁵⁴ And here Lord Hoffman stated, as described earlier, that the question of whether a rule of an investigative power excludes the privilege against self-incrimination must therefore be concluded from the wording, purpose and intention of the statute.¹⁶⁵⁵ The purpose and function of the here relevant investigative powers is not only obtaining evidence for the prosecution of offenders, but also for the broad public purpose of protecting health and the environment, as in the case at hand. The intent of the statute would be frustrated if the persons who know most about the hazards at hand could refuse to provide information on the ground that this information might incriminate them.¹⁶⁵⁶ Therefore, the House of Lords held that there was

¹⁶⁵³ MÖD 2004:64.

¹⁶⁵⁴ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, p. 435.

¹⁶⁵⁵ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, p. 433.

¹⁶⁵⁶ Lord Hoffman referred to similar arguments in financial law and concluded that these arguments were even stronger in the environmental law context. See: *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, p. 434.

no abuse of powers or prejudice to the fairness of a possible trial.¹⁶⁵⁷ The question of whether the obligation to provide information had caused prejudice to the defence in a following criminal trial, they left to the trial judge.¹⁶⁵⁸ The expression of the administrative investigatory function in the individual case is thus left to be decided in the context of the trial. In the common law system this is a valid alternative.

Notably, the Court of Appeal decision focused even more on the legitimate purpose and function of the environmental authorities' investigation.¹⁶⁵⁹ Comment on the decision of the Court of Appeal criticised the practical consequences as entailing an almost unfettered discretion for the Agency in gathering information on its pollution control functions, and that the likely future incorporation of the ECHR could change the law in this respect.¹⁶⁶⁰

Comparatively, it may be noted that the English Green case departs from the potential of the interests of environmental law enforcement to encroach on the right to remain passive. These rights are not absolute and may therefore be delimited in the public interest. The Court's argumentation can be interpreted as acceptance of some self-incriminating effects. The institutional structure of English enforcement, with administrative and criminal procedures being conducted within the same authority, and sometimes at the same time, suggests an increased risk of such self-incriminating situations. The House of Lord met this potential friction with fair trial by arguing the purpose and effectiveness of the enforcement system, and the measures taken by the enforcer. This might, as argued earlier, be partly ascribed to the possibilities open to the criminal court judge to assess and exclude evidence if it was considered to lead to unfairness of the trial. With such an order, it is easier to separate the different functions, and procedural position of the actor's involvement, even when the same authority has dealt with the investigation.

When self-incriminating effects are recognised, and argued to be motivated by public interests, it brings about a proportionality assessment. An English case that illustrates such proportionality discourse is that of *Brown v. Stott*¹⁶⁶¹ from the Privy Council. In this case the public interest argument was central. The argued interest was road traffic safety, not environmental interests, but the reasoning may be relevant in the context here. In the assessment of the police's questions concerning who had been driving the car,

¹⁶⁵⁷ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, p. 435.

¹⁶⁵⁸ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, p. 434.

¹⁶⁵⁹ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [1998] Env. L.R. 153, esp. p. 168. Lord Justice Waller based his arguments on European law fundamentally on the Orkem case. Notably, the ECHR had not become valid domestic law at the time of the judgment of the Court of Appeal.

¹⁶⁶⁰ *R. v. Hertfordshire County Council ex p. Green Environmental Industrial Ltd* [1998] Env. L.R., Case Comment pp. 172–173.

¹⁶⁶¹ *Brown v. Stott (Procurator Fiscal, Dunfermline) and Another* [2003] 1 A.C. 681.

even though the suspect had only been charged with theft, the Privy Council held that this was quite appropriate under the fair trial principles. They made inquiries into the case law of the Strasbourg Court, and indeed of the history, tradition and style of the balanced Convention system, focusing on the importance of proportionality.¹⁶⁶² As Lord Steyn put it, a quite polycentric view of rights, which meets the character of environmental law cases – involving many different inter and intragenerational interests:

The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights.¹⁶⁶³

The Judgment of the Privy Council, expressed in all the different opinions, departs from the privilege against self-incrimination not being absolute,¹⁶⁶⁴ and the fair balance of public and individual rights.¹⁶⁶⁵ It consequently held that where it is necessary to achieve a legitimate aim within the public interest, the privilege of human rights could be subject to limited qualification.¹⁶⁶⁶ The next step was to determine whether these qualifications were proportionate to the purpose in question, or if the fairness of trial was infringed too much.¹⁶⁶⁷ It was held that because this case concerned a single simple question (asking the suspect how she had travelled to the store where she had been caught shop-lifting) and not lengthy coercive interrogations, and so on, they would allow for this small exception which was not disproportionate for the purpose of this important public interest.¹⁶⁶⁸ It would be interesting to see similar reasoning on environmental interests and the proportionality of the expressions thereof in the individual case of enforcement of actor responsibilities for information. Such cases are yet to be encountered.

7.7.6.7 A Comprehensive and Combined Assessment of the Right to Remain Passive in the Context of Administrative Enforcement

As the presented discussion has shown, the existing legal discourse on the matter of fair trial challenges to the actor responsibilities for information shows a tendency to argue both that the right to remain passive is not applicable, and that even if it is, the effective enforcement interest motivates the

¹⁶⁶² *Brown v. Stott (Procurator Fiscal, Dunfermline) and Another* [2003] 1 A.C. 681, pp. 704, 708, and 719–720.

¹⁶⁶³ *Brown v. Stott (Procurator Fiscal, Dunfermline) and Another* [2003] 1 A.C. 681, p. 707.

¹⁶⁶⁴ *Brown v. Stott (Procurator Fiscal, Dunfermline) and Another* [2003] 1 A.C. 681, pp. 702 and 704.

¹⁶⁶⁵ *Brown v. Stott (Procurator Fiscal, Dunfermline) and Another* [2003] 1 A.C. 681, pp. 719, and 728.

¹⁶⁶⁶ *Brown v. Stott (Procurator Fiscal, Dunfermline) and Another* [2003] 1 A.C. 681, p. 720.

¹⁶⁶⁷ It is well to remember that the overall fairness of trial is an absolute right and cannot be infringed upon.

¹⁶⁶⁸ *Brown v. Stott (Procurator Fiscal, Dunfermline) and Another* [2003] 1 A.C. 681, pp. 705, 710, 722–723 and 728.

infringements. It seems the different factors are in a way weighed together in a comprehensive and combined assessment of the individual case, and its general context. This can be illustrated by RÅ 1996:97, where the Swedish Supreme Administrative Court, and the Administrative Court of Appeal before them, commented on the purpose of actor responsibilities and enforcement measures. In their assessment of whether there was a criminal offence, they looked to the purpose of the individual enforcement measure. They held that even though the authorities had found reason to make a more extensive audit, this in itself did not entail suspicion of a criminal offence, and that nothing else showed such purpose of the actions. The Court nevertheless found it appropriate to comment on the problematic delimitation of the reach of the Art. 6 rights within the administrative procedure, but that they did not have to go further into this problem, as the demands for information had not been coerced. Therefore the right to remain passive was not applicable.

Interestingly, the Court of Appeal had earlier discussed the reach of the right to remain passive by arguing the purpose of actor responsibilities for cooperation and information in the administrative supervision and control context. It argued that too far-reaching an application would impede the functioning of fair and effective supervision and control and could not have been the intent of Art. 6. It also reflected on the potentially self-incriminating results and implied a need for investigation of the actual position of the individual in the case at hand, in view of the right to a fair trial, and the proportionality of the enforcement measures, in order to assess the appropriate reach of those rights – but also the difficulty of doing so.

With this reasoning we return from the general purpose of effective enforcement, to an assessment of the process in the individual case; now with a functional and purposive approach to fair trial rights. The general purposive argument is not enough to evaluate the actual position of an individual in the criminal trial. The balancing of individual rights and public interests also imply that it will not suffice to analyse only the general structural function of enforcement of the actor's responsibilities for information. Neither is the character of the information, and the time or place in the procedure in which it is demanded, respectively, enough to assess the status of the relevant fair trial rights. The position of the addressee in the individual case will have to be evaluated and balanced against the expression of the function and purpose of the individual enforcement situation. This discussion brings us back to the Saunders case, and we are once again reminded of the autonomous interpretation and application of Art. 6 in its reflecting the purpose of ensuring the procedural rights of the individual on a criminal charge.

The European Court states in the Saunders case that the vital public interest and the complexity of the case could not justify the typical marked departure from fair trial principles.¹⁶⁶⁹ Thus even if there is another legitimate pur-

¹⁶⁶⁹ *Saunders v. the UK*, Judgment of 17 December 1996, para. 48.

pose this cannot be implemented so that in the end the function is incriminating in relation to the individual person in the individual case. A purposive approach to this individual case may thus reveal that the enforcement of actor information may on the face of it seem acceptable in the light of the ECHR, but in reality it effectively contradicts the purpose and function of the typical rights and makes the procedure as a whole unfair. In the Saunders case the use of the transcripts was in the end found to be in breach of Art. 6, mainly due to the way they were used at the trial. The transcripts replaced the suspect's verbal statements (thus circumventing his right to remain silent) as a main part of the evidence, and as proof of Saunders' character and fault, not just as evidence of factual circumstances. The function of the materials in the criminal trial therefore caused them to conflict with Art. 6. They were the primary evidence against Saunders, and thus functionally substituted the criminal evidence. This is not the role of the administrative enforcer's investigation.

The described domestic environmental law cases state the right to remain passive in pre-trial proceedings to be limited through statutory rules on information duties and competences to enforce them. They all argue the purpose of enforcement of environmental law, and fair and effective procedures such as support for the actor's responsibilities for information and cooperation in administrative enforcement work. They see little influence from the right to remain passive on these responsibilities, even when the involved addressees are at the same time being investigated for environmental crime. The environmental interests and the regulatory function is decisive in seeing the fair trial rules as generally not being applicable, and not that relevant.

In general, I would argue that the law on the balance between the purpose of the actor's responsibilities for information to further the public interest on the one hand, and the individual's right to remain passive in criminal proceedings, has not been tested in any of the cases. The domestic courts have not yet judged an environmental law case where coerced self-incriminating information has actually been used as evidence in criminal proceedings. And the European courts have not tried any environmental law cases on the matter at all. I hold that the function and purpose of enforcement of the actor's responsibilities for information in environmental cases can justify infringement or delimitation of the reach of the individual's right to remain passive when facing potential criminal conviction. However, according to valid law on fundamental fair trial rights, this has to be balanced and proportionate, and generally established in the individual case as a whole, and considering the factual position of the individual addressee. Such an individual evaluation is of course difficult, if not impossible, for the administrative enforcers to make at their stage of the process, enforcing demands for information from the supervised actors.

7.7.6.8 Coercive Enforcement

The right to remain passive is connected to the presupposition of coercive methods for obtaining information from the accused. The European Court has defended the idea that the criminal prosecution shall prove its case against the accused, without resorting to evidence obtained through methods of coercion or oppression contrary to the will of the accused.¹⁶⁷⁰ There is no prohibition on asking for information through the providing of documentation or answering questions, and so on, or drawing conclusions from the suspect's silence.¹⁶⁷¹ The central point is that incriminating evidence should not be obtained by coercion on the part of investigators. The person who refuses to provide incriminating information cannot be punished either.¹⁶⁷²

The Swedish Supreme Court has held that the right to remain passive entails legitimate defence against charges of perjury, outside the criminal proceedings and the trial, as here in the bankruptcy proceedings.¹⁶⁷³ Thus the individual cannot be punished for non-cooperation when the relevant information could lead to incrimination. Comparatively, the House of Lords in the English Green case found no problem in criminal enforcement of the addressee's refusal to adhere to administrative demands for information, even when parallel criminal proceedings were being conducted – and by the same authority. As noted earlier, common law separates the administrative investigation from the subsequent criminal trial, where the court should decide on the appropriate use of evidence. The duties to cooperate in the administrative procedure are not affected and refusal may be punished, if the demands are deemed legitimate and founded on statutory competence. These different positions illustrate well the problematic conflict between the function of the enforcement system and the rights of the individual addressee. The legitimate excuse for refusing to cooperate in the administrative investigation takes away a key element of administrative enforcement: the sanctions towards the person who does not adhere to the legal duties and administrative order. On the other hand, the clean separation of the administrative procedure from the criminal prosecution based upon information from that investigation seems to disregard the context that is obviously relevant from the perspective of the individual addressee. And a middle ground is hard to find without resorting to a comprehensive evaluation of the entire process, in

¹⁶⁷⁰ *Quinn v. Ireland*, Judgment of 21 December 2000.

¹⁶⁷¹ *Murray v. United Kingdom*. Judgment of 8 February 1996. See comment in Prop. 2002/03:106 p. 81.

¹⁶⁷² *Funke v. France*, Judgment of 25 February 1993; *J.B. v. Switzerland*, Judgment of 3 May 2001; *Heaney and McGuinness v. Ireland*, Judgment of 21 December 2000; and *Quinn v. Ireland*, Judgment of 21 December 2000. See, also NJA 2001 p. 563. The cases all concerned conviction and punishment through criminal fines or imprisonment for refusing to make incriminating statements.

¹⁶⁷³ NJA 2001 p. 563.

each individual case and in hindsight, which provides no guidance to the acting administrative enforcers.

Coercion can be many things, but at its core there is the threat of different kinds of sanctions, administrative or criminal, such as imprisonment as well as monetary sanctions. However, coercion has to be directed at making the actor himself actively cooperate in the production of the information, which will be discussed later. In environmental law enforcement in the Swedish system conditional fines are the principal coercive instrument. The Dutch system also relies heavily on such instruments, the *dwangsom*, even though physical enforcement by the authorities is comparatively more common there than in Sweden. Comparatively, in the UK, breaches of enforcement orders are generally criminalised.

The response of the Swedish legal order to the potential conflict between enforced actor duties for information, and the rights of the individual to remain passive, relies on avoiding coercion when there is a risk of self-incrimination. The actor's responsibilities are still valid and administrative enforcers may rely on them, but they cannot use coercive methods to make the actor cooperate. This generally means that they cannot couple orders demanding information with conditional fines, if there can be perceived to be a criminal charge. As a result, Swedish tax law prohibits coercive enforcement of information duties in different situations where criminal charges have been brought.¹⁶⁷⁴ Such legislation was suggested in the revision of the Environmental Code, but has not as yet resulted in any legislative changes.¹⁶⁷⁵ However, case law from the Environmental Court of Appeal has also established such a rule for environmental law enforcers, in view of European law on fair trial.¹⁶⁷⁶

In MÖD 2004:64 the Court held that the administrative enforcer's coercive powers may be delimited by the fair trial principle in Art. 6 of the ECHR in cases of enforcement in the context of suspicion of criminal offences. They found, with support in European law, that the interest and purpose of well-functioning enforcement motivated extensive actor responsibilities but not as far as to allow public authorities to coerce their cooperation in supplying information that could be used as evidence against them in a trial, at least where there is a concrete suspicion of a criminal offence. The reasoning seems to be based upon the interpretation of European Court case law of applying the right to remain passive only to administrative procedures in-

¹⁶⁷⁴ 3:6 and 12 Taxation Act; Prop. 1997/98:10 and SOU 1996:116.

¹⁶⁷⁵ SOU 2004:37 pp. 302–303. Comparisons were there made to Danish and Norwegian reforms introducing general regulation of the enforcement of information duties, and also more fundamentally limiting the actual responsibilities of the actor (2004:37 p. 296). The suggestion was not even commented upon in the following Bill. Later the same year as the original proposal the Environmental Court of Appeal held that the enforcers could not use conditional fines in order not to conflict with Art. 6 of the ECHR.

¹⁶⁷⁶ MÖD 2004:64.

volving coercion in relation to incriminating information.¹⁶⁷⁷ This reasoning was also supported by the recent legislative reforms in the tax law area, and in the investigation by the Environmental Code Committee.¹⁶⁷⁸ The Environmental Court in its more detailed investigation, argued for analogy with tax law prohibition on conditional fines in the interests of legal consistency. However, the order in this case was not coupled with a conditional fine, and therefore the Court could find the self-incriminating rules inapplicable.

From the legal certainty perspective of the individual addressee, one could question this seemingly clear-cut distinction of coercive administrative orders, and just administrative orders, relying on voluntary participation. For the private individual, receiving an authoritative order from a public body does not convey voluntariness. An administrative order is authoritative and should be followed. I would also argue that it seems odd that public bodies would regard their own exercise of authority as something that is to be followed voluntarily. They can use informal measures like information and advice for that purpose. Similar criticism is suggested by the Swedish Council on Legislation advocating a wider prohibition on enforcement orders altogether that ask for information in the context of a criminal charge.¹⁶⁷⁹ This view was deemed to be too extensive by the Government and was not included in the Bill. It could not be seen as coerced, as regulated by the law of the ECHR.¹⁶⁸⁰ The Legal Council in further tax law reform work argued that there should at least be a mandatory caution for the addressee, but this was similarly seen as too extensive and not required by the ECHR.¹⁶⁸¹ The Council contended that even though the individual was clearly under no duty to thus incriminate himself – or herself – it could not be expected that they would understand this when not being informed of the matter, even though they were not threatened with fines or other sanctions.

The English case of *Brown v. Stott* may be noted in this context. In this criminal investigation the police asked questions pertaining to offences for which the suspect had not been cautioned. In asking the intoxicated suspect if she had driven to the supermarket herself, the policeman essentially investigated a possible traffic offence. But this was not seen as coercing admissions of guilt, even though being made in the context of an interrogation by the police, as it was just the asking of a simple question. The coercive character was thus balanced against the interest behind the question, and not found to be a disproportionate infringement on the individual person's rights in the individual case.¹⁶⁸² The coercive character is hence perceived more as

¹⁶⁷⁷ Compare the judgment of the Environmental Court of Appeal to that of the Environmental Court in Vänersborg on 8 November 2004, in the same case (Case no. M 112-02).

¹⁶⁷⁸ SOU 2004:37 Chapter 6.

¹⁶⁷⁹ Prop. 2001/02:25 pp. 349–350.

¹⁶⁸⁰ Prop. 2001/02:25 pp. 205–206.

¹⁶⁸¹ Prop. 2002/03:106 pp. 81 and 334–335.

¹⁶⁸² *Brown v. Stott (Procurator Fiscal, Dunfermline) and Another* [2003] 1 A.C. 681.

a factor that has to be functionally and contextually assessed, which better reflects the European law functional and comprehensive approach to the rights of the individual.

A valid question is what kind of enforcement is at all possible without the possibility of coercion arising through the threat of sanctions? If one takes away “the axe on the wall” can there really be any obligation to speak of? Arguably, Swedish legal discourse handles administrative enforcement orders demanding information, not as conveying any real duties, but as asking for voluntary cooperation. The actor has the responsibility but not the liability, so to speak.

The Swedish Supreme Administrative Court¹⁶⁸³ also states that refusal to supply documentation that may contain incriminating information cannot be punished or subject to coercive measures to make the individual cooperate actively in producing the information. However, the tax authorities in their own investigation through searching the premises of the actor and obtaining the documents could not be seen as coercion of the addressee’s active cooperation in producing the evidence. Nor could it be seen as a punishing sanction for refusal to abide by an order to submit the documents himself. From the perspective of the individual actor, this order may be questioned. It should be of no relevant difference to him if the enforcement authority coerced access to his files to find the information needed or if he took them out himself. And paying for someone to make the investigations that he himself has a right not to have to make, of course, seems unfair. But there it is; the right to remain passive only frees the suspect of active cooperation in the investigation.

7.7.6.9 Summarising the Right to Remain Passive, and the Effect on Administrative Enforcement of Environmental Law

The right to remain passive begins to apply somewhere when a more concrete suspicion of a crime starts to form, even when the suspicion arises within an administrative authority. The enforcer’s powers to investigate that issue are thus limited, and perhaps also generally their investigative powers towards the relevant addressee. However, the right to remain passive outside the actual criminal trial is subject to proportionate infringements in the public interest, and has been so delimited by statutory rules on actor responsibilities and enforcement competences regarding information. Sometimes the rights of the individual justify limits to the enforcement competences. The identification of such situations is made through a balancing of interests in the individual case. Such balancing is done with a functional and purposive approach, and by considering the process as whole, from preliminary administrative processes to real or potential criminal trials using the information obtained at the preliminary stages. Criteria that are considered are who asked

¹⁶⁸³ RÅ 1996 ref. 97, to which the Environmental Courts refer in MÖD 2004:64.

for the information and when, what kind of information was it, and why and how was it asked for? None of these are decisive, but they are all interrelated in the analysis of the case as a whole. For example, asking for admission of culpability may seldom be seen as only gathering facts for making orders, and asking for mere facts may not be allowed at all at a later stage, where the suspect is being prosecuted and awaiting trial. The question of when in the process the information is demanded, will possibly influence the enforcement powers. The closer a criminal trial comes, the more sensitive is the issue of demanding investigation of the matter, even though it is done by the administrative enforcers and for their own purposes. They will probably be careful not to coerce such cooperation.¹⁶⁸⁴

It is important to note that it is not enough to evaluate the public interests, or individual rights, in general. The balancing and the evaluation of the criteria and proportionality will also have to be translated into the individual case. The function and purpose of the right to remain passive, under the principle of fair trial, is to be seen from the position of the individual person in the relevant case as a whole.¹⁶⁸⁵ It seems the application of the relevant fair (criminal) trial rights can be challenging for the administrative enforcer. The assessment of when and how the actor's right to remain passive must be applied. Such challenges and unclarities could have negative impacts on effective enforcement of environmental responsibilities. The enforcers need clear direction.

The Swedish system shows a tendency to steer clear of problems of the addressee's self-incrimination in enforcing information duties through avoiding, or even prohibiting, administrative coercion. This approach may be criticised from various points of view. For the enforcers, it would be detrimental to their use of authority if they were deprived the use of coercive means; the "axe on the wall". The use of authoritative orders to compel actors live up to legal demands is the actual function of legal regulation, compared with voluntary means of steering and regulation. The argued view of plain orders being voluntary therefore seems self-destructive. To put it in the terminology of the Environmental Code system: it breaks the "Environmental Code chain" (miljöbalkskedjan). This is particularly problematic in a context of uncertainty concerning when the right to be passive is applicable.

Some criticism may be stated from the perspective of those involved in the administrative enforcement situation. It would be very hard for an enforcement authority to know in advance what the information will reveal and how it will be used further on in a criminal procedure. And to assess the procedure as a whole can only be done after a criminal trial, when the end result of what evidence was decisive, and so forth, can be seen in its entire

¹⁶⁸⁴ Similarly argued by Darpö, J., *Miljörätt och Europakonventionen* pp. 93–94.

¹⁶⁸⁵ Werlauff, E., *Common European Procedural Law; European Law Requirements Imposed on National Administration of Justice* p. 234.

context.¹⁶⁸⁶ An easy response would be one of excessive caution and to never demand information, but that would go against the grain of actor responsibility, which is so fundamental to environmental law.

Nevertheless, the actor may have to stand for the intrusion of authorities gathering the information themselves, without the active cooperation of the actor, and he may even have to finance such investigation, according to the PPP. It seems that the obtaining of incriminating information without the active involvement of the relevant actor is not covered by Art. 6, even if the methods are coercive in character. Standing for investigators searching premises, or having to pay for an incriminating investigation is, it is suggested, not covered. Crucially, enforcing the actor's responsibility for carrying on the activity in adherence with law is, of course, not covered. Orders for the taking of precautionary or reparatory measures are quite legal in this respect. So this is the way out for administrative enforcers who find themselves in a situation of not knowing if their enforcement of the actor's responsibilities for knowledge, investigation and proof are in breach of the right to remain passive under the fair trial rules of the ECHR. They can turn to the more traditional enforcement methods of inspection and investigation themselves and send the bill to the responsible actor, in line with the PPP. This would then reverse the development of a modern environmental regulation, in the hands of the actors themselves. Probably any professional actor would object that they could have conducted the investigation faster, better and cheaper. And probably the enforcers would agree, as professional actors generally possess the necessary competence and knowledge. Additionally, this approach would take away the actors involvement in developing his environmental work, and the construction of his own business.

The matter must be put in context of the order's basis in sufficient decision-making materials. To know what must be done, information is needed. In the context of a criminal charge, producing information and making investigations may be limited. At least it cannot be coerced, if there is a possible incriminating content of the materials. A way around this is to leave the details of the order to the addressee. That will be discussed in the following. Following the traditional theory of environmental law where acceptance of hazardous business is conditioned by actor responsibilities and public control the delimitation of actor responsibility should lead to less acceptance. When there is insufficient information enforcers should rest on the precautionary principle, and exercise caution in allowing activities involving environmental risks. An administrative enforcer could then revoke the permit of an activity, or stop, or suspend it, while they investigate a suspected environ-

¹⁶⁸⁶ Werlauff, E., *Common European Procedural Law; European Law Requirements Imposed on National Administration of Justice* p. 234, criticising the total assessment of all relevant elements in European Court cases as becoming so concrete and individualised that they provide weak precedential guidance.

mental disturbance. Such measures would not be seen as criminal sanctions for refusing to produce information to enforcers. Their severity in the perspective of the actor may nevertheless cause them to be criticised from the perspective of proportionality. Their far-reaching effects for the addressee may also warrant additional procedural responsibilities for the authorities – including investigation and proof. This might not be the best way to achieve effective enforcement of actor responsibilities.

With this background, it seems a better solution to shift safeguards against self-incrimination to the subsequent criminal procedure. Not until the actual criminal procedure takes form can the comprehensive view of the charged persons rights be ascertained. In comparison the trial judge may in the English system deem evidence inadmissible if they it has been attained in breach of fair trial provisions. Such safeguards could also be taken in the preparations of the prosecution, at least in the Swedish and Dutch systems where only the public prosecuting offices have the powers to prosecute and make criminal investigations (together with the police). Formal regulation of such an order could lift the matter from the enforcer's shoulders and provide better protection of both fair trial and of the preconditions for effective and appropriate administrative enforcement of environmental responsibilities.

The right to remain passive admittedly seems to have had little influence in practice on the environmental enforcer's investigation; the method is often non-coercive, and the information obtained is often on facts and not directly incriminating. However, the potential conflict is yet to be resolved authoritatively, and I would argue that the uncertainties have negative effects on the enforcer's regulatory use of authority. By carrying the legal discourse on the matter further, and putting it in context of its legal system, I believe to have shown that there are problems in the consistency and in the logical results of the arguments. And the problems affect both the individual actor and the effective enforcement of environmental law.

7.7.7 Summarising Remarks on Consequences of Actor Responsibilities

This section of the thesis has put the actor's responsibilities for information in the context of actual enforcement against that actor; what it means in terms of the evidence situation, and how the context of potential sanctions may entail problematic effects of actor responsibilities, and how the legal discourse meets these problems. In some situations the legal discourse does not accept the order of making the decision-making materials and the evidence of the burden of the actor. This might entail that repressive authority is used against them just because they do not have the strength to defend themselves. The legal system may balance such effects, through prohibitions on coercive enforcement, and through arguments of proportionality and reason-

ableness. However, these mechanisms are often not generally applied or regulated, or clearly discussed. When the issues are addressed, the arguments are plural and unstructured. The case law provides little guidance to the administrative enforcement authorities on the appropriate application of actor responsibilities for knowledge, investigation, and proof.

7.8 Concluding Discussion

7.8.1 Administrative Responsibilities for Proper Procedure – Shared Environmental Responsibilities

The discussion in this chapter has shown that the Swedish administrative authority has far-reaching responsibilities to ensure the information needed to exercise their administrative enforcement tasks. The expression of such responsibilities varies. In Swedish environmental law, considerable responsibility for knowledge, investigation, and proof lies on the actor. This is a fundamental and obvious basis of environmental law, and is linked to principles of prevention, precaution, and polluter pays. The basic purpose of these responsibilities is to ensure the required care of environmental interests. The enforcers also have powers to enforce actor responsibilities for information. The actor thus becomes involved in the control of his own activities, both in view of management of risks of detrimental effects, and positive development towards optimal resource management. This legal context influences the distribution of information burdens in the enforcement procedure.

The actor responsibilities do not replace, or eradicate the administrative authority's responsibility for due procedure and good government. They have to ensure that their exercise of power has legal pedigree, and that the decision fits appropriately within the limits of the law, including its purpose and intent. They cannot shift that responsibility over to the actor. The responsibilities for information will, however, be shared in the environmental administrative case, and their distribution are determined by their different objectives. This is manifested in case law; for example, in MÖD 2005:9¹⁶⁸⁷ where it is required that the authority provides evidence indicating a relevant risk, which shows grounds for its enforcement action. The burden of proof is subsequently shifted to the actor, who must then prove that they are taking sufficient precaution; if they will not – or cannot – prove that the indicated risk will validate precautionary enforcement action. The step by step approach advanced by the Environmental Court of Appeal also illustrates this idea, with the authority keeping its procedural responsibility, but laying reasonable duties for information on to the addressee. The question is then how

¹⁶⁸⁷ See: Section 7.6.2.

the actual exercise of this procedure of shared responsibilities balances these different objectives and responsibilities. The analysis has indicated that the fundamental objectives of environmental actor responsibility may sometimes be lost when the well-rooted conceptions of legal certainty are promoted. This could mean that the authority takes over the actor's responsibilities under environmental law, and that should not be the objective of the administrative procedure.

7.8.2 Protection of the Addressee and Allowing Consideration of Environmental Responsibilities

The concrete requirements of what kinds of information should be produced, and how much, must differ from case to case. These requirements are often guided by considerations of reasonableness and proportionality, which basically protects the rights and interests of the individual addressee. In the environmental context, this focus may over emphasises the protection of the interests of the "polluter" in relation to the interests of those suffering the harm of the "pollution".¹⁶⁸⁸ The argument has been made, that the plurality of interests must involve a balancing of interests, in the assessment of reasonableness. As should the fundamental and extensive actor duties for self-control, and other information responsibilities.

The analysis in this chapter has shown cases suggesting that the weighing of interests emphasises the authority's responsibilities and the addressee's interests, at the expense of the actor's environmental responsibilities. Such a case was noted in MÖD 2006:60,¹⁶⁸⁹ where the ordered investigation was deemed too extensive, and thus unreasonable. The investigation regarded information that the actor should have already had, in view of their self-control duties. The reasonableness of the order was, however, assessed not in view of what he should already have done, had he carried out the activity responsibly and in compliance with these legal duties, but in view of what he had actually done – which was poor control over his business. Such an order will inevitably lead to the responsible actor being subject to further enforcement demands than the irresponsible one. From the perspective of environmental law enforcement, this order is unsatisfactory.

In the context of awarding a conditional fine in MÖD 2006:18,¹⁶⁹⁰ in response to non-compliance with an order to investigate, the enforcement authority was burdened with very extensive burdens of investigation and proof. The evidence showed several indications of the actor not living up to their

¹⁶⁸⁸ As has been discussed throughout the study, the environmental perspective today goes much further than pollution control, but the concept "pollutor" is here used to illustrate the person responsible for poor resource management, in relation to the other legitimate interests of such sustainable management.

¹⁶⁸⁹ See: Section 7.5.3.3.

¹⁶⁹⁰ See: Section 7.7.5.

duties, which in view of the threshold idea discussed earlier, should entail that the burden of proof is shifted to the actor. This case concerned the awarding of a conditional fine, so the authority's burden of proof is generally higher, because of the higher demands for legal certainty in view of decisions with more detrimental effects on the individual. Nevertheless, this is not a criminal procedure, and the burden is still shared, even though influenced by the sanction context. The Court's reasoning as regards the burden of investigation and proof does not reflect such shared responsibilities.

The discussion above has pointed out some situations where the discursive focus of the decisive objectives behind the enforcers' procedural duties is diminishing the authority – and thus also the legitimacy – of the actors' responsibilities. I have argued that the established structure of shared information responsibilities have to be allowed room in this assessment also. This calls for awareness and consideration of their grounds and objectives. This thesis attempts to bring these matters into the discourse.

As indicated above, the protection of the individual actor in the enforcement situation is stressed in the context of sanctions. A fundamental challenge to the idea of enforced self-control is the protection of the individual's legal certainty when there is a threat of a severe sanction. A special matter in this context is the fair trial right to remain passive – or protection against self-incrimination. European and Swedish case law on the matter has recognised that the right to remain passive under ECHR Art. 6 reaches into administrative enforcement procedures. The criminal procedural safeguards of the individual will influence to the administrative enforcement procedure, and prohibit the coercion of actor involvement in the control of his activities. The assessment of when this applies is, however, quite challenging for the enforcement authority. I have suggested that this fair trial right would more appropriately be safeguarded in the subsequent criminal procedure.

7.8.3 Appropriate Regulation of Actor Responsibilities

Having thus made these observations, it may be valuable to look at the legal basis for the actor's responsibilities. The sometimes weakened position of such responsibilities in the assessment of procedural safeguards for the actor may have some connection to how they are constructed in the environmental law system. In a comparative perspective it can be noted that all the studied legal orders manifest extensive information demands on the environmental actor in the context of permit regulation. The applicant has to provide information in the permitting procedure, and the permit conditions will include investigation, documentation, and reporting duties, and so on. A permit regime rests on a concessional idea, and the idea that the actor is authorised to carry out the hazardous activity on conditions that they take on precautionary responsibilities, including investigating and producing evidence in the permit procedure, and monitoring and reporting during the operation of the installa-

tion. To some extent there are also general rules stating specific information duties, such as environmental reports, etc. These more precise rules are often stated for installations regulated by permits, or – as in the Netherlands – to replace conditions earlier prescribed in permits. Such constructions provide clear basis for the actor's responsibilities and associated objectives.

As a result of a move towards lesser administrative burdens on business, the permitting regimes have been progressively deregulated. Consequently, administrative enforcement becomes the main steering instrument. The main method for gathering information in this procedure has traditionally been the enforcers' investigation and inspection where they gather the information and ensure expertise and decision-making materials. The Swedish enforcement system is, however, intended to focus on enforced self-control. There are explicit rules on actor responsibilities for information: knowledge, precautionary action and self-control. These rules apply for each and every one, and for any actions of significance to the aims of the Environmental Code. This order has roots in older environmental law tradition, but with the Environmental Code reform, the actor responsibilities have become generally applicable, and with a wider purpose of sustainable development. The scope is thus quite extensive.

The enforceability of the wide responsibilities has been discussed in the perspective of legal certainty. This discussion has involved the foreseeability of actor responsibilities, comparing pre-regulated duties, and enforcement of more generally formulated duties. The main conclusion is that the latter regulatory situation is more challenging from the viewpoint of foreseeability. Such challenges may have bearing on the assessment of reasonable burdens on the actor for investigation and proof. Enforcement orders will provide the specification of actors' duties so that they become foreseeable enough to enforce. In comparison to the pre-regulated duties, this regulation will however to some extent be more intrusive for the actor, and can to some degree seem unforeseeable. Actor responsibilities may be considered fundamental and clear in the environmental law tradition. However, in the meeting with the fundamental principles of administrative procedure, such environmental law principles needs clear and authoritative expression in the legal sources and the enforcement structure in order to be given similar authority in administrative practice – also outside the shrinking scope of permit regulation.

I have suggested some means to further legal certainty – mainly foreseeability. This fundamentally includes careful communicative procedure – which can again be exemplified with the argued step by step approach – and general emphasis on information and advice to actors. Furthermore, specification of actor duties in general rules might also need to be considered. The coupling of such general rules with administrative powers to tailor the demands on individual actor (as for many general rules in Dutch law) may provide appropriate flexibility to such general regulation.

8 Goal Steering, Actor Responsibility, and Precision in Administrative Enforcement

8.1 Introduction

The objective of environmental law is sustainable development –managing resources within the limits of nature. This means that environmental regulation has the essential purpose of achieving certain goals, or results, in the environment. Regulatory measures such as administrative enforcement orders are, however, addressed at individual actors, and aimed at changing their behaviour. But changed behaviour is not goal in itself. Enforcement, and the task of enforcement authorities, is aim and result oriented. The means to this end is managing the behaviour of mankind, with all actors having responsibility for doing their part. Environmental law enforcers will supervise and enforce compliance with such individual responsibilities.

In this thesis, responsibilities for information are in focus. Such responsibilities are essential to enable the management and protection of natural resources. In Chapter 7 the enforcement of actors' information responsibilities were discussed, and the reach of such powers analysed in the perspective of the fundamental principles of the Rechtsstaat. I have found that the Swedish order of enforced self-control involves comparatively far-reaching demands on information duties, also outside the permit regimes.

In this chapter the focus is turned to another way of enforcing actor responsibilities for information, namely on the enforcer's reliance on such responsibilities when ordering precautionary measures. The interesting question, in view of the actor's responsibilities for information, is whether, and to what extent, the enforcement authority can rely on these responsibilities when ordering the actor directly to change their behaviour – to take precautionary measures. Can duties of knowledge and investigation be indirectly required from the addressee of an order to take such measures?

A central aspect of the analysis is the authority's enforcement function of implementing, or translating, the general substantive environmental standards, or responsibilities, into individual duties with which the addressee must comply. This is essentially tied to the protection of legality and foreseeability. The core of the administrative procedural safeguards is that admin-

istrative enforcement must be clear and precise, so that the addressee can understand what is required of them. In the environmental law enforcement case, it is consequently the public authority's duty to express its demands precisely and clearly, while at the same time aiming at enforcing the actor's responsibility – and freedom – to formulate appropriate measures. Enforcers should only set the result oriented framework, and leave the choices within it to the actor. Nevertheless, general actor responsibility becomes, in the authoritative administrative enforcement against the individual, an authoritative statement of the addressee's duties, often with the threat of some sanction. The general responsibility is turned into the administrative exercise of authority against the citizen, and should as such be clear and concrete, communicating to the citizens what they should and should not do to keep within the law, and what the public authorities demand of them in order to do that. This double, and potentially conflicting, function of administrative enforcement measures, will be further investigated. An underlying question is to ascertain how the enforcement authority should enforce actor responsibility without taking over this responsibility itself.

Precision of administrative enforcement orders, and the related issue of choice of appropriate enforcement instrument and method, have been discussed in case law and within statements of administrative practice. This discourse has searched for an expression of the basis and consequences of the different arguments and decisions, with the hope of reaching a more coherent understanding of the balance between administrative safeguards of the individual's legal position, and the environmental law in striving to make actors work effectively towards the aims of sustainability. The analysis is made with a Swedish perspective, but set in a comparative context. All the studied legal orders state the core rule of clear and concrete enforcement, but the implementation and interpretation of this rule reveals differences. It is therefore interesting to mirror the Swedish discourse, its statements and the reasoning behind them, to these foreign discourses.

The investigation will begin by introducing the encountering perspectives of environmental goal steering enforcement and actor responsibilities, and general administrative law aspects of clear and concrete enforcement and related procedural responsibilities. This introduction is followed by a critical discussion of the encounter between the two perspectives and their underlying objectives (Section 8.2). Thereafter the issue is analysed further in the comparative study of expressions in some case law and administrative practice (Sections 8.3–8.5). In closing, the observations made in the comparison are used to shed new light on Swedish enforcement law. The means for enforcement of actor responsibilities is analysed in this new context and a more contextual approach is proposed. This approach suggests a purposive and less formalistic approach to the matter of precision of administrative decisions in this area of law. The context of sanctions is also reflected upon (Section 8.6). Concluding remarks are then made in Section 8.7.

8.2 The Encountering Perspectives of Goal Steering and Precision

8.2.1 Goal Steering and Result Orientation in Environmental Law

8.2.1.1 Implementing Environmental Goals

Environmental law is thus characterised by the function of implementing goals of policy and law. The enforcement decisions of environmental authorities are made in realisation of their administrative functions – or tasks – of furthering these objectives and protecting the legitimate interests involved. The law is an instrument for reaching the goal of sustainable development, implemented more specifically in the Swedish National Environmental Objectives.¹⁶⁹¹ Against this background the environmental law enforcement authority's task is stated as ensuring the realisation of these aims. This entails supervision and control of breaches against legal standards and requirements, mainly under the Environmental Code, but also the positive and proactive tasks of furthering goals and improving environmental management.¹⁶⁹² Such positive and functional administrative tasks are not unique to environmental law. However, goal steering and focus on the actual results in the environment (reactor orientation) are fundamental to the legal culture. They determine the general direction and basis of environmental law and its implementation. As thoroughly discussed earlier in this thesis, this is well established in Swedish environmental law. The Environmental Code departs from the aim and function of reaching sustainable development, and holds that the Code shall be applied so as to achieve these aims, as exemplified in MB 1:1. The preparatory works emphasise purposive goal-oriented tasks.¹⁶⁹³

Goal steering is realised in different ways. One way is to state result oriented norms. The objective of sustainable development is thus operationalised through result oriented policy objectives – such as the National Environmental Objectives – and legal standards, such as environmental quality norms, or limit values, with more or less precision. Goal steering also takes place at the level of individual regulation under environmental law – in permit conditions, or administrative enforcement orders focused on achieving environmental results that implement the goals. This means, first of all, that applying and interpreting substantive law, the weighing of interests and as-

¹⁶⁹¹ Westerlund, S., *En hållbar rättsordning* p. 47 (developed in Chapter 5); Christensen, J., *Rätt och Kretslopp* p. 46. See, further: Section 2.3.1.

¹⁶⁹² These tasks have been described in the country reports in Part II (see: Section 3.4, on the Swedish enforcement authorities' tasks and duties).

¹⁶⁹³ SOU 1996:103 Part 1 pp. 178, 182, and 225; Prop. 1997/98:45 Part 1 pp. 158–159.

assessment of risks, and so on, should be carried out with the underlying functional aim of fulfilling the stated goals.

An activity should, for example, in the permitting procedure only be considered appropriate and legal if it is in line with striving towards sustainability, and the subsequently set up environmental objectives. This can be exemplified by the case of MÖD 2006:53, where the Environmental Court of Appeal held that application of the relevant substantive norms shall be made in context of MB 1:1. The Court pointed to the statement in para. 2 that the Code shall be applied so that human health and the environment are protected against damage and nuisance. It held that the application of the general rules of consideration shall be made in the context of the overarching goal of sustainable development, with guidance from the National Environmental Objectives.¹⁶⁹⁴ In this case the Court saw as its overarching task to consider whether authorising the relevant installation would be in accord with the demands for sustainable development and the relevant national environmental objectives. Interestingly, they discussed the normative impact of such authorisation, as it follows that other similar installations would, due to the equal treatment principle, and also have to be permitted. That could potentially entail very large effects in view of the relevant goals. The permit was not granted.

8.2.1.2 Resource Optimisation and Actor Responsibility

There is a further dimension to goal and reactor oriented regulation within modern environmental law. The positive striving towards sustainable development entails continual and proactive work to strengthen the resource base and its relevant potential. I will refer to this idea as resource optimisation. Environmental measures do not merely signify protection against harm, but also the qualitative improvement of the exploitation of natural resources, so that there is room for more economic and social development. The objective is to meet the needs of current and future generations.¹⁶⁹⁵ The system for sustainable development entails actor-driven work to constantly optimise their own resource use. This is part of actor responsibility, and it is reflected in legal requirements of a constant and dynamic character, stating ongoing precautionary responsibility that adapts to changing circumstances – in the environment, and development of knowledge, technology, and other means for environmental control. Examples include BAT, but also the Swedish rules on self-control duties. These kinds of flexible and dynamic standards and requirements are well rooted in environmental law. They have been established in order to meet the fact that regulation of clear solutions is not always possible in the complex regulatory situation that environmental law

¹⁶⁹⁴ Prop. 1997/98:45 Part 2 p. 8; Prop. 2000/01:130 p. 79; and Prop. 2004/05:150 pp. 90–103. In the relevant case, reference is made to the thus stated objective of “No Eutrofication”.

¹⁶⁹⁵ *Our Common Future* pp. 46, 52, Chapter 8, and pp. 310–312.

involves.¹⁶⁹⁶ The idea is that environmental actors, separately and collectively, should strive towards more effective resource management. This entails resource management in a wide sense, including not only the use of energy and materials, but in reducing waste. Pollution is a kind of waste, and principally a symptom of an ineffective operation.¹⁶⁹⁷

This proactive endeavour to enhance the potential of the resource base means that actors should continually improve their environmental effectiveness. This work can be quite burdensome, but may often also bring economic benefits, as it promotes effectiveness, and can make it possible, for example, for the individual industry to be able to produce more with less. On a macro level, it creates room for economic growth and development within the limited natural resources. Through goal steering, such resource optimisation is largely left to the actors who have the economic interests and often the expertise to do this – at least within business and industry. This order, moreover, means that the actors' freedom to arrange their business is not unduly hampered. Detailed regulation of such organisation is not the concern, or within the public task of the enforcement authorities, but only the results thereof. Within the limits of the required environmental results, the actor has the freedom to take a new direction. This can be suggested to promote technical development. Moreover, the person benefiting financially from the operation should, in line with the polluter pays principle, pay for all the costs of the activity, including those of making the industry resource effective, in a broad sense. The environmental costs are thus internalised.¹⁶⁹⁸

8.2.1.3 Goal Oriented Enforcement and Actor Responsibility

Goal steering is further carried out through result oriented enforcement measures. As the aim and purpose of environmental law is reactor oriented – focused on achieving results in the environment – rather than deciding on how human activities should be carried out, the regulatory method should be characterised by goal steering and environmental results, and not detailed regulation. However, only the actors can be the addressee of regulation.¹⁶⁹⁹ In order to reach goals and results in the environment, the collective responsibility for managing and protecting it must be translated into individual legal duties for actors. The enforcers may then authoritatively order the actor to live up to such duties, and subsequently sanction failure to do so. However, this translation into individual duties is essentially instrumental – a means to

¹⁶⁹⁶ See: SOU 1966:65 p. 200.

¹⁶⁹⁷ *Our Common Future* p. 220, referring to ineffective industrial production, and the potential for steering through economic instruments. Air, water, etc., have historically been seen as free goods, but as this has been proved to be a mistake, the costs of pollution should be internalised in the costs of the operation.

¹⁶⁹⁸ *Our Common Future* pp. 220–222.

¹⁶⁹⁹ Westerlund, S., *Miljörettsliga grundfrågor 2.0* pp. 33–34.

an end. The end, the purpose of the enforcement action, is still goal furthering results in the environment – reactor orientation.

Furthermore, Swedish environmental law enforcement is focused on making actors control their own operations. The goal oriented approach relates to actor responsibility and the enforcement thereof, in that the actor is actively involved in the environmental control – including taking the initiative, investigating possible solutions, and deciding on the appropriate way to reach the demanded results. Direct enforcement should concentrate on the functional results of the measures, instead of the way to get there. The question is then how to combine the authorities' duties to translate the environmental goals and standards into individual duties, and the actor's duties for information. The fundamental issue is thus, as in Chapter 7, the distribution of responsibilities for precautionary measures, and environmental control, between actors and the enforcing public authorities. The following analysis will therefore be focused on this aspect of goal steering.

8.2.2 Clear and Concrete Administrative Enforcement

8.2.2.1 The Core Rule of Clarity and Precision

The public tasks of realising goals in policy and law, and to implement generally formulated framework law, will thus have positive effects in increased flexibility and the possibilities open for more appropriate solutions in view of substantive law. In the context of fundamental principles of public law,¹⁷⁰⁰ there are limits to the exercise of public tasks. Increased administrative discretion must not lead to arbitrariness or excess in the exercise of public power. Administrative law principles provide safeguards to protect the individual against excessive and arbitrary use of public power. To understand administrative enforcement of environmental goals, there is therefore a need to investigate the administrative law perspective further. One basic rule of administrative enforcement and exercise of public authority in general, is that the decision must be clear and concrete, so that individual addressees may understand what is thus authoritatively demanded of them. This becomes particularly important in the context of generally formulated goals and responsibilities, such as in the Swedish Environmental Code.

The core rule on clear and precise orders is found in case law and administrative practice in all the studied legal systems. In Swedish law it is reiterated in statements that roughly say: “an order should be formulated thus that the addressee without any difficulties or risk of misunderstanding may get a

¹⁷⁰⁰ See, mainly: Section 2.2.

clear understanding of what he or she should do”.¹⁷⁰¹ The Parliamentary Ombudsman states on this strive for understandable communication, that the individual must be able to understand the meaning of the decision, assess its reasonableness, and decide whether it should be appealed. The authority should to some extent also consider who the addressee of the decision is.¹⁷⁰²

Both Dutch and English legal discourses reiterate that administrative orders must be clear and certain. Dutch law reflects considerable case law on the matter of precision of order, discussing the basis of the presented core rule of clear and concrete enforcement. English case law states the general rule for different kinds of enforcement orders and in different areas of environmental law, back to the earlier health law.¹⁷⁰³ There is a general understanding at common law that any injunction or mandatory order should be certain and definite in its terms. It should be quite clear what the addressee of the order is required to do – or refrain from doing. The person should know what he or she has done wrong and what is required to remedy it.¹⁷⁰⁴ This point is stressed in current enforcement policies, for example the Regulator’s Compliance Code. Regulators must ensure transparency and provide advice, with the purpose of enabling the actors understanding of what is required by law. This promotes foreseeability, and thus effectiveness and efficiency in compliance control, and it reduces administrative burdens.¹⁷⁰⁵

In comparison, the expression of the core rule is subject to more nuanced analysis in English practice. There are indications that the law on this point is dynamic; subject to developments of values, policy, and law; and to development and reinterpretation in accordance with different aspects of social and legal context. Common law discussion reflects a spectrum of interpretation, ranging from a very formalistic interpretation with extensive responsibilities for the relevant authorities, to a “common sense approach” focused on the purposes of the material laws and the administrative powers, shifting responsibilities and burdens to the addressee. Some of these discourse developments will be illustrated and discussed in the following, with the purpose of discussing Swedish practice in the context of this foreign discourse.

¹⁷⁰¹ Examples include: MÖD 2004:28; and Judgment of the Environmental Court of Appeal on 19 September 2003, in case M 2909-03. See, also: MÖD 2004:67 with a similar statement, adding the words “to live up to the substantive regulation”.

¹⁷⁰² Decision of 30 November 2004 (dnr. 144-2004).

¹⁷⁰³ *R. v. Wheatley* (1885–86) LR 16 Q.B.D. 34; *Attorney General v. Staffordshire CC* [1905] 1 Ch 336; *R. v. Fenny Stratford Justices ex p. Watney Mann (Midlands) Ltd* [1976] 2 All E.R. 888, and [1976] J.P.L. 368. See, also: Hughes, D., et.al., *Environmental Law* p. 11.

¹⁷⁰⁴ See, English examples: *Attorney General v. Staffordshire CC* [1905] 1 Ch 336, at 343 (on road maintenance and repair); *Myatt v. Teignbridge DC* [1995] Env. L.R. 78, pp. 79–80 (on statutory nuisance); *Redland Bricks Ltd v Morris and Another* [1969] 2 All E.R. 576 (on mandatory injunctions); and *Miller-Mead v. Minister of Housing and Local Government and Another* [1963] 1 All E.R. 459 (on planning law). Dutch examples include: ABRvS 13 November 2002, Case no. 200202646/1, AB 2003, 77; and ABRvS 11 August 2004, Case no. 200400185/1, AB 2004, 370.

¹⁷⁰⁵ See: Section 4.4.4.2.

8.2.2.2 Investigating the Basis and Meaning of the Core Rule

The core rule of specification of enforcement orders is thus established in the legal discourse of all the studied legal orders. The basis and more explicit meaning or application of this rule is, however, not very clear or precise. I will discuss the reason and basis for this rule and analyse the expressions of it in practice. It seems, however, that the rule is based upon basic public law principles of communication and transparency; and of the authorities' normative regulatory role. Both these are connected to the basic Rechtsstaat idea of legal certainty, fundamentally legality. Some introduction to these aspects will therefore be made here, before looking closer at legal practice.

The reiterated rule states that it should be clear to individuals what they have to do to abide by administrative decisions. This relates to matters of foreseeability, and entails that an administrative enforcement order has to be sufficiently precise, to clearly communicate the duties to the addressee. It is important that individuals understand the demands so that they have the opportunity of following them and to contradict the order in the administrative process, in order to look out for their interests. Clear and concrete enforcement is thus linked to the right to defence, as a part of good administration.¹⁷⁰⁶ Moreover, in view of a wider sense of legal certainty, the transparency that clear and concrete regulation may bring will provide better possibilities for all concerned parties to look after their interests. The core rule is therefore inherently connected to rules on proper procedure, as described early on in Section 2.2.3: that the individual addressed with an order should be communicated the decision promptly with clear and understandable language, and that the decision should be motivated.¹⁷⁰⁷ Similarly, as discussed in Section 4.2.5.2, the administrative law principles reflected in the grounds for judicial review in the United Kingdom demand procedural propriety and fairness in the protection of the individual's rights.

But the core rule also refers to the contents of the order – the actual message thereof – and the idea that the addressee should know from the order precisely what to do, which measures to take and not to take. This means that an administrative enforcement order has to be sufficiently precise to clearly communicate the duties to the addressee. As stated in Chapter 7, the enforcement decision has a function of translating general rules into individual duties. According to general administrative law, this decision is for the enforcement authority to make. It has a decision-making responsibility, which cannot be placed on the individual. This regulatory task is to some extent of normative character. The enforcement order should not merely reproduce the statutory demands, or other legal standards, but prescribe more concretely and specifically what this entails for the individual actor – that is,

¹⁷⁰⁶ Compare: Prop. 1971:30 p. 441. See, further: Section 2.2.3.2.

¹⁷⁰⁷ Such rules on proper procedure are found in all the studied legal orders; in the Swedish FL, the Dutch Awb, and English common law on the grounds for judicial review.

the measures or behaviour thus demanded. The core rule is therefore sometimes expressed as a demand for specification of steps to be taken.¹⁷⁰⁸

The aspect of precision connects to the question of who is responsible for knowing and deciding what precautionary measures should be taken. The question of distribution of information responsibilities is in focus in this thesis. As discussed earlier, the regulatory function of enforcement is influenced by the context of environmental law, where the responsibility for investigation and control is shared between the authority and the actor. The enforcer must direct the actors clearly and precisely, but they should not take over their responsibilities to control the activities themselves – or intrude on their freedom to do so. This meeting of the environmental and administrative law structures will be investigated further in the following.

8.2.3 Clear and Precise Goal Steering and Administrative Enforcement of Actor Responsibilities

8.2.3.1 The Encounter

Administrative law demands that enforcement authorities ensure legal certainty, and the lawfulness of their exercise of authority. They are responsible for the proceedings of the case, for coming to an administrative decision, and for the procedure that ensures the correct and appropriate decision. This also ties in with the duty described in Chapter 7, to ensure sufficient decision-making materials. What is more, the enforcers have to conclude the case with a decision establishing the duties of individual addressees under law, and they must make them clear and precise to addressees so that they understand what the administrative authority has decided is their duty. This has to do with transparency and communication, thus facilitating general control over the administration with the opportunity for individuals to defend their rights and interests. Administrative enforcers cannot hand on this procedural responsibility to the individual enforcement addressee.

However, administrative authorities also have positive duties, to carry out their public tasks. Environmental authorities are responsible for supervising and controlling compliance with environmental law, and in this capacity to ensure realisation of the goals and purposes behind the law. Such positive and functional administrative tasks are not unique for environmental law. Realising state policy is a general task of law, and for administrative authorities. This is an expression of a more substantive perspective of the Rechtsstaat and its ideals, and it is connected to democracy.¹⁷⁰⁹ Application

¹⁷⁰⁸ See, for example: MÖD 2006:56, and Judgment of the Environmental Court of Appeal on 19 September 2003, in case M 2909-03. See, further: Section 8.3.1.

¹⁷⁰⁹ Compare: Peczenik, A., *Vad är rätt?* pp. 46–47; and Sundberg, H., *Allmän förvaltningsrätt* p. 112, and *Förvaltningen och Rättssäkerheten* p. 321. Note also Nilsson, A., *Man ska vara försiktig* p. 408.

of the law and the exercise of administrative tasks in general is the purpose of realising democratically based policy in law. This also promotes protection of the public interests behind the law.¹⁷¹⁰ As discussed earlier, the goals of environmental law and the public tasks of the enforcement authorities are focused on the quality of the environment and the sustainability of natural resources, and of making individual actors take their parts in protecting and managing environmental resources – including their active involvement in the control. This can be seen in the shared responsibility for information in enforcement procedures.

The context of goal steering relates to regulation targeting environmental results or standards, and actors actively managing their activity so as to achieve these goals. Choosing the actual technical solution or procedural measures is more appropriately left to the actor. The actor may then choose the most cost-effective and otherwise more suitable solution for reaching the set goal or respecting the set limit. Furthermore, steering from the administrative bodies generally should ideally be focused on supporting the actor's own active environmental work, expressing dynamic demands of continual proactive improvement in environmental effectiveness. This may conflict with the authority's duty to clearly specify the legal duties and steps that the actor must take.

Contemporary environmental law thus brings a challenge to the administrative law tradition, in the idea of actor responsibility and enforced self-control,¹⁷¹¹ as thoroughly discussed throughout this thesis.¹⁷¹² Environmental law enforcement strives to make the actor take responsibility for self-control, and thus shifts such procedural responsibilities on to the actor. The authority has the role of supporting this self-control. This is where the core rule meets the environmental law actor responsibility. Environmental law actors have a continuing and constant duty to regulate their own operations and actions, and to take all necessary precautionary measures, including planning their activities, ensuring sufficient knowledge and expertise, and investigating, assessing and deciding on the appropriate way to go. Actor responsibility is also found in the enforcement context. The discussed responsibilities of the enforcement authorities should therefore be seen in context of this functional structure of focusing on environmental goals and results, and requiring actors to work towards them themselves. The more an enforcer investigates, assesses, and specifies the precautionary measures to be taken, the less is demanded of the actor to know, investigate, and take action. The authority's responsibilities for proper procedure, and protection of legal certainty, in the

¹⁷¹⁰ See: Section 2.2.1.

¹⁷¹¹ Prop. 1997/98:45 Part 1 pp. 160–161, and Part 2 p. 279; SOU 1996:103 Part 2 p. 312. NVV Handbook 2001:4 Chapter 2, esp. p. 31. See, also: Prop. 1987/88:85 pp. 251–258; and Westerlund, S., *Miljöskyddslagen* pp. 352–353, on earlier regulation based upon the same idea.

¹⁷¹² See, for example: Section 3.4.3.

enforcement situation should not mean that the public authority takes over the actor's fundamental responsibilities. It should compel the actor to live up to them himself. Otherwise enforcement becomes counter-productive.

Clarity and precision in the enforcement of environmental law may be argued to make enforcement more effective, as the actors are clearly told what they should do, which of course facilitates compliance.¹⁷¹³ The easier addressed actors can follow the enforcer's instructions the easier is it for them to live up to their demands fully, no matter how little special competence or expertise they might possess. Also, clear and precise orders serve better as grounds for execution.¹⁷¹⁴ Specified enforcement decisions also serve better as grounds for sanctions, and for coercive enforcement of the ordered measures, as it is easier to live up to the demands of foreseeability and legality, which are prescribed for criminal procedure, and so on, as discussed in Chapter 7. However, despite these advantages for effective environmental enforcement, and steering of the individual's actions, such steering is not the fundamental idea and purpose of environmental law. It is not effective in enforcing actor responsibility and self-control, and may even be suggested to lie outside the legal intention, which therefore questions the basis of the exercise of authority. The aims and purposes of environmental law is reactor and result oriented, which means that the basis and direction for legal regulation is found in the results in the environment. These results relate to environmental protection and resource sustainability. Moreover, actors are to become actively involved in the environmental management – for example, through demands for self-control. The complexities and uncertainties of environmental circumstances may otherwise lead to extensive demands for investigation and expertise from the authority. Inability to find clear and precise normative answers may then benefit the actor not living up to environmental responsibilities, at the expense of legitimate environmental interests. Against this background, detailed steering through specified orders seems counter-productive. The expressions in practice of this potential conflict will now be discussed.

8.2.3.2 Indication of Friction in the Encounter

Enforcement law practice reveals some friction, or tension, in the assessment of distribution of the discussed responsibilities, between the administrative enforcer and the individual actor. The environmental law challenge to administrative responsibilities has been argued in this enforcement law discourse. Enforcers have expressed concern over strict practice when it comes to goal steering enforcement.¹⁷¹⁵ There have also been some attempts to find

¹⁷¹³ Compare: MÖD 2004:28.

¹⁷¹⁴ See obiter dicta in MÖD 2003:78. See, also: MÖD 2004:63.

¹⁷¹⁵ See: Prop. 1997/98:45 Part 1 pp. 494–495, on the statements from enforcement authorities in the preparations of the Environmental Code. See, moreover, a description of the strict case law on precision, in: NVV Handbook 2001:4 pp. 97–98.

ways around the demands for precision of orders, in order to avoid the administrative law demands for investigation and proof, and direct steering of the actor's behaviour.¹⁷¹⁶ The idea is that environmental law enforcers should provide the support and guidance the actor needs, but not under any duty, and they should not assist the actor in details such as identifying the most appropriate technical solution, or routines, for a particular activity. It is all about assisting the actor help herself. It is the actor who should assess the risks and the precautionary measures. The enforcement authorities should supervise the results and intervene only when the actor's own measures are clearly not working.¹⁷¹⁷ They want to enforce the actor's own duties to control the situation, and not control it themselves. That goes against the whole idea of actor responsibility.

A crucial point to make here is that the actor's responsibilities for precautionary and proactive measures are substantive standards, which are in themselves not affected by the administrative regulation context. Nevertheless, the proper exercise of authority by the enforcer is another thing, which will still set demands on the formulation of orders and other procedural aspects. If this clear separation is made, the environmental law standard of actor responsibility can, to a great extent, not be enforced. This would amount to a systematic inconsistency or in the environmental law perspective (and terminology) a contra-productiveness.

From the environmental law horizon, the end result of a precautionary measure is the focus. This is what enforcement is focused on, and this is the basis for enforcement competence. It may well be argued that the enforcement order should not limit the action of the actor by pointing out a specific technical solution to abate a problem. This could be seen as an excessive and arbitrary use of authority in relation to the purpose of administrative enforcement and the relevant legal requirements. There could be alternative measures that are equally acceptable from the point of environmental law that focuses on the actual environmental effects and risks.¹⁷¹⁸ In addition to this, it would be contrary to the actor responsibilities and the principle that the potential polluter should pay, that the enforcers would take over their precautionary responsibilities. A system where enforcers had to do that would entail unfair distribution of burdens. The demands for actor responsibility would be more burdensome for those who voluntarily follow the environmental law demands on their proactive responsibilities. Actors who wait until the authorities compel them to take on their responsibilities will to a

¹⁷¹⁶ See, for example: MÖD 2004:23, and the related debate in NVV, *Tillsynsnytt*, December 2003, no 3 pp. 4–5, referring to NVV Handbook 2001:4 p. 89.

¹⁷¹⁷ NVV Handbook 2001:4 pp. 55–56 and 62, with reference to the General Guidance NFS 2001:3. See, also the enforcement authority's arguments in case law, for example in MÖD 2004:23.

¹⁷¹⁸ See, for example: MÖD 2001:34, where the Court decided on a prohibition instead of an order to install a specific kind of water treatment installation.

great extent be freed from the responsibilities of information in relation to their environmentally hazardous operations.

Having thus established grounds for challenging the administrative law procedural responsibilities of the enforcement authorities in the context of environmental law enforcement and actor responsibility, it then becomes a matter of interest to investigate more closely the discourse on the matter in practice. The demands for legal certainty, and administrative procedural responsibilities, are to some extent prioritised in authoritative legal practice. Sometimes the challenge of the actor's responsibilities is not even acknowledged. There is some discussion on the matter in Swedish law, although not very explicit. The indicated environmental law arguments on reactor orientation, and principal actor responsibilities, are in practice noted but not seen as sufficiently clear or extensive to take over the administrative authorities' procedural responsibilities.¹⁷¹⁹ In the following, the discourse in the legal practice will be studied more closely. Comparison is made between the Swedish, Dutch and English practices. Before moving on to study the discourse on precision and goal steering in administrative enforcement practice, a parallel Swedish discourse within the permitting procedure should, however, be noted.

8.2.3.3 Noting a Parallel Discourse of Precision in Permit Conditions

The matter of the relationship between environmental law goals and result orientation, actor responsibility, and clear and precise regulation, is also debated in relation to permit conditions. The formulation of permit conditions has been the topic of much debate, and recent precedents have marked a move towards more precision of permit conditions. The preparatory works include arguments for goal steering and promote the setting of result oriented conditions like limit values, or other goal oriented rules. It is always for the actor to show that the necessary measures have been taken.¹⁷²⁰ The Industrial Emissions Directive (IED)¹⁷²¹ states in Art. 14.1(a) that the permit conditions are to include emission limit values, and that they may if needed be complemented with, or substituted by, other similar parameters or technical measures ensuring equivalent levels of environmental protection (Art 14.2). Permit conditions must not prescribe specific technology, and so on, but refer to BAT (Art 15.2). The statements in Swedish preparatory works also

¹⁷¹⁹ See for example: MÖD 2000:6, where the Court stated that it was for the board to investigate and decide on the necessary precautionary measures, and to specify the decided solution in a precise order (rather than prohibiting discharge). See, also: MÖD 2004:23, where in response to arguments of actor responsibilities, the Court stated: "It must, as before, be clear from such an order what the addressee has to consider as it is the task of the enforcement authority to specify this."

¹⁷²⁰ Prop. 1997/98:45, Part 1 pp. 494–495; Part 2 p. 272; and SOU 2004:37 p. 244ff.

¹⁷²¹ Directive 2010/75/EU on industrial emissions (integrated pollution prevention and control) (Recast).

refer to these rules in their earlier versions of them in the IPPC directive.¹⁷²² It is also indicated in this context that the administrative orders enforcing such limit values will normally not have to specify further the duties of the addressee, but can simply state the thus regulated limit value.¹⁷²³

In recent years the formulation of permit conditions has been subject to debate and regulation. Authoritative case law has involved discussion of the need for clear and precise formulation of duties, in context of the potential sanctions for breaches of permit conditions. This has involved debate on the possibility of making the use of chemical products generally conditional on the existence of sufficient knowledge of the risks, and so forth, and on the duty of the permitting authority to specify conditions on the actor's routines and standards for supervision and control. The Supreme Court has here established a precedent in that such general regulation is not appropriate in view of the criminal – and administrative – enforcement of non-compliance. Such conditions of investigatory duties must be specified.¹⁷²⁴ Moreover, the formulation of precise and enforceable permit conditions has been similarly discussed further in permitting cases, with regard to specification of emission limit values and the control of compliance thereof. The Environmental Court of Appeal thus established that these measures should be specified in the conditions, even though it recognised that the detail of the prescription of type and periodicity of the control may sometimes be left to control programmes.¹⁷²⁵ A central problem is that it is difficult to specify in permit conditions the fundamentally dynamic and constant adaptive demands that characterise environmental law. The permit conditions need to live up to the demands of legal certainty, especially in view of the strict sanctions that are tied to the permit. They should therefore be formulated in such a manner that they can serve as grounds for establishing an offence, and in that case also grounds for the sanctions in such a procedure.¹⁷²⁶

From the environmental perspective, effective enforcement is, of course, wanted. Clear enforcement orders and clear and appropriate statements of individual duties will generally be easier to supervise and to base coercive action on, and to sanction. However, permit conditions with precise and concrete indication of the individual actor's duties might restrict the actor to one regulated course of action, and thus jeopardise the dynamic character of the responsibility, and of the demand for continual adaption to new information, new technology, and the state of the environment. It is not possible to spec-

¹⁷²² Directive 96/61/EC concerning integrated pollution prevention and control; stated in a new version in Directive 2008/1/EC, and now recast in IED.

¹⁷²³ Prop. 1997/98:45, Part 1 pp. 494–495.

¹⁷²⁴ NJA 2006 p. 310, and the following judgment of the Environmental Court of Appeal on 12 November 2007 in case M 4317-06. See, also, for case comment: Michanek, G., *Tillståndsvillkor om utredning av kemikaliers miljörisker*. See, further judgments on the matter in: NJA 2010 p. 516 and MÖD 2009:5.

¹⁷²⁵ MÖD 2009:2, MÖD 2009:9; and on 6 February 2009 in case M 5069-07.

¹⁷²⁶ Prop. 1997/98:45 Part 1 p. 524, and Part 2 p. 204; NJA 2006 p. 310.

ify in advance in a precise permit condition the concrete meaning of the responsibility for knowledge in practice for the individual actor, or activity.¹⁷²⁷ The need for dynamic and adaptive permit conditions is to some extent supported by regulatory constructions referring to BAT, and limit values. As noted earlier, EU law also demands the conditions on technical measures not be restricted to a certain technology, but instead linked to BAT.

There is consequently a parallel discourse on the encounter between the interests of legal certainty and the actor's environmental law responsibilities. In the interests of communicating a wider context of the discourse, this will to some extent also be considered in the following analysis. The general differences should, however, initially be noted: primarily that the permits are more formalised and stable than enforcement orders. It is a complex and extensive procedure to change the regulation of an activity. In the Swedish system the legal status of the permit is strong and room for change is limited.¹⁷²⁸ An enforcement order may – on the contrary – generally be introduced and subsequently replaced, or added to by further orders, with little legal limitation.

Another important difference is that the breach of permit conditions is generally criminalised, while the breach of enforcement orders is only an offence in the English system. As argued in Chapter 7, heavier sanctions entail more demands for procedural safeguards of the individual's legal certainty. This means that the considerations of legal certainty could be argued to be qualified when it comes to permit conditions, in the legal orders where the sanctions are different in character.¹⁷²⁹

Having thus described the encountering perspectives of environmental and administrative law, and noted a parallel discussion on permit regulation, it is now time to further investigate the enforcement law discourse on the issue of goal oriented steering of actor responsibilities. The motive for this analysis is to search for the basis and meaning of the core rule in its contemporary environmental law context, and to discuss the findings in view of the encountering legal cultures. I will first investigate the matter in all the studied legal orders separately, and conclude with a comparative discussion.

¹⁷²⁷ Compare to the reasoning of the Supreme Court on the lack of dynamic character of the disputed condition in NJA 2006 p. 310, and also the statement of the Swedish Chemicals Agency in the case proceedings. The wider extent of the responsibility for knowledge, other than the specific documentation demands for chemicals, is also acknowledged by the Environmental Court of Appeal. The Supreme Court statement may, however, be interpreted as indicating a *lex specialis* perception, but that is not entirely clear.

¹⁷²⁸ See: MB Chapter 24; and Darpö, J., *Rätt tillstånd för miljön* pp. 58–61.

¹⁷²⁹ Compare: NJA 2006 p. 310, and SOU 2004:37 pp. 244–245.

8.3 Sweden

8.3.1 Departing from Strict Demands for Precision

8.3.1.1 Little Guidance in Legislation and Preparatory Works

In Swedish law there are few statutory regulations of the formulation of administrative orders, and none regulating the precision of ordered positive duties. The Administrative Procedure Act states generally that administrative decisions should be motivated, and that the addressee must be informed of the decision, and how to appeal. Moreover, the authority should express itself in such language that the addressee, and other interested persons, can understand the decision.¹⁷³⁰ The latter rule generally refers simply to the language of the authority.¹⁷³¹ The Act on Conditional Fines Section 2 prescribes some basic demands on the contents of an order, when coupled with a conditional fine. The rule requires statement of the identity of the addressee, time frames, etc. There is, however, no explicit regulation of the specification of the actual measures to be taken. In comparison, the Finnish Administrative Procedure Act states, apart from more formal requirements, such as those of language,¹⁷³² the demand that it should be clear from an administrative decision, both the motive for the decision and a specified information of what a party is entitled or obliged to, or how the case otherwise has been decided.¹⁷³³ This rule requires full and specified notification of the ordered duties, etc.¹⁷³⁴

The Swedish legislator did discuss, in the preparations of the Environmental Code, the concretion and clarity of statutory regulation and permit conditions. The concluding statement is that adherence of the rules of the Code depend on two main factors; first of all, that the relevantly affected persons understand the purpose of the regulation and the significance of them being followed; and secondly, that there is a well functioning supervision and enforcement of breaches of the law.¹⁷³⁵ The preparatory works also emphasise the need for permit conditions to be formulated so that they are unambiguous and easy to supervise and enforce. The legislator makes a point of effective enforcement through clear and concrete statement of duties.¹⁷³⁶ The clear and concrete formulation of permit conditions is further emphasised in connection to administrative and criminal enforcement.¹⁷³⁷

¹⁷³⁰ FL Sections 7 and 20–21.

¹⁷³¹ Hellners, T., and Malmqvist, B., *Förvaltningslagen; Med kommentarer* pp. 95–96.

¹⁷³² Finnish Administrative Procedure Act Section 9.

¹⁷³³ Finnish Administrative Procedure Act Section 44.1.

¹⁷³⁴ Mäenpää, O., *Grunderna för god förvaltning* p. 188, and *Hallinto-oikeus* pp. 367–368.

¹⁷³⁵ Prop. 1997/98:45, Part 1 p. 172.

¹⁷³⁶ Prop. 1997/98:45, Part 1 p. 495. Similar arguments are also made in case law, see for example obiter dicta in MÖD 2003:78. See, also: MÖD 2004:63.

¹⁷³⁷ SOU 2004:37 p. 244.

Administrative enforcement guidance also emphasises precision. The recommendations in some of the NVV Guidance, however, reveal problems with goal and result oriented enforcement. It is recommended that a lawyer is involved in such decision-making procedures. It is, moreover, pointed out that practice places very high demands on the formal procedure of enforcement orders, and they discuss how the orders should be formulated on appeal.¹⁷³⁸ More specifically on the issue of precision of enforcement orders, the guidance departs from the core idea of clear and precise enforcement, stating that an order must be clearly formulated so as to be completely clear to the addressee that which the enforcement authority expects of them. It is argued that case law is very restrictive on this issue. If an order can in the least bit be misunderstood, the Agency warns that the order risks being quashed on appeal. Wording such as “be carried out in an acceptable manner”, “or in another way that can be accepted by the enforcement authority”, or any other formulation that entails that the order cannot be clearly delimited, is as a rule not accepted on appeal. The decision should, for example, if so needed, be illustrated with detailed maps or blueprints so that there is no doubt about what measures and care the enforcement authority requires.¹⁷³⁹ General Guidance statements on the system of enforcement also prescribe precision when ordering an actor to suggest a control programme or measures for improvement of self-regulation/control. Even though the general idea is that the activity and the responsibility for the assessments and the choices are to be placed on the actor, the enforcer should specify what the suggestion should focus on. It should be clear what the enforcement authority expects the actor to do in order to follow the authority’s request.¹⁷⁴⁰

So far this is in line with the general administrative core rule of clear and concrete administrative enforcement. It seems there are high demands for precision of administrative enforcement orders, despite the lack of such requirements in statutory law. It is interesting then to investigate more closely how this demand for precision is applied in the enforcement of environmental law, where the demands on goal steering and actor responsibility are structurally important.

8.3.1.2 Older Administrative Practice of Precision of Orders

A basis for the precision of enforcement decision in environmental law can be observed in older environmental law. The preparatory works of the former rules for regulating polluting activities, state that the enforcement order

¹⁷³⁸ Swedish NVV Handbook 2001:4 p. 94.

¹⁷³⁹ NVV Handbook 2001:4 pp. 97–98.

¹⁷⁴⁰ NVV General Guidance NFS 2001:3, on 26:19 and NVV Handbook 2001:4 p. 68. Notably, the General Guidance states as to the Self-control Ordinance Section 6, that the enforcement authorities should refrain from getting involved in the assessment of risks and the evaluation of the necessity of measures. They can, however, give general information and advice.

should prescribe a prohibition on concrete technical or other measures.¹⁷⁴¹ This statement was reiterated in administrative appeals practice from the National Licensing Board for Protection of the Environment in cases on the precision of orders.

On a closer look at this administrative practice, the Board sometimes basically refers to the above stated core rule of clear and precise orders, in order for the addressee to know what he is under a duty to do. In a 1992 decision¹⁷⁴² the Board reviewed an order to install a further means of treatment of sewage water than the removal of sludge.¹⁷⁴³ The Board found that the relevant formulation did not live up to the demands of clarity and precision, and the existence of attached information materials did not change this view. The Board revoked the enforcement decision and referred the matter back to the local enforcement authority for a new procedure.

In other cases the requirements for precision are somewhat elaborated. The Board then holds, with reference to the preparatory works, that an order of prohibition or precautionary measures, should amount to¹⁷⁴⁴ “concrete technical or other measures”. The Board’s reasons in these cases also reveal reliance on the authorities’ responsibilities to investigate and make an authoritative decision.¹⁷⁴⁵

In one case,¹⁷⁴⁶ for example, the enforcement authority’s investigations had showed many alternative methods of appropriate treatment, and it therefore argued the importance of leaving to the addressee the opportunity of finding out and deciding on the rectifying measure that was appropriate for him. It argued that the enforcement authority should not act as consultant to the one responsible for the measures, but should keep to setting the demands needed to decide the permissibility of the activity – for example, in emission levels. It had subsequently found it inappropriate to specify more closely the demands on technical equipment, as the operator should be able to choose the treatment technique.

The Board, however, was not swayed by these arguments. It acknowledged the variety of available measures, but linked this to the responsibility of the enforcement authority to state the concrete technical or other measures that the addressee were under a duty to carry out. The Board indicated that it

¹⁷⁴¹ Prop. 1969:28 p. 289, regarding ML Section 40.

¹⁷⁴² National Licensing Board for Protection of the Environment, 17 November 1992, in Decision B 212/92.

¹⁷⁴³ The formulation parallels a statutory prohibition on the release of sewage water with such limited treatment, see: Ordinance on Environmentally Hazardous Activities and the Protection of Public Health Section 12, at that time legislated in ML.

¹⁷⁴⁴ In Swedish: ”gå ut på”.

¹⁷⁴⁵ See for example the National Licensing Board for Protection of the Environment, 8 September 1995, in Decision B 166/95, and on 20 April 1993, in Decision B 50/93, both referring, in this context, to Prop. 1969:28 p. 289.

¹⁷⁴⁶ National Licensing Board for Protection of the Environment, 20 April 1993, in Decision B 50/93.

was for the enforcers to investigate the matter further, through ordering the actor to investigate the alternatives, in order to thereafter be able to choose and order the specified measures, based upon the information obtained through the actor's investigations. A provision that the addressee should install treatment approved by the enforcement authority was hence deemed not to be sufficiently precise. It revoked the order in the relevant parts and referred the matter back to the original enforcement body.

On the same note, the Board found in yet another sewage treatment case,¹⁷⁴⁷ and departing from the duties to state concrete measures in a clear and precise order, that an enforcement situation where it was not sufficiently well investigated whether another, cheaper treatment solution was better. As a consequence, the Board revoked the order and referred it back to the enforcement authority for further investigation in order to be able to specify which alternative to order. The responsibility for the decision of what to do, exactly, and ascertaining the necessary information for this decision, thus falls on the enforcement authority. It can involve the actor in the investigation, but only through direct orders of specific investigation, the result of which the authority can subsequently rest its decision.

The Parliamentary Ombudsman has, moreover, in decisions from the 1990s, criticised enforcers of environmental law for poor precision of orders.¹⁷⁴⁸ In these cases far-reaching demands for specification of the concrete performance, for which non-adherence is tied to a monetary sanction in a conditional fine. The Ombudsman emphasised a demand for precision of orders in context of the treat of a conditional fine, a matter which has been developed in the literature.¹⁷⁴⁹ However, in one of these cases,¹⁷⁵⁰ the Ombudsman extended the strict demands for precision to non-binding advice, stating that such a measure was done in the context of the enforcer's authoritative competence. The underlying idea was that enforcers may, if their advice were not followed, return with an authoritative order, perhaps coupled with a conditional fine. The Ombudsman argued that the actor should be told what to do to avoid being addressed with such an authoritative order.

8.3.1.3 Enforcement of the Environmental Code – General Case Law Confirmation of the Core Rule

A central question then is whether this legal practice has changed with the development of environmental law in general, and with the introduction of the Environmental Code specifically. As indicated above, the preparatory works refer to the importance of clear and precise enforcement, but give

¹⁷⁴⁷ The National Licensing Board for Protection of the Environment, 7 November 1995 in Decision B 229/95.

¹⁷⁴⁸ See, for examples: Decisions by the Parliamentary Ombudsman in: JO 1990/91 p. 270, 10 March 1992 (dnr. 2128-1991), and of 10 March 1997 (dnr 1857-1996).

¹⁷⁴⁹ See: Lavin, R., *Offentligrättsligt vite I* pp. 76–93.

¹⁷⁵⁰ Decision of 10 March 1997 (dnr 1857-1996).

little guidance as to what this means for the formulation of enforcement orders or the enforcement procedure in general. Moreover, the referred enforcement guidance indicates strict legal demands on the formulation of enforcement orders, and of the enforcement procedure in general. At the same time the Environmental Code has emphasised the focus on goal steering and making actors actively involved in the procedure of controlling their own activities. This also places on them responsibilities for information; for having sufficient knowledge, investigating, planning, and strategically developing their activities and the precautionary measures. But there is little guidance as to how this will be achieved in an enforcement procedure where the authority carries extensive responsibilities for investigating, deciding on, and then ordering the actor precisely what precautionary measures to take. An interesting point is whether the new focus of the Environmental Code, including the emphasis on enforced actor responsibilities, has meant that the enforcement authorities can to any great extent leave the investigation, assessment and choice of what the duties are, to the addressee.

This matter was discussed in cases before the Environmental Court of Appeal, mainly during 2003–2004.¹⁷⁵¹ Despite the new context of the Environmental Code, the judgments of the Court in these cases continue to state in general that widely or generally formulated orders to abate an environmental problem are as a rule not legal. A widely formulated order to “take the necessary measures” or suchlike, with no further information would thus not stand. It would need more precision. The Court’s reasoning generally departs from the rule that an order should be formulated so that the addressee without difficulties or risk of misunderstanding can clearly understand what he or she shall do. It is, moreover, often pointed out that such restrictions stem from safeguards of legal certainty of the individual. It is also pointed out that clear and precise formulation is important for effective enforcement.¹⁷⁵² This does however, necessarily mean to say that a specified concrete technical solution must be specified, but the order will need more precision in some way.

The Court has moreover stated that an order under MB 26:9 must pertain to concrete measures and that it should be clearly visible what the addressee has to do. In a case from 2006¹⁷⁵³ concerning an order informing of the relevant regulations, the Environmental Court of Appeal referred to the rule that an order should clearly communicate to the addressee their duties, and used the wording recognised from the National Licensing Board that an order must refer to concrete measures. It is hard to say what this means in this

¹⁷⁵¹ Judgments of the Environmental Court of Appeal: MÖD 2004:28; MÖD 2006:56; and on 19 September 2003, in case 2909-03.

¹⁷⁵² MÖD 2004:28, and Judgment of the Environmental Court of Appeal 19 September 2003 in case M 2909-03. See, also: MÖD 2004:23; and MÖD 2004:67, discussing orders demanding the actor to suggest measures.

¹⁷⁵³ MÖD 2006:56.

analysis, as the Court never had to assess wider formulated orders of measures, but only information about the law. Nevertheless, the wording suggests that it would not be enough to demand a result or a general demand for appropriate measures, but that concrete action would have to be specified.

8.3.1.4 Complicating the Matter

In some cases, the enforcement authorities will explicitly argue a changed situation with regard for actor responsibilities under the Environmental Code and that this should also reflect on enforcement law.¹⁷⁵⁴ The court will nevertheless steer the enforcer back to more precise orders of precautionary measures. To complicate the matter further, in some cases the Environmental Courts has found enforcement orders too precise, or rather that they took normative decisions on matters which should be left to the addressee. It has held that specified technical or other measures should not be specified, since alternative ways to abate the problem cannot be ruled out.¹⁷⁵⁵

The Courts have sometimes resolved this issue through adjusting the order to instead state a prohibition.¹⁷⁵⁶ This solution will be further analysed. In another case, from the Environmental Court of Växjö,¹⁷⁵⁷ on telecommunication devices, the enforcers had, in response to a company's notice that they were to erect a mast, ordered that they instead build another kind of mast better suited for the birdlife of the area. It found, however, that the relevant environmental law did not give the enforcer competence to order an operator to erect a certain kind of installation, even if it served as an alternative to another installation, with risks to the natural environment. The consequence thereof, it was argued, would be that the actor would be in breach of the order if they chose not to erect any installation at all. It found that the enforcer had no legal support for ordering the installation, and revoked the order. Similarly, in a case about noise nuisance, an order specifying precautionary measures to be taken was not accepted, as the actor should assess which measures to take. The enforcement authority's only concern is the result – reducing noise nuisance to acceptable levels.¹⁷⁵⁸

Obviously, a clear and precise order stating the addressee's duties is the rule, but expressions of this rule can differ. There are also statements in practice that refer to the goal and result orientation of environmental regulation, and the enhanced actor responsibility. We will therefore have to look a bit further into the cases to try to further our understanding of what the demand for precision means in the environmental law context.

¹⁷⁵⁴ See, for example: MÖD 2004:23.

¹⁷⁵⁵ MÖD 2004:58.

¹⁷⁵⁶ MÖD 2004:58

¹⁷⁵⁷ Environmental Court of Växjö, Judgment of 13 October 2008, in Case M 2817-07.

¹⁷⁵⁸ Environmental Court of Vänersborg, Judgment of 25 September 2008, in Case M 643-08.

8.3.2 Orders Stating the Relevant Valid Rules

One way of indicating to the addressee what the problem is and what has to be done, is to communicate to them what the relevant rules regulate. This can be done through repeating the wording of relevant legislation, or merely referring to a section of the legislation, which must be followed. Supposedly, the actor has not understood this, as they are conducting their business in breach of the said rules. Informing actors of the rules might then be a good way of making it clear for them what their duties are under environmental law, without regulating in detail how they should go about conducting their business to comply with these rules. This is, after all, the responsibility of the actor. This might be compared to the specification of what the problem is, and the desired result: “You must change your behaviour and do what these rules say you have to do” – at least where the relevant breach of the law is indicated. However, this approach has been described as being generally not acceptable. Such formulation is not sufficiently clear and concrete.¹⁷⁵⁹ This may be illustrated – outside the field of environmental law – by the Judgment of the Supreme Administrative Court in RÅ 1994 ref. 29. The case concerned an order to take measures so as to comply with relevant legislation (Radio Law Section 15). Such formulation of orders was suggested in the preparatory works, and was therefore accepted by the Administrative Court of Appeal. The Supreme Administrative Court nonetheless quashed the order for its imprecise formulation, which did not live up to the fundamental demands on an order coupled with a conditional fine.

The matter of orders merely stating valid law has also been discussed in Environmental Court of Appeal cases.¹⁷⁶⁰ Paralleling the statements above, the Court has held that an enforcement order should not merely describe the relevant state of law through information about legislation and general guidance.¹⁷⁶¹ The order is not the appropriate means for such information. It needs to state what the law means in the individual case. This distinguishes the administrative tasks of information, advice, and service, on the one hand, and enforcement of individual duties on the other. In the exercise of enforcement tasks administrative enforcers have a normative regulatory role where they must translate relevant regulations into concrete individual duties. They must make the general rules concrete and relevant for the actor in the specific situation. This means more than stating the relevant law.

The Environmental Court of Appeal has in cases on this matter stated that an order should be formulated so that the addressee without difficulty or risk

¹⁷⁵⁹ JO 1997/98 p. 418; Lavin, R., *Offentlighetsligt vite I* pp. 82–85, with reference to earlier case law.

¹⁷⁶⁰ MÖD 2004:28; MÖD 2006:56; and Judgment of the Environmental Court of Appeal of 19 September 2003, in case M 2909-03.

¹⁷⁶¹ MÖD 2004:28.

of misunderstanding may clearly understand what he or she should do.¹⁷⁶² The clarity of the order is important for the legal certainty of the addressee, but also for the effectiveness of the enforcement work. An order should therefore not only state formulations of general character, references to general guidance, etc. Nevertheless, as a matter of exception, such a generally formulated order may be acceptable, as they were in the referred cases, if the closer meaning of the order can, put in context, still be considered to be clear to the addressee. This matter will be discussed further down.¹⁷⁶³

8.3.3 Specification of Limit Values, Functional Levels, etc

8.3.3.1 True Result Oriented Steering

Enforcement orders specifying limit values, functional requirements or such alike, represent a way for enforcers to specify the desired result. Such enforcement is truly result oriented, and well in line with the goal oriented environmental law system, with its functional focus on results in the environment. It leaves it to the actor to decide how to achieve these results. Addressees of orders stating such a limit value, or functional standard, will have to have relevant knowledge and information. They may need to make investigations, and must make the actual choice about what steps to take. This means administrative enforcement without taking over the actor's responsibilities for information. Seen from another angle, this approach does not interfere with the actor's freedom in choosing the most suitable measures, and the potential for optimising activities. The environmental enforcer's concern is essentially the consequences for the environment— not the way the actors conduct their business.

8.3.3.2 Authoritative Acceptance of Ordering Limit Values – but Critical Reports of Problems in Practice

A traditional view is that enforcement orders should express clear and concrete steering, specifying technological solutions or other measures that the actor should take. Nonetheless, the preparatory works, referring to the practice of the National Licensing Board for Protection of the Environment, open up for prescribing a limit value or nuisance level, including functional technological requirements, both in permit conditions and enforcement orders. Such results can be required without indicating the method or technique for attaining them. Though emphasising the need for specified and enforceable permit conditions, it is held that such regulation should normally be clear

¹⁷⁶² In MÖD 2006:56 the order containing nothing more than what follows from different pieces of legislation, was found not to constitute an enforcement order at all, but only information to the actor. There was therefore no need to quash the appealed decision. It only informed of the rules.

¹⁷⁶³ Mainly in Section 8.6.5.3.

and precise enough to be subsequently executed, and upon which to base the awarding of conditional fines.¹⁷⁶⁴ This kind of regulation was held to leave the task to the actor of finding the most cost-effective solution to achieve the ordered result. This practice was also stated to be generally accepted by industry. The Code was held to accentuate this direction, as is argued, to a higher degree than earlier and be tied to the results – that is, to the effects on health and the environment. It is pointed out in this context that it is always the task of operators to show they have taken the necessary measures. In these cases it is therefore not the duty of the enforcement authority to indicate the technique to be used to live up to a permit's conditions.¹⁷⁶⁵

It should be noted that the referred statements are to some extent made in response to statements submitted by enforcement authorities in the consultation process. These statements indicate problems upholding these kinds of orders in the enforcement procedure, especially in the Court's unwillingness to award conditional sanctions for breaches of enforcement orders. They sought explicit statutory regulation stating that an order may state that the actor shall take such measures so that a certain nuisance level is not exceeded. The legislator, however, found enforcement orders and permit conditions indicating a limit value, nuisance level, or technical functional demands not to be exceeded, to be sufficiently clear to be executable and serve as grounds for awarding a conditional fine.¹⁷⁶⁶ Furthermore, the Environment Agency has indicated problems with orders stating limit values having been overturned on appeal.¹⁷⁶⁷ Such problems can, however, not be drawn from the relevant law on the formulation of enforcement order. The pre-Code practice of the National Licensing Board, which will soon be exemplified, reveals an established acceptance of enforcement orders focusing on the adherence of a specified limit value. These orders more or less explicitly demand that the necessary precautionary measures are taken to conform to this level, and these measures are generally not specified. It seems the limit value then replaces the specification of concrete measures in communicating clearly to actors their relevant duties. In a way, prescribing a limit value constitutes a kind of proactive prohibition, stating that environmental effects over the stated level are forbidden, and leaving it up to the actor to take steps to keep on the right side of the law.

The problems indicated by the enforcement authorities are more likely found the court practice for warranting fines for breaches of the orders specifying limit values. It has been noted in pre-Code practice, that the administrative courts have not accepted orders expressing limit values as sufficiently precise to base a conditional fine. The already then established shifted bur-

¹⁷⁶⁴ Prop. 1997/98:45 Part 1 p. 494.

¹⁷⁶⁵ Prop. 1997/98:45 Part 2 p. 272. This thus links to MB 2:1, and the shifted burden of evidence, which is closely related to actor responsibility for precautionary measures.

¹⁷⁶⁶ Prop. 1997/98:45, Part 1 pp. 494–495.

¹⁷⁶⁷ NVV Handbook 2001:4 at p. 97.

den of proof was held not to influence the demands on the formulation of the order. Such court practice was criticised by environmental authorities for their involvement in already decided substantive demands from the environmental authorities.¹⁷⁶⁸ The criticism echoes the statements in the preparations of the Environmental Code. However, according to the preparatory works, the orders stating a limit value should be held to be clear and executable. Also a fine should be able to be awarded based in response to a breach of an ordered limit value. Today, the conditional fines are awarded by the environmental courts, and not the administrative courts. This would suggest a more coherent view of limit values as specification of enforcement orders.

8.3.3.3 Acceptance in Pre-Code Administrative Practice

Some of the argued pre-Code administrative practice relates to the enforcement of limit values prescribed in relevant permit conditions. In one decision from 1990¹⁷⁶⁹ the Board stated that the enforcement authority, according to the Environmental Protection Act, had the competence to order the actor to take such measures that would result in the limit values prescribed in the permit conditions not to be exceeded. It also stated explicitly that such an order could be coupled with a conditional fine, which would suggest that the order fulfils the higher standard of legal certainty demanded in the context of a sanction. It further stated that according to the then current practice, the use of this enforcement order competence did not demand closer specification of precautionary measures to be taken. Consequently, an order simply demands that the taking of such measures that limit values for emission of a certain substance prescribed in the permit conditions, are not exceeded. The enforcers also ordered the company to make some investigations.

A recurring case type on orders prescribing limit values relates to noise nuisance, often from infrastructure installations, but also from nightclubs, concerts, etc. Such orders are also prescribed in situations where such limit values are not prescribed in permit conditions. Here the addressee is ordered to take the necessary noise reducing measures to ensure that the maximum noise level is not exceeded in the, often specified, surrounding houses, etc. The order may also prescribe noise measurements to be made and reported to the enforcers. Continual conditional fines are also prescribed. Such a case before the introduction of the Environmental Code can be seen in a 1995 decision¹⁷⁷⁰ where the Swedish Railway Administration had been ordered to

¹⁷⁶⁸ Judgement of the Administrative Court of Appeal of 6 June 1994, in case 1211-94; discussed in: Darpö, J., *Ansvaret för efterbehandling* pp. 184 and 238.

¹⁷⁶⁹ Decision of the National Licensing Board for Protection of the Environment, 2 February 1990, in Decision B 8/90, and Decision B 9/90 of the same day, for similar statements on ordering generally to take measures not to exceed noise nuisance limits prescribed in the permit conditions.

¹⁷⁷⁰ Decision of the Conditional Board for Environmental Protection of 5 September 1995, in Decision B 150/95.

take such noise reducing measures on a specified stretch of railroad to ensure specified maximum noise levels in and outside neighbouring houses and to take measurements and report the results. The Licensing Board had no objections to the specification of limit values instead of specifying the actual noise reducing measures. The main issue, however, pertained to the reasonableness of the needed measures.

8.3.3.4 Continued Support in Case Law from Environmental Courts

Environmental Court case law continues this practice. For example, in MÖD 2008:27 the Environmental Court of Appeal upheld an order demanding the Swedish Road Administration to carry out noise-reducing measures to ensure that the outdoor noise levels by the residential properties on the specified stretches of road did not exceed 60 dB. Similarly, the Court in MÖD 2005:63, upheld an order on the Swedish Railroad Administration to take noise-reducing measures in a number of properties to lower noise levels and to keep them under specified maximum levels. This seems an established practice. Generally, the cases before the courts mainly argue the reasonableness of the stated demands, in terms of the costs involved, especially in view of what these duties would mean in the perspective of the entire public roads or railroad system.¹⁷⁷¹ Similarly, orders containing widely formulated demands to take necessary measures to ensure that specified noise levels are not exceeded can also be seen in the context of regulating noise disturbance from music arrangements – such as nightclubs and open air festivals.¹⁷⁷²

Thus widely formulated orders to take the necessary precautionary measures may then after all be accepted, if they are supplemented by the specification of a desired result, in terms of a limit value. This limit value can be stated in a permit condition which is enforced by the administrative enforcers, or in the order, where the enforcement authority instead sets the limit value for the relevant authority. The specification of the result thus entails that the method of ensuring this result does not have to be specified. In fact, it might even be argued as being inappropriate for the enforcer to prescribe how to ensure keeping below maximum levels (of, for example, noise nuisance). This should be left to the individual actor.¹⁷⁷³

Sometimes the limit value can be supported by indications of what measures to take in order to be able to keep the relevant environmental disturbance within the set limits. Such an order dealt with in MÖD 2000:32.¹⁷⁷⁴ The original board order only stated that the Swedish Road Administration was ordered to take precautionary noise-reducing measures that the stated

¹⁷⁷¹ See, apart from the discussed cases: MÖD 2005:12; and MÖD 2006:34.

¹⁷⁷² See, for example: MÖD 2001:17; and Judgment of the Environmental Court of Växjö, of 21 December 2006, in case M 739-06.

¹⁷⁷³ See, for example: Judgment of the Environmental Court of Vänersborg of 25 September 2008, in case M 643-08.

¹⁷⁷⁴ MÖD 2000:32.

noise level was not exceeded anywhere in the relevant area – a school yard/playground. The Environmental Court of Appeal, in its analysis of the case, weighed the costs of the installation of a fence for noise reduction, and the health and environmental interests involved, and found such costs to be reasonable. They consequently exemplified the noise-reducing measures with the putting in place of such a fence. The Court thus ordered the Road Administration to put in place, within a stated time frame, a noise-reducing fence, or to take other noise-reducing measures so that the stated noise level was not exceeded anywhere in the school yard/playground. The order also stated that the noise-reducing measures were to be located nearby the school. The case does not specifically discuss precision of orders. The appeal was on the reasonableness. However, the Court clarified and specified the order, but did so by still keeping the environmental quality result as the relevant demand. The non-prescriptive suggestions of practical solutions and steps to take, does not seem to make the order unclear. The method of how to reach this result is not part of the order, other than as an example – a recommendation at the most. But this is not specified with any legal authority. It therefore does not bind the actor. It presents an option on how to live up to the ordered duty.

8.3.3.5 Setting Limit Values as Proper Goal and Result Oriented Enforcement – Discussion

In this section, enforcement orders stating limit values, functional standards, or the like, are described as a proper goal steering and result oriented regulatory approach. This approach appropriately focuses on the actual environmental effects, and not the way actors conduct their businesses. It also involves actors in the control of their businesses. This approach has strong legal support, and is generally considered to fulfil the demands for clear and precise enforcement, even in the context of sanctions. Limit values and the like are accepted as being sufficiently clear on which to base an assessment and enforcement of non-compliance. The basis in legal discourse has pertained to formulation of permit conditions, and subsequent enforcement of the thus stated limit values, etc. In this context limit values are very commonly used, and in view of EU law and case law from recent years, this approach is further emphasised, as demands for clear regulation of limit values and the monitoring thereof is thus authoritatively required¹⁷⁷⁵ Nevertheless, this law only covers the shrinking number of large industries that are regulated through IED and domestic permitting schemes. Much of environmental regulation falls outside this system and rests on the administrative enforcement of general rules.

Enforcement of specified limits, levels, or standards in administrative orders have also gained support in environmental law, even though the en-

¹⁷⁷⁵ See: Section 8.2.3.3.

enforcement authorities have noted some problems on upholding these measures. These problems cannot be noted in authoritative case law or administrative practice, and should not be considered to carry any legal authority. The discussed type of enforcement order must be considered clear and precise enough to clearly communicate to addressees what their duties are.

The question then is how useful and practical this enforcement approach is. First of all, it might be noted that setting a limit value or functional standard is not always an easy task. Sometimes, as in noise nuisance cases, there are norms and recommendations to lean on in determining maximum dB levels in a certain context. In such a case, this enforcement approach is quite accessible, and properly steers actors without taking over their information duties. In other situations, the relevant standard is found in environmental quality standards. If this quality standard – for example, for particles in inner city air, is found to be exceeded, it can be challenging to link the standard to individual duties. Simply referring to an environmental quality standard is not specific enough with regard to the core rule of clear communication of the individual's legal duties – certainly when many actors are contributing to the problem collectively. In some cases, there are no authoritative environmental standards or nuisance levels to rely on, but only general rules of consideration, and precautionary duties, coupled with general environmental objectives. In these latter situations the result oriented enforcement order can be quite a challenging task. The authority has a normative task in setting standards from general and collective objectives and standards. This may require considerable legal and environmental scientific expertise.

Secondly, stating limit values, or the like, does not always seem an appropriate solution. This is partly based upon the above stated lack of clear regulation, but also on the fact that some environmental problems are simply not that easily described, or controlled, in terms of specified standards or limits. In some ways the common Swedish case of poorly functioning private sewerages may represent such a situation. There is often little way of knowing how the specific sewerage system under ground is working. Diffuse leakage of nutrients from manure on a farm may be another case where it can be difficult to set, and to measure a limit value, or quality standards. Furthermore, orders prescribing limit values and the like do not seem to be that common in their enforcement against private individuals. The enforcement situations reflected in case law generally handle problems with private sewerage systems or furnaces. In these cases the enforcers generally seem to formulate either direct demands of precautionary measures, or if that is not appropriate or possible, a prohibition. The reason for this is not elaborated in the judgments, but it could be that it would be unreasonably difficult for the private individual to monitor and control levels of polluting substances or noise levels.¹⁷⁷⁶ In these situations the enforcement authority may choose

¹⁷⁷⁶ See, for example, the appealed order in MÖD 2003:78. See, also: MÖD 2004:63.

another way to formulate an enforcement order. It may decide on specific measures to take, and when, in order to be precise – but this can be argued to leave little flexibility for the actor. Another way is to order the actor to investigate the matter and suggest how the relevant problem could be abated.

8.3.4 Orders to Suggest Measures

8.3.4.1 Revisiting the Discourse on Information Responsibilities

Earlier on¹⁷⁷⁷ I have investigated an enforcement approach involving requirements on the actor to suggest appropriate precautionary steps or measures. The matter has been discussed in context of enforcement of information responsibilities, as such an order implies a duty to ascertain sufficient knowledge and facts, to investigate the matter, assess the materials, and to draw some conclusions of appropriate precautionary measures. This case law is also linked to the matter of precision of enforcement orders, as they entail a preliminary step in the enforcement of precautionary duties and thus links the themes investigated in Chapters 7 and 8. The idea is that the enforcement authority will subsequently assess the actor's suggestions and make an order based thereon. Actors are thus actively involved in the control of their own activities and the enforcement authority will have the more passive role in the investigation. But it still keeps its role as the authoritative decision-maker determining normatively the actor's duties. In this section, the case law on this matter is revisited and further analysed in the context of clear and precise enforcement of environmental law.

8.3.4.2 Pre-Code Administrative Practice – No Support for Enforcers' Claims for Actor Responsibilities

Prior to the introduction of the Environmental Code the enforcement authorities had also claimed that knowledge, investigation, and assessment of proper precautionary measures fell within the actor's responsibility. In two cases from 1993 the National Licensing Board reviewed the orders from a local enforcement authority to camping facilities. One required the installation of a treatment facility approved by the enforcers, and the other one ordered the actor to submit suggestions on how necessary sewage treatment could be put in place.¹⁷⁷⁸

In the first case, the enforcement authority argued the importance of the actor being given room to find for himself the way to abatement that was right for him.¹⁷⁷⁹ The authority should in this context not act as a consultant

¹⁷⁷⁷ See: Section 7.5.3.4.

¹⁷⁷⁸ Decisions of the National Licensing Board for Protection of the Environment 20 April 1993 in Decision B 50/93; and of 27 October 1993 in Decision B 165/93.

¹⁷⁷⁹ Decision B 50/93.

to the responsible party, but instead keep to setting demands; for example, on emission levels needed for the concessional rules¹⁷⁸⁰ to be followed. The authority referred to the important practice of voluntary cooperation, on active involvement, the freedom of the individual actor, and on flexibility of enforcement. It found support in the function of soft steering, as stated in the preparatory works,¹⁷⁸¹ and claimed that it would be inappropriate to more closely specify demands on the equipment, when the actor should himself be able to choose treatment technology. The enforcement authority also referred to General Guidance¹⁷⁸² stating that the authority may order the actor to submit suggestions for appropriate measures.

The National Licensing Board did not accept the arguments of the enforcement authority, and held that notwithstanding the described general guidance, an enforcement order should state concrete technical or other measures (similarly as in the above described case law on precision of orders), and that it was for the enforcement authority to state which measures should be taken. The order must be formulated so as to communicate clearly to the addressee what was expected of him. The Board suggested that the enforcers should approach the matter step by step, first ordering the actor to investigate the different relevant alternatives. After this the enforcers could, based upon this investigation, decide on the appropriate solution and issue an order to take a concrete measure. The general orders to install a treatment solution approved by the enforcers, were therefore revoked.

In the second case, the local enforcement authority had ordered the actor to submit suggestions about how the necessary treatment could be done. On appeal the County Board changed the order to that of compelling the actor to investigate different specified alternatives, and that the investigations should indicate certain expected emission values, the expected costs, and a schedule for carrying out the measures. The National Licensing Board, however, did not accept the formulation of the order, of either the local enforcer, or the Country Board. It held that through these orders, the actor was required to indicate the appropriate protective measures themselves, which is not lawful. The enforcers, they stated, only had the option to ask for decision-making materials through information and investigation. After that they could order precautionary measures or prohibit the activity. As this decision shows, the enforcers could not ask the actor to investigate different specified alternative measures either. The investigation, it seems, will thus have to be separate from the assessment of what measures are appropriate in the situation, and only pertain to more specific investigation of the situation in general. It seems the line is hard to draw, but the general idea is that the enforcers can-

¹⁷⁸⁰ In Swedish: "tillåtlighetsreglerna", to be paralleled to the rules of consideration in MB Chapter 2.

¹⁷⁸¹ ML Section 39; and Prop. 1980/81:92 p. 77.

¹⁷⁸² Environment Protection Agency General Guidance 90:11 p. 28.

not involve the responsible actor more actively in the procedure of finding the appropriate solution to abate the problem. This is the responsibility of the enforcement authority.

8.3.4.3 Case Law from the Environmental Courts – Still No Support

After introducing the Environmental Code, where actor responsibilities have been emphasised, and the duties involved more explicitly expressed, the enforcement method of ordering the actor to suggest measures was tried again. In the earlier discussed MÖD 2004:23,¹⁷⁸³ a local enforcement authority had ordered an actor to submit suggestions on how the relevant sewage water treatment facility should be improved so as to avoid health nuisance. They argued that the Environmental Code prescribes more extensive information responsibilities for the actor than before and that the responsibilities could not be perceived as unclear in context of the relevant legislation on sewerage. The case thus concerned the scope of the actor's responsibilities for investigation in the Environmental Code, and whether this was broader than under earlier legislation. The Environmental Court of Appeal found that the Code did not support an order to submit suggestions for solutions. This was still for the enforcer to decide and specify in the order.

The County Council and Environmental Court referred to the above presented practice of the National Licensing Board and argued the step by step enforcement approach of ordering investigation and asking for information, and subsequently deciding on and ordering a concrete and specified course of action. The Environmental Court agreed with the local enforcers, in that the Code brought changes entailing greater responsibilities for the actor for knowledge, investigation, and proof. However, this did not sway its perception of the legal demands on the enforcers.

The enforcement authority had argued in the Environmental Court that the introduction of the Environmental Code had extended the responsibilities of the actor for showing the enforcers what measures were needed to abate the health or environment nuisance and to show that the rules of consideration of the Code were being followed. It referred to the shifted burden of proof changing the practice of not accepting orders to submit suggestions for measures. It further claimed that the actor could not argue, in their defence, that the demands were unclear. There are clear statutory demands for the relevant activity, and actors are responsible for self-control of the installation, and MB 26:19 should be applicable to the operation. Its claims on actor responsibilities had been supported by the Environmental Protection Agency in pre-trial debate.¹⁷⁸⁴ It is interesting to note that the earlier argued points of actor responsibility are here taken up again in the new context of the Code.

¹⁷⁸³ See: Section 7.5.3.4

¹⁷⁸⁴ NVV, *Tillsynsnytt*, December 2003, no 3 pp. 4–5, referring to NVV Handbook 2001:4 p. 89.

The Environmental Court of Appeal searched the Environmental Code's provisions of enforcement powers, and the actor's responsibilities expressed in general regulations, for support for such demands, but found none. It initially held that an order to suggest measures would not be accepted in the context of steady administrative practice before the introduction of the Environmental Code, as referred to above, departed with reference to the preparatory works of the Code.¹⁷⁸⁵ An order should state the technical measures or the levels of disturbance or limit values that could not be exceeded. The Court further investigated the general rules argued to extend actor responsibilities and to subsequently potentially change this practice, but did not find sufficient support for this. The demand for knowledge was argued by the Court to be of such general character that it did not succeed the demands that from the viewpoint of legal certainty must be made on the formulation of an enforcement order. It must, as before, be clear from an order what the addressee had to consider and it was the enforcement authority's task to specify this. It suggested the step by step enforcement approach of ordering investigation and self-control/regulation measures under MB 26:19 and 22, in order to gather the decision-making materials to be able to then decide on and order specific measures.

The Environmental Court of Appeal thus notes the new rules on actor responsibility for knowledge and self-control, but is cautious in extending these principles so as to actually affect the distribution of responsibilities in the enforcement situation. The responsibility for knowledge is clearly found not to entail a competence for enforcers to ask addressee to suggest what measures are to be taken. The specific competence to ask for investigation does not cover this particular demand, and the general rules are too general to base specific duties in relation to the enforcement authority.

Similarly, in MÖD 2004:67, which was delivered the same day, the Court stated that even though there was a need to take measures for better sewage treatment, it they held that there was no statutory support for ordering the addressee to submit suggestions for solutions to the treatment problem. The Court, moreover, questioned the appropriateness of such an order towards a private person. The Court argued that the order should provide the addressee with clear notice of what he had to do to comply with the substantive regulation, a prohibition to emit sewage water that has not been treated further than sludge removal. On the basis of these arguments the relevant order was deemed not to live up to the demands that must for reasons of legal certainty be made on a duty of the relevant kind.

The claim for specified orders is carried to some length in an Environmental Court case of 2005 where an order to apply for a permit (which was also required by the environmental legislation) was reviewed. The problem was that the addressee was to suggest appropriate environmental measures

¹⁷⁸⁵ Prop. 1997/98:45, Part I pp. 494–495.

for the sewage treatment installation in the application, and then, after being granted a permit, to carry out such approved measures. This seems a normal permitting procedure, requiring the applicant to show that the activity should receive this permit and to respect the responsibilities that comes with it. There is a permit obligation for sewage treatment installations, and the local enforcement authority is the permitting authority. The Court, however, stated that such an order was not precise enough. It also stated that a supervisory and controlling environmental authority never demands suggestions for solutions. Instead it is a task for the authority to present the concrete technical or other measures that shall be taken if the activity is not to be prohibited. It may then order the actor to make investigations and present material upon which to base such an evaluation.¹⁷⁸⁶

This case might be argued to describe a simple case of confusing the administrative instruments and procedures, and that it would have been quashed on appeal. It is nevertheless interesting to show this case as an example of the discourse in the encounters of environmental. There is clearly a perception of a conflict between environmental law enforcement power and the general principles of the administrative law tradition in striving to protect the individual citizen from the excessive and arbitrary exercise of authority.

8.3.5 Indirect Steering through Prohibitions, etc

8.3.5.1 Clear and Precise Prohibition

Responsibilities for information can be indirectly shifted to the addressed actor, through simply ordering a stop, a prohibition; or alternatively to order the actor to apply for authorisation of some kind. An order stating that the activity should stop, and/or that it is prohibited to continue the activity, is much easier to formulate in a way that is perceived as clear, certain and concrete. As long as the relevant activity is indicated, the act of not doing it is easily understood. This advantage has been utilised in Swedish enforcement practice.¹⁷⁸⁷ A way of making the actor herself carry the responsibility for the knowledge, investigation, assessment and choice of measures to be taken, is to prohibit the activity, or emission, so long as it does not live up to the stated requirements. Thus a negative order, stating what the actor must not do, can be used by the enforcer to regulate a situation where the actor is not contributing actively to the regulatory procedure. Seeing how this is an order of negative duties, it will logically not have to specify what the actor has to do in order for the prohibition to be lifted.

¹⁷⁸⁶ Environmental Court i Vänersborg, Judgment of 24 August 2005, in case M 1753-05.

¹⁷⁸⁷ See: Lavin, R., *Offentliggrättsligt vite I* pp. 74–75, for an earlier discussion in context of orders coupled with conditional fine, generally in administrative law.

8.3.5.2 Pre-Code Practice on Prohibition

Practice from before the Environmental Code system contains decisions on prohibitions in cases where there is some discussion on how to solve the sewage problem, and there might be different alternative solutions.¹⁷⁸⁸ In these cases the appellants have argued that there are alternative solutions to the ones suggested by the enforcers, and usually that the enforcers should be responsible for investigating these alternatives. The National Licensing Board met these arguments with orders simply prohibiting the discharge of sewage water that had not undergone further treatment other than sludge separation. They met the appeal arguments of not being told specifically how to go about being allowed to use the sewerage system again, or what solution to install, and where, with the motivation that there was a statutory prohibition on such discharge, and that the onus of proof was on the actor. The central message in these cases is that there can very well be different solutions to the relevant problem, and the investigation, assessment, and subsequent choice of such measures is left to the actor, and not to be made by the administrative enforcer. The enforcer could hence prohibit the discharge of the poorly treated sewage water, even though this is a notable intrusion on a person's home life, and where the costs of the necessary measures are quite high. It should be noted that all these examples are based upon a statutory prohibition, where no balancing of interests or reasonableness considerations are stated, and where the regulated standard of proof for the actor is high. The practice might be quite different when it comes to other legal standards and requirements.

8.3.5.3 Environmental Court Case Law on Prohibition

The Environmental Court of Appeal has in several cases turned to ordering a prohibition, even when subject to the assessment of appropriateness and reasonableness of the precautionary measures are involved. In cases where the choice of treatment solution has been disputed, the Courts have chosen to change orders to install indicated sewage treatment works, and instead simply prohibit the discharge.¹⁷⁸⁹ The essential motive has been that it cannot be ruled out that there are alternative measures to those suggested by the enforcement authorities, and therefore the order should not authoritatively choose treatment solutions. The investigation of alternatives and choice is thus left to the actor.

In MÖD 2004:58, for example, the enforcement authority had decided on a quite specified order, coupled with a conditional fine, to take certain measures in installing sewage treatment works; type plans as well. On subsequent

¹⁷⁸⁸ See, for examples on Decisions of the National Licensing Board: 1 November 1995 in Decision B 202/95; and of 3 November 1995 in Decisions B 211–214/95.

¹⁷⁸⁹ Judgments of the Environmental Court of Appeal in: MÖD 2001:34, and MÖD 2004:58, and of 29 December 2006, in case M 169-06.

appeal, the Environmental Court of Appeal found that there were not enough decision-making materials at hand to decide on the appropriate technical solution, etc. It could not be ruled out, the Court stated, that acceptable treatment could be achieved with other methods. This was resolved through an order prohibiting emission of all untreated sewage water, and that the treatment solution was to be accepted by the local enforcer. Thus the investigation, the proof, the activity, and so on, was put on the actor by means of a prohibition and an order of a kind of authorisation procedure.¹⁷⁹⁰

This prohibition rested on a statutory prohibition against release of untreated sewage water. Such a rule may provide added support for ordering a prohibition. In a different situation, a prohibition may be considered unreasonable. In an early case from the environmental courts, still judging on the Environmental Protection Act regulations, the Environmental Court of Appeal reviewed an order to prohibit the discharge of sewage water. The discharge was not covered by the statutory prohibition,¹⁷⁹¹ but by the general rule on necessary and reasonable precautionary measures.¹⁷⁹² The Court indicated that even though there are formally no obstacles for deciding on a prohibition, such an order would normally be preceded by an order to take precautionary measures. The immediate prohibition was thus deemed too far-reaching. The technical preconditions to achieve further sewage water treatment, and the costs thereof, should according to the Court first be investigated. It is the responsibility of the enforcement authority to ensure that such decision-making materials are produced. Thereafter the enforcers should assess and decide which measures should be required, and communicate this in a specified order. It seems that when the statutory demands include balancing of interests, and so forth, the enforcers must ensure sufficient decision-making materials. It should be noted, however, that it does not seem to be any problem in later case law, with ordering prohibitions of different kinds, in different situations.

In a 2006 case¹⁷⁹³ the Environmental Court of Appeal stated that the facts of the case demonstrated that the existing sewage treatment installation did not work to satisfaction, and that the addressee had not shown that he had taken such action or precautionary measures as could reasonably be demanded to prevent damage or nuisance. The order was therefore deemed motivated. However, there was not enough information about the appropri-

¹⁷⁹⁰ Interestingly, the Environmental Court had in its thus overruled Judgment found that there was not enough proof to make the order. It however, held the rules that shifted burden of proof not applicable, and instead argued the inquisitorial principle. It emphasised the onerous character of the decision, and held that the enforcers were under the duties to prove the grounds of the order. That involved investigations about the sewage treatment facility and proving that the installation was illegal. The Environmental Court, moreover, pointed to the lack of proof about to the functioning of the installation and the emissions of the water.

¹⁷⁹¹ MÖD 2000:6.

¹⁷⁹² ML Section 5 (currently in 2:3 of the Environmental Code).

¹⁷⁹³ Judgment of the Environmental Court of Appeal of 29 December 2006, in case M 169-06.

ateness of the specifically ordered treatment technique. Even though the specified measure was considered typically a good solution, the Court held that it could not be ruled out that satisfactory sewage water treatment could be attained with other methods. Therefore the order of a specified solution was replaced with a prohibition on emitting sewage water that had not undergone treatment authorised by the enforcement authority. This way, the Court got around the problem of proof in the situation of lack of investigation and materials, and of specification. It pointed out that it is the actor's duty to show his compliance with the demands for precaution, and that this order gave him the opportunity to find solutions by himself, and make potentially needed notification or permit application. The Court's choice to require that the chosen solution be authorised by the enforcer is noteworthy. This entails an important normative function of the enforcer.

Furthermore, in an earlier case from 2001, similarly changing an order to install a specified treatment solution into an order prohibiting the discharge, the Court stated in conclusion that the enforcement authority should, after having ordered a prohibition, and subsequent to an application by the actor, try which treatment measures were required to allow the discharge. The investigation, the proof, the activity, and so on, was thus put on the actor, demanding that they take the initiative of submitting a request for approval of suggested measures. In a way the factual effects of the order seem to be the setting up of a kind of authorisation procedure. These last two discussed Judgments seem to conflict with the ones discussed above on the unlawfulness of orders indicating a duty to submit suggestions.

8.3.5.4 Orders to Apply for a Permit

Apart from the discussed orders requiring authorisation by the enforcement authority, the enforcers may also order an actor to apply for a permit in some cases. This is, for example, regulated in 9:6 of the Code regarding so-called environmentally hazardous activities – mainly polluting installations. The Environmental Court of Appeal has made statements that such an order may in some circumstances be appropriate. This was the case in MÖD 2008:25, where the Environmental Court in Växjö had changed an order to apply for a permit into an order prohibiting the activity, supplemented with information about voluntary application for a permit. The issue concerned a company dealing with recycling of waste, and there had been complaints about the disturbances and uncertainties about the risks involved, which needed further investigation. The Environmental Court of Appeal, however, found it inappropriate to base a prohibition upon the uncertainty of the effects of an activity, when it was possible to investigate the matter in a permitting procedure. This procedure ensures a more comprehensive investigation and allows for participation of all the concerned parties. The Court therefore ordered the actor to apply for a permit.

The order responded to the above-described complaints. The end result would be that the activity is fully investigated in order to regulate the disturbance, and the relation to the affected neighbours. However, an order to apply for a permit is milder, as it moves the investigatory duties forward in time, allowing the activities to continue in the meantime instead of stopping them and making resumption conditional on authorisation. This might be read as a statement of proportionality in relation to the prohibition. The application for a permit was milder, but still enforced investigatory duties. This case may be distinguished from the above stated cases ordering a prohibition in response to lack of certainty. The prohibitions in those cases were issued in response to uncertainties as to what the appropriate countermeasures were, while the 2008 case concerned a situation where the actual disturbance was unclear. In such a case the proportionality argument makes more sense than in one of prohibition in response to disputed choice of solution of a problem that is sufficiently clear.

8.3.6 Summarising Remarks

Swedish enforcement law has been described in this section as departing from a strict demand of precision of precautionary duties through orders specifying concrete technical or other measures. Orders cannot merely refer to general statements of relevant law or precautionary responsibility. Having followed the discourse in practice, however, and in legal preparations, a tension may be noted in the meeting of goal-steering and actor responsibilities, with public law safeguards of procedural propriety and the legal certainty of the individual. The enforcement authorities have argued that they should not carry the actor's duties for precaution, and nor for information duties. The preparatory works support their general claim, and the appellate bodies agree with the general view of actor responsibilities, and the extended importance and reach thereof in the Environmental Code. It has nevertheless been difficult to find a way to combine these features of environmental law with the administrative authority's procedural responsibilities, and the protection of the legal certainty of the individual addressee of enforcement.

Enforcement practice reveals a search for means to better enforce the actor responsibilities, with focus on the environmental goals and results. One way is to prescribe limit values or other specified results. This is an approach that suggests appropriate combination of these meeting legal aspects. This might be the case when the knowledge about the matter is very uncertain, or needs a lot of investigation, or when the environmental problem is difficult to translate into specific, measurable limits or standards. But the responsibilities for information can also be indirectly shifted to the addressed actor, through simply ordering a stop, a prohibition; or alternatively to order the actor to apply for authorisation of some kind. Examples of such approaches may be drawn from case law. These enforcement approaches have been ac-

cepted in case law and show the means to enforce goal steering and actor responsibilities, while at the same time fulfilling the authorities' procedural responsibilities. They keep the normative role as regulator, and communicate clearly to the addressee their concrete legal duties. This way, both the enforcer and the actor are held to their responsibilities. In effect, however, it seems that in the perspective of the actor, there is little difference between being ordered to suggest precautionary measures, and being ordered a limit value, or a functional standard. They still have to find a way to solve the problem that the enforcement authority will accept, or which achieves the stated result. This goes for the activity under a prohibition too. The prohibiting order is nevertheless a rather more intrusive decision, in that it bans the activity until the actor has solved the problem. The prohibiting order will probably provide little indication on what needs to be done. It will only state what not to do and why. In this context, the perception of orders to submit suggestions for solutions as unlawful seems inconsistent and formalistic.

8.4 United Kingdom

8.4.1 Introduction

The strict demands for precision in the Swedish system will now be compared to the common law of the United Kingdom. Just as in the Swedish and Dutch legal orders, relevant English law revolves around the above-discussed core rule of clear and certain administrative enforcement.¹⁷⁹⁴ An order should be certain and definite in its terms, and it should be quite clear what the addressee is required to do or refrain from doing. He or she should know what has to be done wrong, and what is required to remedy it.¹⁷⁹⁵ There is, moreover, some statutory regulation of the contents of an enforcement order, and case law reveals a dynamic discourse on the practical implementation of this principle in the formulation of enforcement orders. There are, however, significant differences in different areas of environmental law. Statutory nuisance law will hence be described separately. I will start by noting the statutory demands of the formulation of orders, in particular the precision of duties to take measures.

¹⁷⁹⁴ See: *R. v. Wheatley* (1885–86) LR 16 Q.B.D. 34; *Attorney General v. Staffordshire CC* [1905] 1 Ch 336; *R. v. Fenny Stratford Justices ex p. Watney Mann (Midlands) Ltd* [1976] 2 All E.R. 888, and [1976] J.P.L. 368. See, also: Hughes, D., et.al., *Environmental Law* p. 11.

¹⁷⁹⁵ See, for examples: *Attorney General v. Staffordshire CC* [1905] 1 Ch 336, at 343 (on road maintenance and repair); *Myatt v. Teignbridge DC* [1995] Env. L.R. 78, pp. 79–80 (on statutory nuisance); *Redland Bricks Ltd v Morris and Another* [1969] 2 All E.R. 576 (on mandatory injunctions); and *Miller-Mead v. Minister of Housing and Local Government and Another* [1963] 1 All E.R. 459 (on planning law).

8.4.2 Statutory Demands of Precision of Orders, etc

8.4.2.1 Enforcement under the Environmental Permitting Regime

There are two central kinds of orders – notices – for compliance control under the Environmental Permitting regime.¹⁷⁹⁶ The provisions stating these enforcement powers prescribe what statements the notices must include. Firstly, there is the enforcement notice, which is served to address contraventions of permit conditions (EP Regulation 36). An enforcement notice has to state that the regulator is of the opinion that the operator has contravened, is contravening or is likely to contravene the permit conditions, as well as the matters constituting the contravention or risk thereof. It also has to specify the necessary remedial steps and the time period for these steps.

Secondly, there is the suspension notice, which is served to address risks of serious pollution caused by the relevant activities (EP Regulation 37). The suspension notice must specify the relevant risk. The notice must also specify the steps that must be taken to remove the risk and the time frame for this. The notice must also direct how the authorisation or permit is affected by the suspension. The whole or part of the activity may be covered and thus the extent of the effects on the authorisation must be described here. This means first of all that until the notice is withdrawn (when the remedying steps have been taken) the permit ceases to authorise the relevant operation or activities. Secondly, where the permit still has authorising effect, the notice shall state any steps required to be taken in carrying out those activities, in addition to those steps already required by the permit conditions.

It seems that these formal requirements on enforcement notices are common in English environmental law. Provisions of enforcement powers in water law and planning law typically prescribe that a notice must state the relevant problem (the breach of law, the environment or other problem), and specify steps or works to be taken and a period of time for this.¹⁷⁹⁷

8.4.2.2 Enforcement under Statutory Nuisance Law

The statutory requirements on the formulation of enforcement orders are quite different in statutory nuisance law. In this field of law, the local enforcement authorities have a distinctive discretion as to what their abatement orders should consist. An abatement order can, according to the EPA 1990 Section 80(1), *either* simply require abatement of the nuisance, prohibit or restrict its occurrence or reoccurrence, *or* require the execution of works or

¹⁷⁹⁶ There are also particular enforcement measures for certain sectors of regulation, for example, notices to close landfill facilities (EP Regulations Schedule 10 Para. 10) and prohibition notices in relation to hazardous discharges into groundwater (Schedule 22 Para. 9). These specific instruments are not further investigated.

¹⁷⁹⁷ See for examples: Water Resources Act 1991 Section 161A, Town and Country Planning Act Section 173, Water Act 2003 Section 25A.

steps necessary for the abatement, prohibition or limitation, or combinations of the types of orders. It is hence optional to go further and specify remedying steps or works. This is different from other environmental law provisions on enforcement. On the face of it the rule places more responsibility on the operator or actor for understanding, or finding out what has to be done.

The question is what this means. Notices must, in all fairness, tell the addressee what is wrong and what kind of remedial measures are needed. There is an abundance of case law on the debate on specification of abatement orders, some of which will be analysed in the following.

8.4.2.3 Lack of Case Law Guidance under the Permitting Regimes

When analysing the law on precision of enforcement orders under the EP regime, or the former PPC regime and water pollution regulations, one discovers the lack of case law on the matter. Comparatively, in the area of statutory nuisance, there is an enormously large store of case law. This may partly be attributed to the fact that appeals of enforcement measures in the permitting regimes have been kept outside the courts, and instead handled by the Secretary of State.¹⁷⁹⁸ But this cannot explain the lack of precedents through judicial review cases or through criminal trial cases following compliance. Perhaps, this can be attributed to the more negotiatory permitting procedure, and the fact that the permitting authority also controls compliance. Thus the competent authority's regulation of the activity is constant and based upon a communicative and wide-ranging procedure.

This situation of poor direction through case law authority, however, means that guidance on the law of goal steering versus precision of orders, and on the formulation of the enforcement orders, has to be sought elsewhere. It has been suggested that the quite considerable body of case law on the Town and Country Planning Act, specifically on the form and validity of planning law enforcement notices, can provide guidance.¹⁷⁹⁹ The statutory provisions on the form and function of the notice, as well as the context of an authorisation regime, speak in favour of such "loan" of case law guidance. I will therefore look to some planning law cases for guidance. The case law on the precision of matters in the planning law notice concerns enforcement notices, but I find no reason why this could not be used for mandatory specification in suspension notices as well.¹⁸⁰⁰

The case law on statutory nuisance should, however, be considered with caution, as the described statutory requirements and contexts are different.

¹⁷⁹⁸ See: EP Regulation 31, and formerly in the Pollution Prevention and Control (England and Wales) Regulations 2000, Statutory Instrument 2000 No 1973, Regulation 27.

¹⁷⁹⁹ Tromans, S., and Poustie, M., *Environment Protection Legislation 1990–2002* pp. 66–68. This statement regards the earlier IPC regime (Environment Protection Act 1999, Part I). The wording of the provisions is, however, the same in relevant parts. The promoted use of planning law precedents should be equally valid in relation to the PPC and EP Regimes.

¹⁸⁰⁰ Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990–2002* p. 68.

There may be some analogies to be beneficially made regarding the perception of the distribution and balance of the responsibilities and liabilities of the authority and actor.

8.4.2.4 The Impact of Enforcement Policy Documents

Enforcement policy may be helpful in determining how the enforcer should formulate its enforcement orders, certainly in an area where there are no direct authoritative cases or detailed provisions in statutes. It can be drawn from the different enforcement policies that the communicative and cooperative approach is important. This is generally manifested in the Regulators' Compliance Code,¹⁸⁰¹ and in the Enforcement Concordat¹⁸⁰², where in the interest of economic progress and lessening administrative burdens, the authorities should see to it that business receive clear explanations of what is required of them and when. They should have the opportunity to resolve the problem before formal enforcement measures are taken, unless immediate action is needed. The Environment Agency's own enforcement policy, moreover, shows that prevention through seeking cooperative and voluntary solutions is important, even though it will not hesitate to use more formal enforcement instruments when needed. Transparency is one of the policy objectives stated in the documents, stating that the enforcement action of the Agency shall be clearly motivated, and that some kind of consultation between the regulator and the regulated should take place before formal action, if urgent action is not required.¹⁸⁰³

8.4.3 Case Law on Precision of Orders – Test of Certainty

8.4.3.1 Introduction

English planning law demands, as do also the rules on administrative enforcement under the EP regime, as well as other areas of environmental law, that the enforcement order should indicate the steps or works that must be taken to remedy the contravention or the risk thereof. The question is, what does this mean? What kind and degree of specification is needed? As discussed earlier, English enforcement law on the specification of orders, departs from the general core rule of clear and certain communication of duties. This investigation is based on that point of departure.

¹⁸⁰¹ Regulator's Compliance Code. Statutory Code of Practice for Regulators, Better Regulation Executive, Department for Business Enterprise & Regulatory Reform, 17 December 2007.

¹⁸⁰² Enforcement Concordat: Good Practice Guide for England and Wales. See, also: Hawke, N., et.al., *Pollution Control; The Powers and Duties of Local Authorities* p. 7.

¹⁸⁰³ Enforcement and Prosecution Policy, Doc. No. EAS/8001/1/1, Version 2, Issued 07/08/08.

8.4.3.2 The Miller-Mead Case – Specification of Contravention and Remedial Steps

Guidance on the question of the meaning of the core rule and the statutory demands for precision can be found in a precedent in planning law in the case of *Miller-Mead v. Minister of Housing and Local Government* (*Miller-Mead*).¹⁸⁰⁴ This case dealt with the question of whether a notice is bad for failure to specify with sufficient accuracy and precision the matters required under the statutory provision. The relevant enforcement notices – served on a land owner – addressed the fact that a lot of people lived in caravans on his land. This was not permitted under planning law and the local planning authority served two notices stating that this was not permitted land-use and ordered its discontinuance through removing the caravans from his land. On appeal to the Secretary of State, the notices were deemed too wide, since just parking caravans was in fact permitted. It was only the residential use that needed permission or otherwise amounted to a contravention of planning law. The notices were therefore varied, specifying the contravention and remedial steps as referring to caravans for residential use. On further appeal it was claimed that such amendments of the notices were not legal, as the errors in the notices had made them null and void. The Court of Appeal also based its judgment upon the rule that a valid enforcement notice must specify the alleged breach of planning law or permit to have taken place, and the steps to be taken to remedy it. A notice not specifying these matters was therefore not to be seen as an enforcement notice in the view of the law. It was thus ineffective. The question was, nevertheless, what this meant in terms of specification and whether the original notice could be considered null and void.

The appellants argued the necessity of notices being reasonably clear and explicit so that the addressee would know what he had to comply with, especially in the context of the penalties involved for non-compliance. They said that it matters not that the facts were all known to the addressee but not to the authority. It was for the planning authority at its peril to get to know all the relevant facts and state truly the offence committed, otherwise the notice was null and void without a court having to state so in an appeal.¹⁸⁰⁵ They referred to existent case law on the matter. These arguments parallel the above-discussed investigatory duties of the authority, and the statements in Swedish case law that it is for the authority to find out what measures are required in the specific case.

¹⁸⁰⁴ [1963] 2 Q.B. 196.

¹⁸⁰⁵ *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 Q.B. 196, pp. 219–220 and 225.

8.4.3.3 Marking a Move from Formalism to a “Test of Certainty”

The appellants’ arguments were met with force by the Court of Appeal, making the case a turning point in enforcement law, turning from a strict formalistic approach, setting tough demands on the form and accuracy of the notices in order to protect the addressee. In fact, Lord Denning reminds us that this formalism is already passé:¹⁸⁰⁶

As I listened to the argument and read the cases, I began to wonder whether we were not in danger of returning to the formalism of earlier days. The recitals in an enforcement notice were being treated as if they were a charge against the offender, and not only a charge, but a record of his conviction, which must be strictly accurate, else it is a nullity and void.

Miller-Mead initiates a more pragmatic and purposive approach, focusing more on the purpose of the notice and of the form requirements, and on the actual communicative result. It promotes a test of the clarity and certainty of a notice asking whether the notice tells the recipient fairly what he has done wrong and what he must do to remedy it. Lord Justice Upjohn states:¹⁸⁰⁷

One must remember the word of Lord Simonds in the Bridlington case¹⁸⁰⁸ that the court must insist on a strict and rigid adherence to formalities, for the rights of the owners and occupiers are being subjected to interference. This interference, on the other hand, is for the common good and the powers are entrusted to responsible public bodies of great experience. The requirements of the section must be interpreted with reasonableness in all the circumstances of the case. With all respect to Cater’s case,¹⁸⁰⁹ the function of the court is not to introduce strict rules not justified by the words of the section. I repeat, therefore, that in my judgement the test must be: does the notice tell him fairly what he has done wrong and what he must do to remedy it?

Since then this has been the approach taken in case law,¹⁸¹⁰ and the turning point in Miller-Mead is explicitly stated as a much needed and favoured new

¹⁸⁰⁶ *Miller-Mead v Minister of Housing and Local Government* [1963] 2 Q.B. 196, p. 220.

¹⁸⁰⁷ *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 Q.B. 196, p. 232.

¹⁸⁰⁸ *East Riding County Council v. Park Estate (Bridlington) Ltd* [1957] A.C. 223, p. 228.

¹⁸⁰⁹ *Cater v. Essex CC* [1960] 1 Q.B. 424. This was a case where a notice had stated that the land-use was carried out without a permit; a statement which was seen as false as some of the activities were automatically permitted by statutory law for 28 days, without having to seek a planning permit. As the statement was thus considered false, even though this did not materially change the grounds for the notice, the notice was considered a nullity because of the then argued necessary strict formal requirements.

¹⁸¹⁰ See: *Munnich v. Godstone Rural DC* [1966] 1 W.L.R. 427; *Ormston v. Horsham Rural DC* (1966) 17 P. & C.R. 105; *Kaur v. Secretary of State for the Environment* (1991) 61 P. & C.R. 249; *Tandridge v. Verrechia* [2000] Q.B. 318; and *Payne v. National Assembly for Wales, Payne v Caerphilly* [2007] 1 P. & C.R. 4.

approach.¹⁸¹¹ Before this, it is stated, people were taking an undue advantage of this strict approach, using formalities to defeat the public good.¹⁸¹²

8.4.3.4 Specified Enforcement and the Test of Certainty in Summary

According to the law of Miller-Mead, an enforcement notice or a suspension notice arguably must specify the matters prescribed in the statutory wording; the opinion that there is a contravention of relevant statute or permit condition, and the matters constituting this contravention, and the remedial steps that must be taken to remedy it, as well as the compliance time, and in the suspension notice the effect on the permit in question also.¹⁸¹³ If it fails to specify any of these things entirely, the notice does not on the face of it comply with the requirements in the statutory provision and is plainly inoperative as such a notice.¹⁸¹⁴ “it is a nullity and is so much waste paper”.¹⁸¹⁵ It can thus be challenged and even ignored in further proceedings. This was the case in *Tandridge DC v. Verrechia*¹⁸¹⁶ where the council had added on a land-use issue in its enforcement notice, but failed to specify any steps to remedy this breach. This added part of the notice was therefore held to be a nullity. It was held that even though the regulator could choose to under-enforce, that is, to require less than necessary to fully remedy the breach, it was not allowed to not specify any steps at all.¹⁸¹⁷

But perhaps more challenging and in enforcement practice the more common situation is where the notice is not obviously not complying with these requirements, but rather that the notice may fail to specify with sufficient precision the matters required. The question follows: to which particularity and detail do the matters have to be specified?

Miller-Mead states that if the notice is hopelessly ambiguous and uncertain, so that the addressee cannot tell in what respect he had contravened the relevant rules, or that he could not tell with reasonable certainty what steps he had to take to remedy the alleged contravention, the notice would also be impossible to enforce and thus bad on its face and a nullity.¹⁸¹⁸ This is, however, distinguished from faults on the facts at the basis of the notice. This notice was deemed too wide, and was therefore not valid. This did not mean that it was a nullity. It could therefore be varied and amended but still en-

¹⁸¹¹ *Munnich v. Godstone Rural DC* [1966] 1 W.L.R. 427, see p. 435; and *Ormston v. Horscham Rural DC* (1966) 17 P. & C.R. 105, p. 108. See, also: Case Comment to *South Hand DC Halsey* [1996] J.P.L. 761, p. 766, where it is stated that the courts have been criticised for taking an over technical approach to the interpretation of the law on enforcement.

¹⁸¹² *Munnich v. Godstone Rural DC* [1966] 1 W.L.R. 427, p. 435.

¹⁸¹³ EP Regulations 36–37.

¹⁸¹⁴ *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 Q.B. 196, pp. 225–226.

¹⁸¹⁵ *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 Q.B. 196, p. 226.

¹⁸¹⁶ *Tandridge DC v. Verrechia* [2000] Q.B. 318.

¹⁸¹⁷ *Tandridge DC v. Verrechia* [2000] Q.B. 318, esp pp. 333–334.

¹⁸¹⁸ *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 Q.B. 196, p. 226.

forced. But this is a limited possibility. A notice which is bad and completely misfires cannot be thus cured but must be quashed.

Thus the central question is whether the notice complies with the legal requirements.¹⁸¹⁹ This is where the Court falls back on the argumentation of turning away from a strict formalism, and instead looking to the purpose of the legislation and interpreting the requirements with reasonableness in the light of all the circumstances of the case. Thus a test as to certainty and fairness is suggested. This test asks the question: Does the notice tell the addressee fairly what he has done wrong and what he must do to remedy it? The relevant notice to remove the caravans was in accordance with the requirements in the relevant act, and the mistake in stating too wide an application, referring to caravans but applying only to those used for residential purposes, was not so vague and unclear as to render it a nullity. It was, however, adjusted in the appellate court to clarify what was meant.

8.4.3.5 Building on Miller-Mead – Consideration of the Addressee’s Knowledge

The authority of Miller-Mead has been confirmed in the following case law. In *Ormston v. Horsham Rural DC (Ormston)*,¹⁸²⁰ concerning restoration of lands to its former use, the Court applied the Miller-Mead test of asking if the notice told the recipient what he had done wrong and what he had to do to remedy it. First it addressed the complaint that the notice seemed confused as to what the wrong referred to; development without permission or non-compliance with a permission condition. But this did not make the notice unclear. The Court held that a notice was not bad for failure to specify the kind of breach involved more clearly, as long as it told the addressee fairly what he had done wrong. It was clear in the case at hand that the problem was the change from agricultural land use to a use for the purpose of repairing and parking motor vehicles.

The next question in *Ormston* was the claimed uncertainty of required remedial steps. The notice ordered the addressee to restore the land to the condition before the development, which meant restoring it to agricultural land. The recipient of the notice knew the condition of the land before the development and Lord Justice Harman in the Court of Appeal stated that he did not see any hardship in being thus told to put it back as it was. He saw himself unable to understand the uncertainty in this. He further stated:

To say it was void for uncertainty because it does not specify any further what he had to do to restore it seems to me to be becoming too meticulous and over-nice in these matters. Quite clearly the notice seems to me to tell

¹⁸¹⁹ In the Miller-Mead case Section 23 of the Town and Country Planning Act 1947, but for the purpose of this analysis: EP Regulations 36–37.

¹⁸²⁰ *Ormston v. Horsham Rural DC* (1966) 17 P & CR 105.

him (a) what is complained of and (b) what he has to do. That is quite enough. I think the enforcement notice was perfectly good.¹⁸²¹

The Court's reasons imply that the enforcer can consider the addressee's knowledge of the pre-development condition of the building when formulating the notice. Similar reasons were stated in *Kaur v. Secretary of State for the Environment*,¹⁸²² where an order to restore a demolished and reconstructed roof in breach of planning control to its predevelopment condition was held to be not so uncertain as to render it a nullity.¹⁸²³ These notices were deemed having fairly told the addressees what they had to do.

However, in the *Ormston* case the extra clarifying addition of a statement that the design of the reinstated roof should first be approved by the authority, had made it null and void for uncertainty, being dependent on a decision by the authority on the issue. Moreover, in *Payne v. National Assembly for Wales (Payne)*,¹⁸²⁴ where the analysis of the clarity and certainty of the notices was not clearly visible, the reliance on approval from the authorities could reasonably be interpreted to have been decisive in the Secretary of State's decision on appeal, deeming the notice bad on its face.¹⁸²⁵

The Miller-Mead test was also applied in *Buckinghamshire CC v. North West Estates Plc.*¹⁸²⁶ The case concerned a sought injunction for non-compliance with enforcement notices, and long standing breaches of planning control. The land – originally farm land – was developed before modern planning control for sand and gravel quarries, but had since been further developed for different and other kinds of use: tipping, landfill, concrete crushing. To address the contraventions of planning control, the planning authorities served a set of enforcement notices targeting different kinds of use in different parts of the area. The result was a complex mass of orders, referring to plans, maps and earlier planning conditions. It was argued on the part of the landowners that the Court should refuse to enforce the notices due to the uncertainty in its contents. The Court, applying the Miller-Mead test, analysed the different notices and found that it was quite all right to reasonably refer to plans and permit conditions to specify the orders, and that the plans and maps involved did not seem difficult to understand or use. The Court considered that the relevant reader of these plans would be skilled people, knowledgeable in the context of the permit conditions, maps, previous condition of the land, etc. It therefore held that this did not show that the

¹⁸²¹ *Ormston v. Horsham Rural DC* (1966) 17 P & C.R. 105, p. 109–110.

¹⁸²² *Kaur v. Secretary of State for the Environment* (1991) 61 P & C.R. 249.

¹⁸²³ *Kaur v. Secretary of State for the Environment* (1991) 61 P & C.R. 249.

¹⁸²⁴ *Payne v. National Assembly for Wales* [2007] 1 P. & C.R. 4.

¹⁸²⁵ The case before the Court only handled the question of whether the Secretary of State could repair a notice which was held bad on its face. The Court held that such a notice was null and void and therefore there was no power to vary it. There was in fact no notice, as it was a nullity at law.

¹⁸²⁶ *Buckinghamshire CC v. North West Estates Plc* [2003] J.P.L. 414.

notices did not communicate to the relevant responsible actors what was wrong and what had to be done to remedy that wrong.

This situation may be very relevant in the context of environmental law enforcement towards industrial installations; large, complex, and often very high technological operations. In this situation it could be argued that enforcers can expect that the operator understands the particularities and the historical and present context of the operation of the installation. This thus puts more responsibilities on knowledge and activity on the part of the actor, instead of the enforcer. The law of Miller-Mead and further application thus suggest that even though an enforcement order has to specify what the actor has to do in terms of remedial action, it does not require in all cases detailed specification of each step or technical or methodological choice to be made. Some pre-understanding can be expected. Moreover, a knowledgeable addressee may be expected to understand complex information. A lot of information responsibility is left to the actor, as long as he or she understands what is expected of them in more general terms. When it comes to operators of industrial installations this should often not be a problem. When compared with the law on actor responsibility for information in Swedish environmental law, the reasoning behind the law of Miller-Meade and following case law, could support more extensive reliance on the actor's knowledge and insights, instead of a formalistic requirement for precision of concrete precautionary steps and measures.

8.4.3.6 Further Case Law on Precision

There are, however, still requirements of clear communication of legal duties. An essential message of such communication is the desired result of remedial steps. In *Stratford upon Avon District Council v. Hitchman*¹⁸²⁷ the validity of the notice could not be challenged, as it was a case of deciding on an application for an injunction. It is, however, clearly stated that the notice directing that the addressee could not keep dogs in breach of residential use of the premises, but not specifying the maximum number of dogs, was not seen as sufficiently clear and certain in its form. The Court subsequently formulated the injunction so as to require the addressee to not increase the number of dogs, and by letting the number of dogs decrease though natural causes in due time, to the number desired by the authority. This shows the importance of specifically stating the desired result of remedial steps. The case comment notes that the enforcer could not leave it up to the addressee to figure out what they must do to keep on the right side of the criminal law. This is accepted in statutory nuisance law but not in planning enforcement law¹⁸²⁸ (and perhaps in enforcement under the EP Regulations).

¹⁸²⁷ *Stratford upon Avon DC v. Hitchman* [2002] Env. L.R. 7.

¹⁸²⁸ *Stratford upon Avon DC v. Hitchman* [2002] Env. L.R. 7, p. 197.

In the case of *Munnich v. Godstone Rural DC*,¹⁸²⁹ there was some confusion as to people living in caravans on the relevant premises being proprietors, occupiers or permit holders. The enforcement was unclear on the matter of who was under a duty to do what. The order became a sort of collective order. This did not trouble the justices but they stated that the relevant addressees – owners and occupiers of the caravans – had been served notices telling them what they had done wrong and what they had to do to remedy it: merely to remove the caravans, which were used for dwelling. The fact that all the occupiers had not been named in each notice did not make it unclear or uncertain in any relevant way, and nor did the fact that some of the dwellers were served with notices unnecessarily. The Court held:¹⁸³⁰

Accordingly, it is necessary that the enforcement notice should make it plain to the ordinary reasonable man what it is that is being complained about and what he is required to do. If the enforcement notice is couched in such language as to leave the ordinary man in any reasonable doubt on either of those two points, then it is a bad notice. If, however, it fairly informs the reasonable man on each of those points, the fact that it may be clumsily drafted and that by the exercise of ingenuity some other meaning may be wrested from it is beside the point.

Once again the fundamental requirements of making it clear what is wrong and what is required to do to remedy the wrong is reiterated, in a way that can summarise the planning law discourse on the meaning of the core rule on clear and concrete enforcement orders.

8.4.4 Specification of Orders under Statutory Nuisance Law

8.4.4.1 Introduction

The following analysis is focused on the relationship between the discretionary enforcement powers under Section 80(1) of the Environmental Protection Act 1990, and requirements of specification of works for the notice to be good and valid. There is a large store of case law on the application of these rules and its statutory predecessors, and that there has been quite some difficulty in dealing with these regimes. In the Falmouth case the Court of Appeal reviewed the extensive discourse and tried to bring clarity to the issue. It then developed the law towards extensive discretion on the part of the regulator, and the subsequent shift of responsibilities to the regulated.¹⁸³¹ To illustrate the significance of this shift, the study will start with describing earlier case law.

¹⁸²⁹ *Munnich v. Godstone Rural DC* [1966] 1 W.L.R. 427.

¹⁸³⁰ *Munnich v. Godstone Rural DC* [1966] 1 W.L.R. 427, p. 439.

¹⁸³¹ For explicit reference to this effect see Lord Justice Law's response to the arguments of the defendant *Sevenoaks DC v. Brands Hatch Leisure Group Ltd* [2000] Env. L.R. 5, p. 94.

8.4.4.2 Earlier Case Law; Precision of Necessary Works or Steps

Earlier law on statutory nuisance suggested that if works or steps were necessary to abate or prevent a nuisance, these steps had to be specified with some particularity.¹⁸³² In *R. v. Wheatley* the Justices read the relevant provision on enforcement powers and found that it required necessary works to be specified. The notice only required abatement of the nuisance arising from untrapped drains, and to carry out whatever works were necessary, and to prevent recurrence of the nuisance. Hence the notice was bad. Some comments were, moreover, made regarding the possibilities open to the authority for knowing the best way to abate the nuisance. Mr Justice Mathew held that there were good possibilities in the inspection, and otherwise, to gather the necessary basis for a decision on the appropriate measures. The addressee would be just as burdened, if not more, since he would not know if his measures were to be deemed sufficient by the authorities and the courts. This could not have been the legislators' intent.¹⁸³³ This links to the above-discussed role of the authority to normatively decide what the law demands of the addressee in the individual situation. The addressee cannot decide this, as it will still be the authority that has the final word on the matter. The individual's subordination to the enforcer's authority was thus implied.

However, if no positive action like actual works were required, no such specification was deemed necessary. In *Millard v. Wastall*¹⁸³⁴ the justices distinguished the case from *Wheatley* on the basis that *Wheatley* concerned works – actual positive action. This was not the case here. No works were necessary or required here, only care in the stoking and to abstain from permitting smoke to issue from the chimney.¹⁸³⁵ Similarly, in *McGillivray v. Stephenson*¹⁸³⁶ the justices argued, with reference to older case law, that the abatement order per se was the operative order, and that there was no need for the local authority to also call for any particular works, if it did not think such works were needed.

These cases relate to the statutory wording in the Public Health Act 1875, providing the power to issue abatement orders. This provision prescribed that a notice should require the addressee to execute such works and such things as may be necessary for the abatement of the notice. Present legislation requires that a notice contains any or both of the orders – to abate and/or to undertake works. The specification debate was also lively in the 19th century. The enforcer's authority and normative power was highlighted here.

¹⁸³² *R. v. Wheatley* (1985–86) 16 Q.B.D. 34.

¹⁸³³ *R. v. Wheatley* (1985–86) 16 Q.B.D. 34.

¹⁸³⁴ *Millard v. Wastall* [1898] 1 Q.B. 342.

¹⁸³⁵ *Millard v. Wastall* [1898] 1 Q.B. 342, p. 343.

¹⁸³⁶ [1950] 1 All E.R. 942.

8.4.4.3 Newer Case Law; No Specification of Works Where Negative Measures Would Suffice

A more recent line of case law followed this discourse, and developed it further and in line with the new wording of the regulation on the power and duty to make an abatement order. First we have the cases where it is deemed that no positive action is required – it is not necessary to undertake any “works” or “take any steps” in order to abate the nuisance in question. In general the case law of *Wheatley* is followed in cases like *Budd v. Colchester Borough Council* (*Budd*),¹⁸³⁷ *SFI Group Plc (Formerly Surrey Free Inns Plc) v. Gosport Borough Council* (*Surrey Free Inns*),¹⁸³⁸ and *Griffiths v. Pembrokeshire County Council*.¹⁸³⁹ These cases followed the approach of *Millard v. Wastall*¹⁸⁴⁰ that no works or steps had to be specified. In fact, even if there are many different alternatives and some of them include works to be done, for example, sound insulation, but that there is an alternative that does not require works, thus making works not necessary, then this alternative in effect takes away the duty to specify steps or works.

In *Budd*, the Court of Appeal found good an abatement notice simply requiring the recipient to abate the nuisance constituted by dogs barking on his premises. It argued that there were many ways to abate the nuisance and there was no duty for the enforcer to specify such. Lord Justice Swinton Thomas analysed the relevant case law and thus divided the question of duty to specify into three different cases. First of all, the contemporary wording of the power and duty to serve an abatement notice leaves it to the enforcer to choose between simply requiring abatement of the nuisance, or stating requirements of specific remedying steps or works to be done. However, in some cases, the requirement of works to be done was so inherently obvious in the abatement requirement that it would be unreasonable not to specify those works. In these cases they “may well be under a duty to set out works or steps which they require to be taken”¹⁸⁴¹ Ordinarily, however, a simple abatement order will suffice, and that was the case here. It was even held that this was more appropriate here, leaving the decision to the addressee to determine the most practical course of action for him.¹⁸⁴² A similar approach was taken in *Surrey Free Inns*¹⁸⁴³ (decided on by the Court of Appeal the same month as *Budd*) where it was stated:

The respondent council was entitled to serve an abatement notice simply requiring the appellant to abate the nuisance caused by playing amplified mu-

¹⁸³⁷ *Budd v. Colchester BC* [1999] Env. L.R. 739.

¹⁸³⁸ [1999] Env. L.R. 750.

¹⁸³⁹ [2000] Env. L.R. 622.

¹⁸⁴⁰ *Millard v. Wastall* [1898] 1 Q.B. 342.

¹⁸⁴¹ *Budd v. Colchester BC* [1999] Env. L.R. 739, p. 749.

¹⁸⁴² *Budd v. Colchester BC* [1999] Env. L.R. 739, pp. 747–748.

¹⁸⁴³ [1999] Env. L.R. 750.

sic. This left it open to the appellant to abate the nuisance in any number of ways, not all of which would involve any works or positive steps within section 80(1)(b). ... The notice is neither defective nor in error in leaving it to the appellant to abate in any way it chose.

In summary, the authority has the discretionary choice to merely order abatement, or to order works to be done, and then specify them. Budd, however, points to the fact that this discretion is limited by reasonableness. Sometimes the situation in itself reasonably requires specification of works, and they must then be specified. But otherwise it is lawful, and sometimes even preferable, not to intervene in the addressee's freedom to choose the means for abatement.

8.4.4.4 Newer Case Law on Specification When Positive Measures Are Explicitly or Implicitly Required

Where the execution of steps or works is necessary to abate a nuisance, some of the discussed judgments suggest that a notice would only be valid if those works were described with some precision. An important motive for this is the criminal sanctioning of non-compliance. Authority on specification of such necessary works is found in the following cases: *The Network Housing Association Ltd v. Westminster City Council (Network Housing)*,¹⁸⁴⁴ *Sterling Homes v. Birmingham City Council (Sterling Homes)*,¹⁸⁴⁵ and *Kirklees Metropolitan Council v. Field & Others (Kirklees)*¹⁸⁴⁶.

The *Network Housing* case concerned poor sound insulation in a block of flats, leading to the residents suffering noise nuisance. The City Council served an abatement notice on the Housing Association, requiring it to provide suitable and effective sound insulation in order to improve the situation or to carry out other work so as to achieve the required degree of insulation. There were different opinions on how such insulation works should be achieved, and Mr Justice Buckley therefore held that the council should have made up its mind about what should be done, and subsequently specified this in the notice.¹⁸⁴⁷ It was, however, not necessary to be so specific as to provide a builder's specification. Mr Justice Buckley stressed the importance of telling the addressee clearly what works were to be carried out, because of the risk of criminal sanctions for non-compliance. He also held that these situations involved a large proportion of common sense, and that in some obvious cases requiring little more than a result should suffice.

The reasons in *Sterling Homes* are not easy to follow, certainly in view of its later application. The case involves a quite new residential property, situated in an industrial area. Some of the residents brought complaints about

¹⁸⁴⁴ [1995] Env. L.R. 176.

¹⁸⁴⁵ [1996] Env. L.R. 121.

¹⁸⁴⁶ [1998] Env. L.R. 337.

¹⁸⁴⁷ *The Network Housing Association Ltd v. Westminster CC* [1995] Env. L.R. 176, p. 183.

noise disturbances from a nearby industry. The local authority found this a nuisance and served a notice on the owner of the residential property, stating that the structure of the building was causing nuisance for those living there. The sound proofing was in some way bad. The owner was required in the notice to abate the nuisance, and for that purpose carry out such works as may be necessary so that the noise and vibration did not cause prejudice to health or constitute a nuisance, and to take any other necessary steps for that purpose.

The Court's judgment, delivered by Mr Justice McCullough, stated that such works and other steps that were required by a notice must also be specified. He held that Section 80(1) must have been intended to go back to the law stated in *Wheatley* requiring necessary works to be specified.¹⁸⁴⁸ It should, however, be noted that this case concerned a notice where works had indeed been ordered – just not specified. Mr Justice McCullough argued against the law according to the wording of the Control of Pollution Act 1974, which he read as rendering the decision in *Wheatley* inapplicable. Now, he suggested, *Wheatley* was reinstated.

Mr Justice McCullough commented further that he would have preferred, due to considerations of practicality, to have held the notice served on *Sterling* sufficient, but according to the wording of the law and authoritative case law, this was not possible. He argued that it would be fairer if the owner and not the local authority should decide what works were to be done. He was likely to know his premises best and may choose the most optimal solution for him. If the local authority thought his works insufficient there was not unfairness in requiring more. It would also be cheaper for the public purse if local authorities did not have to tell those responsible for nuisances on how to abate them.¹⁸⁴⁹

Interpretation of *Sterling* varies. The Divisional Court in *Surrey Free Inns* explained *Sterling Homes* to mean that

“If the only way in which the nuisance can be abated is by works or steps, then the notice must specify them.”¹⁸⁵⁰

This was also held in *Kirklees Metropolitan Council v. Field & Others*¹⁸⁵¹ – based upon *Sterling Homes*. My interpretation of the case is, as may be noted above, different¹⁸⁵² and instead follows the later interpretation by Lord Justice Simon Brown in the *Falmouth* case, which will be discussed soon. Mr Justice Owen in *Kirklees* read Mr Justice McCullough in *Sterling Homes*

¹⁸⁴⁸ *Sterling Homes v. Birmingham CC* [1996] Env. L.R. 121, p. 130–132.

¹⁸⁴⁹ *Sterling Homes v. Birmingham CC* [1996] Env. L.R. 121, pp. 133–134.

¹⁸⁵⁰ *SFI Group Plc v. Gosport BC* [1999] Env. L.R. 1, p. 8.

¹⁸⁵¹ *Kirklees Metropolitan Council v Field & Others* [1998] Env. L.R. 337.

¹⁸⁵² See, also: Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990–2002* p. 376

as holding that when works are in fact required *by the nature of the nuisance itself* – by the situation in fact – then these have to be specified by the enforcer. My reading of *Sterling Homes* is that if works are required *by the local authority/the notice*, then they have to be specified. The nuisance at hand in *Kirklees* was a rock face threatening the cottages below, and the imminent danger of collapse of rock, which clearly required works to be done.

A decisive factor in the *Kirklees* case was that the risk of criminal penalties for non-compliance with the abatement notice affected the required form of a notice. Lord Justice Brook stated:

The relevant part of the long title to the 1990 Act (“An Act ... to restate the law defining statutory nuisance and improve the summary procedures for dealing with them”) does not suggest that Parliament intended to take the drastic step of imposing criminal penalties on citizens who had failed to execute works which were positively needed to abate a nuisance without specifying what was required of them, ...¹⁸⁵³

It should also be noted that in *Kirklees* not only the character of the nuisance was considered, but also the circumstances of the addressees. Mr Justice Owen departs from statements that the abatement notice did not specify the works considered necessary, even though the local authority had consulted experts, and that the home owners addressed by the notice were of limited means and subject to imminent danger of rock collapsing on their homes, and that they were also at risk of prosecution if they did not comply with the notice.¹⁸⁵⁴ He also distinguished the case from *Myatt v Teignbridge DC*¹⁸⁵⁵ where specification was not needed as the addressee well understood what the cause of the nuisance was, dogs barking and disturbing neighbours, and how it could be abated. This was not the case in *Kirklees*, where the home owners did not know how to abate the nuisance.

In summary, this case law prescribed that in cases where a nuisance might be remedied without works being necessary, such works did not have to be specified. When it came to specification of works required, the case law was somewhat confused. Works required clearly had to be specified with some particularity. However, the disconcerting question seemed to be: Who or what required such works? *Sterling Homes*, *Network Housing* and *Budd* all seemed to argue a duty to specify works required by the enforcer, based upon a choice at the discretion of that enforcer to choose to simply require abatement or to specify works.¹⁸⁵⁶ It is the authority who has chosen to re-

¹⁸⁵³ *Kirklees Metropolitan Council v. Field & Others* [1998] Env. L.R. 337, p. 343.

¹⁸⁵⁴ *Kirklees Metropolitan Council v. Field & Others* [1998] Env. L.R. 337, p. 339.

¹⁸⁵⁵ [1995] Env. L.R. 78.

¹⁸⁵⁶ See, for example, on the wording in *Sterling Homes v. Birmingham CC* [1996] Env. L.R. 121, pp. 131–132: “such works and other steps as are required by an abatement notice issued...”.

quire these steps. The judgments of Kirklees and Surrey Free Inns, however, instead base the duty to specify on the factual necessity of works to abate a nuisance, depending on the nature of the nuisance, and also on the circumstances of the addressees. Accordingly, this is where works are necessary to abate the nuisance, either explicitly required by the notice or implicitly – as necessitated by the factual circumstance. An important reason for this duty to specify was the threat of criminal prosecution for non-compliance with the notice. The justices in Kirklees set out to clarify the law on this point, but apparently the matter was still confused.¹⁸⁵⁷

8.4.4.5 The Falmouth Case Resolving the Law on Specification – Specification of Works Only When Explicitly Required

8.4.4.5.1 Introduction

The described line of case law and the puzzlement described seems to have been resolved by the Court of Appeal in *R v. Falmouth and Truro Port Health Authority ex parte West Water Ltd (Falmouth)*.¹⁸⁵⁸ The case concerned nuisance from sewage discharge from a public water treatment facility, South West Water Ltd. The Local Port Health Authority served a notice on South West Water simply requiring abatement within three months. This case came to settle authoritatively, that an enforcing authority is free to choose to serve a notice of a simple abatement order and leave the choice of means to abate to the addressee, notwithstanding the fact that positive measures – works – are obviously necessary to abate the nuisance. They should only have to specify the precise works and steps if they chose to require such specified works.¹⁸⁵⁹ The closer reasoning of the appellate court will now be studied.

8.4.4.5.2 Necessary Steps to Abate Nuisance from Sewerage

The Falmouth case raises a number of interesting issues, one being the not always so clear distinction between positive and negative measures to abate. It was initially argued by the enforcement authority that abatement could be attained by simply turning off the sewage water pumps and that the consequential works that South West Water had to carry out, because of its statutory duties to take care of the area's sewage water, was a separate issue from that of abatement of the relevant nuisance. South West Water argued that these things were not so easily separated. The “switching off the pumps” argument did not succeed in the courts. To do so without making alternative

¹⁸⁵⁷ Simon Brown LJ, referring to the Environmental Law Report Case Comment to *Kirklees Metropolitan Council v. Field & Others* [1998] Env. L.R. 337, at 344. See, also: Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990-2002* p. 376.

¹⁸⁵⁸ [2000] Env. L.R. 658, also in [2001] Q.B. 445, C.A., and [2000] 3 All E.R. 306.

¹⁸⁵⁹ *R v. Falmouth and Truro Port Health Authority, ex p. South West Water Ltd* [2000] Env. L.R. 658, p. 686.

arrangements for the sewage water treatment was plainly out of the question and would not be contemplated by any rational public authority.¹⁸⁶⁰ Alternative measures that required works were necessary. It consequently had to decide if such measures had to be specified in the notice.¹⁸⁶¹ Earlier case law, especially *Kirklees*, had held that they must.

8.4.4.5.3 *Clarifying a Duty to Specify Works Only When the Authority Required Specific Works*

In *Falmouth*, Lord Justice Simon Brown discussed case law on the issue of a duty to specify works. He read Mr Justice McCullough in *Sterling Homes* to hold that the local authority has, in all cases, a choice between simply to require abatement of the nuisance or to require works or steps. A requirement to specify works or steps arise only in the latter event. Lord Justice Brown held that this view was also demonstrated in *Budd*, and that the Divisional Court in *Kirklees* appeared to have misunderstood that holding and subsequently concluded that if works or steps are in fact required they must be specified. This decision in *Kirklees* was founded on the Court of Appeal's summary of *Sterling Homes* in *Surrey Free Inns* (and in *Budd*), which could suggest that the principle claim of the three situations for specification of works had, by implication, been approved by the Court of Appeal. Lord Justice Brown rejected this approval, as these references were not necessary parts of the Courts' decisions. The Court of Appeal in the *Falmouth* case was free to decide the central issue itself and was not bound by precedent.

The Court of Appeal in *Falmouth* thus overruled *Kirklees* in the specification of works issue. Lord Justice Brown based this upon the reasons of appropriateness, fairness and public interest – also raised by Mr Justice McCullough in *Sterling*.¹⁸⁶² Lord Justice Brown argued that there was no duty to specify works in the case where there were many alternatives for abatement, not all entailing works to be executed. He saw no reason why the position would be any different just because some works *are* essential in a particular case. In both cases there was a clear choice between different options for abatement of the nuisance. He asked the central question: Why should the local authority have to make that choice, and not the addressee? In favour of making this the authority's responsibility are the arguments of foreseeability and legality, stated in *Kirklees* (and others), that specification is needed because of the threat of criminal sanctions for non-compliance. In favour of the

¹⁸⁶⁰ *R v. Falmouth and Truro Port Health Authority, ex p. South West Water* [1999] Env. L.R. 833, at 861.

¹⁸⁶¹ [2000] Env. L.R. 658, at 678.

¹⁸⁶² *R v. Falmouth and Truro Port Health Authority, ex p. South West Water* [1999] Env. L.R. 833, p. 686, referring to *Sterling Homes v. Birmingham CC* [1996] Env. L.R. 121, pp. 133–134, and in the report of the *Sterling Homes* case above. Mr Justice McCullough had, however, held it impossible to decide in line with these arguments, in that works had to be specified according to law.

choice being the actor's responsibility are the public interest and fairness arguments of Mr Justice McCullough's in *Sterling Homes*.¹⁸⁶³ Lord Justice Brown preferred the latter, and also picked up on the reasoning in *Budd* on the sufficiency in *Budd* of leaving the choice of measure to the addressee, thus being able to choose the one best suited for him or her. An argument of appropriateness and benefit for the addressee can be read in here too.¹⁸⁶⁴

The other justices agreed with his arguments. It was added that the situation under the Environmental Protection Act 1990 differed from older health law, applied in *Wheatley*, where the responsibility was seen as appropriately being put on the justices. The new legislation was clearly intended to streamline the statutory nuisance procedure. It gives the local authority the choice in the form of abatement order in 80(1), and puts the addressee at more immediate risk of prosecution for non-compliance. These are material changes to the enforcement regime, according to Lady Justice Hale.¹⁸⁶⁵

Thus Falmouth overruled the judgment in *Kirklees* in stating that actual situations which require works to be done trigger a duty for the local authority to specify such works. After Falmouth the choice is free for the authority to make a simple order of abatement, or to require specific steps or works to be carried out (which must then be specified). This was confirmed in *Cambridge City Council v. Douglas*¹⁸⁶⁶ where the Court stated in its decision and arguments that it was clear from Falmouth that the local authority had in every case an unfettered freedom to choose whether to simply order abatement or requiring, and then – and only then – having the duty specifying works.

8.4.4.5.4 *Opening Up for Situations Where Blank Orders Could Be Unreasonable?*

It is sometimes cautioned that Lord Justice Brown appears to have concluded that there might be (as noted in *Budd*) a class of case where it would be unreasonable for the enforcer to just serve a blank abatement order without specifying obviously necessary works.¹⁸⁶⁷ I do not believe that he did. A close reading of his conclusions states: “*Even if I was prepared ... to recognise a class of case ...*”¹⁸⁶⁸ (emphasis added). In his case analysis he accepts that *Budd* was identifying such a class of case, but that he did not accept the

¹⁸⁶³ Both arguments are described in the above.

¹⁸⁶⁴ *Budd v. Colchester BC* [1999] Env. L.R. 739, pp. 747–748.

¹⁸⁶⁵ *R v. Falmouth and Truro Port Health Authority, ex p. South West Water* [2000] Env. L.R. 658, at 707.

¹⁸⁶⁶ [2001] Env. L.R. 41.

¹⁸⁶⁷ See, for example: Hawke, N., et.al., *Pollution Control; The Powers and Duties of Local Authorities* p. 64; and Jones, B., and Parpworth, N., *Environmental Liabilities* pp. 468–469.

¹⁸⁶⁸ *R v. Falmouth and Truro Port Health Authority, ex p. South West Water* [2000] Env. L.R. 658, p. 686.

statements that there was no divergence between the decided cases.¹⁸⁶⁹ And considering that he stated these arguments only in obiter, he was free to review and decide on the issue freely.¹⁸⁷⁰

However, one might still interpret this statement by Lord Justice Brown as recognising potential challenges on reasonableness. The possibilities should, in my interpretation of these statements, be narrow.¹⁸⁷¹ The possibilities were, however, pointed out by Lord Justice Laws in the post-Falmouth case of *Sevenoaks District Council v. Brands Hatch Leisure Group Ltd (Sevenoaks)*.¹⁸⁷² He held that there may well be some utility in recognising such a class of case where it may be irrational for the authority not to specify works.¹⁸⁷³ Lord Justice Laws hereby opened up for a challenge on Wednesbury reasonableness, even though the case at hand was not such a case.

It has been argued that the remarks of the Justices, Swinton Thomas in *Budd and Laws in Sevenoaks*, were in obiter, and it may therefore be unwise to make too much of the “irrational” class of case.¹⁸⁷⁴ However, the statements in *Falmouth* were also in obiter, although the wording of the justices’ statements demonstrates an ambition to authoritatively clarify the precision of works debate. As the case comment on *Brighton and Hove BC v. Ocean Coachworks (Brighton) Ltd (Ocean Coachworks)*¹⁸⁷⁵ in the *Environmental Law Reports* points out, the cases keep coming.¹⁸⁷⁶ Perhaps the situation was still not perceived as clear. I would suggest that there is still (as generally in cases of administrative authority decision-making) room for challenge on *Wednesbury* reasonableness. It may be that the enforcement policies of the authority may then be used for evaluating the reasonableness of the approach, together with the circumstances of the nuisance problem and a common sense reading of the notice.

8.4.4.5.5 *Discussion on the Grounds and Consequences of Falmouth*

The obiter statements by Lord Justice Brown in *Falmouth* in the specification of steps or works were clearly seen as authoritative. The reactions in following case comments and handbooks in this area tell us that the case had effects on administrative enforcement work in the development towards a goal-centred approach and on shifting responsibilities from the regulator to the regulated. As one case comment stated it was now completely acceptable for local authorities to specify in their administrative orders the end result

¹⁸⁶⁹ *R v. Falmouth and Truro Port Health Authority, ex p. South West Water* [2000] Env. L.R. 658, p. 685.

¹⁸⁷⁰ *R v. Falmouth and Truro Port Health Authority, ex p. South West Water* [2000] Env. L.R. 658, p. 686.

¹⁸⁷¹ See, also: Malcolm, R., *Statutory Nuisance: The Validity of Abatement Notices* p. 900.

¹⁸⁷² [2001] Env. L.R. 5.

¹⁸⁷³ *Sevenoaks DC v. Brands Hatch Leisure Group Ltd* [2001] Env. L.R. 5 86, p. 91.

¹⁸⁷⁴ Jones, B., and Parpworth, N., *Environmental Liabilities* p. 469.

¹⁸⁷⁵ [2001] Env. L.R. 4.

¹⁸⁷⁶ [2001] Env. L.R. 4, p. 84.

required, but not the steps to take to that end.¹⁸⁷⁷ And arguably, the choice is easy for the pragmatic authority: never draft anything other than simple abatement notices in order to ensure the validity of an administrative order, thus closing the door to appeal.¹⁸⁷⁸ This certainly poses question of reasonability and fairness; there are issues of legal certainty here that disturb the legal mind. These issues should be addressed. How far is it reasonable to go in shifting the burdens and risks in ensuring the public interest, or more specifically for environmental and health purposes?

One suggestion in addressing these questions is to limit the discretion of the enforcers on the basis of reasonableness in the specific situation, taking into account the means and resources, financially and otherwise, for taking on the responsibilities conferred.¹⁸⁷⁹ Thus the regulated addressees could often be characterised as a “knowledgeable perpetrator”, typically business and industrial operators that have (or should have) the knowledge of their activities and the different technical solutions to certain problems, and so on, and the means and responsibility of ensuring the finance for this in the business planning, etc. It is not difficult to see that they should have extensive responsibilities for avoiding nuisance. And it is also often more beneficial to them, since they can choose the optimum solution for their operations.

On the other hand, we have the category of the ordinary private person who generally does not have the means or the knowledge to make extensive works, or even to know what kind of works are needed. The enforcer often knows better in these situations. Should they then be allowed and encouraged to leave the task to the addressee in order to avoid the legal minefield of ordering them what to do more precisely? At the threat of criminal sanctions this surely seems unreasonable and certainly the responsible, conscientious, and pragmatic enforcer will not see the point in such harshness.

In the clear case it may be most effective to just tell the individual what to do and how to do it. But certainly there would be problematic and disputable cases. The Kirklees case was such a case, and there it was argued in the terms of private individuals without knowledge or means. One could in view of the core rule on clear and precise administrative orders, argue that it was indeed not clear from the notice what they should do. It might have been clear to a professional person. The private cottage owners faced a huge risk, and the local authority had consulted experts to get some idea of what had to be done, but would not specify the works that had to be done to avoid non-compliance with the abatement notice. On the other hand, such an evaluation of the possibilities open to the perpetrator risks over-emphasising the situa-

¹⁸⁷⁷ *Statutory Notice*, Case Comment, in *Planning and Environmental Law Bulletin (PELB)* 2000, April, 30, p 30.

¹⁸⁷⁸ Malcolm, R., *Statutory Nuisance: The Validity of Abatement Notices* p. 900. This curious effect was also noted by Justice Langley in: *Lambie v. Thanet DC* [2001] Env. L.R. 21, p. 401.

¹⁸⁷⁹ Malcolm, R., *Statutory Nuisance: The Validity of Abatement Notices* pp. 900–902.

tion of the individual at the expense of other interests involved. It may, moreover, conflict to some extent with the legal principle of equal treatment.

8.4.4.6 Degree and Quality of Specification

8.4.4.6.1 Introduction

Case law on statutory nuisance after the Falmouth case has generally relied on the possibility open to the enforcer of simply demanding blankly that a specified nuisance is fixed, indicating directly or indirectly the desired result of the abatement measures. This has come to mean that enforcers as a rule cannot be forced to indicate with precision what steps or measures the actor should take to do this. They may make such demands, and if they do find it appropriate to require a specific measure to be taken, then they will have to specify this. There is no formal demand in statutory nuisance law to make such demands. Here, this can to a great extent be left to the actor. Therefore the more recent specification debate is quite different from the Swedish debate. There is little problem in leaving the decisions to the actor, as long as the relevant problem and to some extent the desired result, is sufficiently clear. The approach is rather pragmatic.

In the Falmouth case Lord Justice Brown states that “the enforcing authority should be wary of being drawn too deeply and lengthily into scientific or technical debate,...”, and in referring to the precedents of Sterling and Budd, that it may be both fairer and more cost-effective and practicable, both for the addressee and the public if it is the obligation of the actor to decide on the appropriate steps or works to abate a nuisance. And if the chosen steps prove ineffective, it is not unfair that the authority obliges him to do more.¹⁸⁸⁰ These issues become essential in the debate on specification and burden of proof and investigation. Once the Falmouth case prescribed that works and steps only have to be specified if they are actually required by the authority in the notice, the questions of what kind of requirements that trigger this duty, and the extent of the works, should be specified.¹⁸⁸¹ There is some authority on this, advancing a sort of common sense understanding of the addressee’s comprehension, from the notice, of what he has to do. This is similar to the above discussed law stemming from Miller-Mead.

8.4.4.6.2 Distinguishing “Steps” and “Works”

In the earlier mentioned Sevenoaks case,¹⁸⁸² the council had served a notice on an operator of a racing facility due to noise nuisance from the activities

¹⁸⁸⁰ *R v. Falmouth and Truro Port Health Authority, ex p. South West Water* [2000] Env. L.R. 658.

¹⁸⁸¹ *Brighton and Hove Council v. Ocean Coachworks (Brighton) Ltd* [2001] Env. L.R. 4; *Sevenoaks DC v. Brands Hatch Leisure Group Ltd* [2001] Env. L.R. 5; and *Cambridge CC v. Douglas* [2001] Env. L.R. 41.

¹⁸⁸² *Sevenoaks DC v. Brands Hatch Leisure Group Ltd* [2000] Env. L.R. 5.

there. The notice required abatement of the nuisance and the taking of necessary steps to prevent recurrence of specific noise nuisance specified in an attached schedule. The required results were specified, but not the steps to be taken to ensure such results. The operator complained that the notice was invalid due to lack of specification of steps required by the notice. In response, Lord Justice Laws distinguished “steps” from “works”:¹⁸⁸³

Conceptually, every abatement of a nuisance must require some steps to be taken if only because, by definition, the status quo is being changed; so the taking of some steps is inherent in the requirements of a notice which is strictly expressed only in terms of section 80(1)(a). Section 80(1)(b), I apprehend, bites where the local authority choose to specify how the abatement is to be achieved. ... In truth, the schedule there set out, properly understood, does no more nor less than give particulars of the abatement requirement imposed under section 80(1)(a). A case where works had to be done would, I think, be a different case.

Lord Justice Laws contrasted this to *London Borough of Camden v. London Underground Ltd*¹⁸⁸⁴ where works had been required but not specified. In my view, this is not a case so easily distinguished from the *Sevenoaks* case, other than on the face of the notice, the wording “works” had been used instead of “steps”. One could argue in the words of Lord Justice Laws in *Sevenoaks*, the specification requirement “bites where the local authority chooses to specify how the abatement is to be achieved”. The law after *Sevenoaks*, however, reserves the specification demands to notices requiring “works”.

I would say that the *Sevenoaks* decision narrowed the scope of the duty to specify abatement measures even more than *Falmouth*. *Falmouth* does not distinguish between steps and works, but seems to use them without preference or interchangeably. The central message in *Falmouth* is that if the authority chooses to specify the measures to be made to abate the nuisance, they have to be specified. *Sevenoaks* follows on this line and points out that the schedule attached to the notice in question does not set out particular steps to be taken, nor does it require any works (which in this case is viewed as a more qualified or more of a positive active measure). The use of the word “steps” (in the very wide sense having taken the necessary steps to ensure the abatement results specified in the schedule) in the notice does not mean that specific steps (known to the enforcer but not the addressee) are required. That would, according to Lord Justice Laws, be a hopelessly mechanistic approach and this argument on the part of the defendant is seen as barren and technical.¹⁸⁸⁵ This falls in line with the “common sense-approach” noted in both statutory nuisance and planning law, pointing to the

¹⁸⁸³ *Sevenoaks DC v. Brands Hatch Leisure Group Ltd* [2000] Env. L.R. 5, pp. 92–93.

¹⁸⁸⁴ *London Borough of Camden v. London Underground Ltd* [2000] Env. L.R. 369.

¹⁸⁸⁵ *Sevenoaks DC v. Brands Hatch Leisure Group Ltd* [2000] Env. L.R. 5, p. 94.

public interests in a kind of teleological reading of the law and the case at hand, and avoiding a very formalistic legal approach, or strict interpretation in favour of the individual for that matter.

What is, however, pointed out in *Sevenoaks* as important, especially in a noise nuisance case, is that the level of noise which is seen as acceptable, is identified, which this notice does very well, through the attached schedule.¹⁸⁸⁶ Thus this case points out that at least concerning noise, the interests of clarity and foreseeability are secured through clear statements of the result or goal of the abatement, not the methods for reaching this point. I will return to this discussion further down.

8.4.4.6.3 *Specification From the Common Sense Understanding of the Core Rule*

Further authority can be seen in *Brighton and Hove BC v. Ocean Coachworks (Brighton) Ltd*¹⁸⁸⁷ where an abatement order had been served on a workshop, requiring the addressee to abate the noise nuisance from the work and associated activities such as sound from a radio. They were required to simply keep the door to the workshop closed. The exceptions from this requirement of steps to be taken were argued to be unclear – when the door had to be opened for moving vehicles in and out of the workshop, or for other genuine business reasons.¹⁸⁸⁸ It was argued that the notice had required works without specifying them in sufficient clarity.

The Court rested on the idea that a notice must be clear for the recipient. It must not be seen as an abstract document, but one which relates to the activities on the premises. It must be well understood by the addressee, and all those involved in the activities. The notice was indeed considered clear and unambiguous. It should not pose any difficulties to the relevant persons as to understanding what had to be done or where exceptions were at hand. Indeed, to anyone not searching for uncertainly and ambiguity where none exist, this was a simple and clear notice capable of immediate compliance. The notice was held to sufficiently specify the steps to be taken, keeping the door closed when it did not have to open for moving materials, and so on, in operation of the business.¹⁸⁸⁹ There was some use of the word “works” in the notice, but this was not seen as relevant. The judgment rested on a common sense reading of the notice. The enforcer’s message was clear and unambiguous: Just close the door!

¹⁸⁸⁶ *Sevenoaks DC v. Brands Hatch Leisure Group Ltd* [2000] Env. L.R. 5, p. 92, referring to *R v. Fenny Stratford Justices ex p. Watney Mann (Midlands) Ltd* [1976] 1 W.L.R. 1101.

¹⁸⁸⁷ [2001] Env. L.R. 4.

¹⁸⁸⁸ *Brighton and Hove BC v. Ocean Coachworks (Brighton) Ltd* [2001] Env. L.R. 4, p. 80.

¹⁸⁸⁹ It was stated by Lord Bingham CJ, that there might arise difficulties for the authorities in proving that an incident of the door being kept open did not fall into the scope of the exceptions. However, this is a difficulty of fact, not of interpretation. See: *Brighton and Hove BC v. Ocean Coachworks (Brighton) Ltd* [2001] Env. L.R. 4, p. 83.

There was a similar reasoning in *Cambridge City Council v. Douglas*,¹⁸⁹⁰ where an abatement order concerning noise nuisance from music in a pub was appealed and claimed invalid, mainly because of ambiguity through referring to works in regulating recovery of the council's expenditure, but not otherwise specifying such works. The Administrative Court referring to the authority of *Falmouth* on the freedom of the local authority to choose whether to simply order abatement, or requiring and subsequently specifying works, stated that in the case before them a common sense reading of the notice (and not just searching for an escape route) does not give rise to any ambiguity or uncertainty as to the contents of the order; this was a case of a simple abatement order, and the reference to works in statements on subsequent procedures did not change this.

In conclusion it seems that the courts are trying to avoid a very extensive or a very formalistic interpretation of the duty to specify works or steps required by the notice. A common sense reading of the case seems to be the road taken in the court discourse, focusing on the question of whether the notice makes it clear to the addressee what is required, taking into consideration the context of the notice in the public interest purposes of the regulation of statutory nuisance, and factors on the part of the addressee, thus making an actual evaluation if the relevant actors understand what they should do, not generally requiring the enforcers to spell out every factor if the particulars of how the nuisance should be abated, etc. If the notice is subsequently seen as being sufficiently clear, and if the courts can see no injustice to the recipient by this approach, they are prepared to view mistakes through references to works or steps in a notice as superfluous and of no significance to the validity of the notice.¹⁸⁹¹ These references alone do not affect the validity of the notice.¹⁸⁹²

The difference from earlier case law can be noted, for example, in *Wheatley*,¹⁸⁹³ *Millard and Wastall*,¹⁸⁹⁴ *Network Housing*,¹⁸⁹⁵ and *Sterling Homes*,¹⁸⁹⁶ where the mere inclusion of the words "works" or "steps" seem to be the central issue to trigger the duty to specify these measures with some particularity.

Another notable tendency in this discourse on specification of steps or works is the significance of the public benefits of leaving to the actor the choice and decision of how to go about abating the problem. This may be seen in *Falmouth* and following cases on the freedom of the authority to completely leave it up to the addressee on how to abate through serving a

¹⁸⁹⁰ [2001] Env. L.R. 41.

¹⁸⁹¹ Jones, B., and Parpworth, N., *Environmental Liability* p. 469.

¹⁸⁹² Hawke, N., et.al., *Pollution Control; The Powers and Duties of Local Authorities* p. 64.

¹⁸⁹³ *R v. Wheatley* (1985-86) 16 Q.B.D 34.

¹⁸⁹⁴ *Millard v. Wastall* [1898] 1 Q.B. 342.

¹⁸⁹⁵ *The Network Housing Association Ltd v. Westminster CC* [1995] Env. L.R. 176.

¹⁸⁹⁶ *Sterling Homes v. Birmingham CC* [1996] Env. L.R. 121.

simple abatement order. But this can also be noted in the case law where steps or works have been specified, but not in close detail.

8.4.4.7 Comparative Remarks on Specification of Orders under Statutory Nuisance Law

As a general principle, mandatory orders should be clear and certain, so that the addressee knows what he or she has done wrong, and what should be done to remedy this wrong. Nevertheless, statutory nuisance law regulates for the local enforcement authorities, a unique discretion as to what their abatement orders should consist. An abatement order can, according to the Environmental Protection Act 1990, either simply require abatement of the nuisance, prohibit or restrict its occurrence or recurrence, or require the execution of works or steps necessary for the abatement, prohibition or limitation, or combinations of the types of orders. It is hence optional to go further and specify remedying steps or works. More specifically, according to the authority of Falmouth, the local authority does not have to specify any remedial steps or works unless it has chosen to expressly require such actions. This is different from other environmental law provisions on enforcement and on the face of the rule puts more responsibilities on the relevant operator or actor.

Consequently, the enforcers of statutory nuisance law can make blank abatement orders. Such blank orders can be compared to the practice in Swedish enforcement law, to order a prohibition, when it is uncertain what those measures should be, or where there is a variety of solutions.¹⁸⁹⁷ The responsibility for knowledge and investigation of appropriate action is, with these kinds of enforcement order, left entirely to the addressee, without defining directly in a notice that they should investigate, or present information. The blank order thus represents an indirect way of shifting the responsibilities for information to the actor. The English authorities that supervise and enforce the rules on statutory nuisance are not to the same extent provided with such explicitly conferred powers to require information and documentation, as the regulators of the EP regime. By serving a blank order, they can manoeuvre around the difficulties concerning gathering information about the activity and trying to find out the best way to solve the problem, without the cooperation of the addressee.

In the English case law following Falmouth, the authority's discretion in the exercise of its enforcement powers is also seen in the required particularity and extent of specification. The particularity in the specification of steps, such as telling the addressee how the steps should be carried out, is not required if the authority has not chosen to particularise this. There is, however, a fundamental requirement for clearly communicating to the addressee the problem and his obligations. The order thus still has to be clear and concrete.

¹⁸⁹⁷ See: Section 8.3.5.

As a rule, an order has to state what it believes is causing the nuisance in question so that the addressee knows what he or she has done wrong. By stating clearly what is wrong, and that this has to be remedied, the notice states the required result. The meaning of these demands for clarity will be developed further down.

In the assessment of whether the quality and degree of precision does sufficiently communicate to the actor what he or she has to do, a common sense approach is argued. This reminds us of the above-discussed planning law, based on Miller-Meade, but with a more extensive effect. The important thing is to ensure that the addressee reasonably can understand what is required of him, and that it is expected that he has some idea of what to do. In this evaluation of what can be expected from the addressee, matters on the part of the addressee are considered. The public interests of effective enforcement are important motives for this law on enforcement. It might be argued that this approach suggests a wider idea of legal certainty, which protects a wider range of legitimate interests under relevant substantive law, and not only that of the addressee of the enforcement measures. Notably, however, the discussed room for shifting information responsibilities over to the actor in the enforcement procedure is limited to statutory nuisance law. Nevertheless, the planning law discussion suggests that a more purposive and factual understanding of the core rule can be found also in the context of statutory provisions of specification of steps and works, such as in the EP regulations.

8.4.5 Orders Specifying the Problem and the Desired Result

8.4.5.1 Introduction

Having thus discussed precision of duties and steps to be taken in different areas of environmental law, we now move on to view the matter from another perspective. In this chapter, the question revolves around demands for clear and precise exercise of administrative power in the context of goal and result steering and actor responsibilities. It is therefore interesting to investigate the law on result oriented enforcement orders, and how this is combined with demands for clear and precise enforcement. First of all, a discursive focus on specifying the actual problem is discussed, and thereafter, the use of limit values in enforcement. The case law will, as usual, mostly pertain to statutory nuisance. I believe, however, that a wider comparative discussion is possible to make.

8.4.5.2 Orders Specifying What Is Wrong and Should Be Fixed?

One aspect of specification of enforcement orders, which can be noticed in the English enforcement system, is the expressed focus on specifying the problem. Both for enforcement orders under the EP Regulations 36–37 and

abatement orders under the Environmental Protection Act Section 80, precision of the problem is required. Moreover, the discussed case law on precision of orders often focus on the communication to the addressee of an administrative order, of what the relevant offence that should be done something about is. What is the problem, or rather: what is the breach of the law? It indicates a sort of labelling of the relevant effects on the surroundings as unlawful, and thus indirectly communicates to the addressee what they have to do to achieve legal compliance. The specification of the nuisance may not always be perceived as goal steering or result orientated enforcement, but the formulation of the relevant problem sometimes constitutes an indication of what should be done about it. The steering becomes more functional, and perhaps easier to the individual addressee to follow. Specifying the relevant problem, that is the breach of law, corresponds well with the core idea of communication to the individual addressee as to what his legal duties are.

As stated before, statutory nuisance law has a somewhat special character. The local enforcement authorities have discretion as to what their abatement orders should consist. An abatement order can either simply require abatement of the nuisance, prohibit or restrict its occurrence or recurrence, or require the execution of works or steps necessary for the abatement, prohibition or limitation, or combinations of the types of orders. It is hence optional to go further and specify remedying steps or works. Nevertheless, it seems that identifying the nuisance is a fundamental requirement for clearly communicating to the addressee the problem and his obligations. An order has to state what it believes is causing the nuisance, so that the addressee knows what he or she has done wrong.

The formulation of the relevant nuisance is a straightforward requirement and in general terms this is not subject to much dispute in court. The notices will normally state that the playing of loud music, or the barking of dogs, or the smoke from burning rubbish in the yard, and so on, is causing a nuisance, or is prejudicial to health. There is no general statutory requirement to specify which of the disturbances listed in EPA Section 79 is at hand, or state if it is a nuisance or prejudicial to health.¹⁸⁹⁸ It seems that as a matter of general principle the important thing is to state what of the addressee's activities is causing the statutory nuisance, and what is required to abate them. They must, in other words, identify the nuisance and let the addressee know what is required of him.¹⁸⁹⁹ In the above-discussed cases about precision of orders, it is commonly pointed to the fact that the notice has stated clearly what the source of the nuisance is.

¹⁸⁹⁸ *Lowe & Watson v. South Somerset DC* [1998] Env. L.R. 143.

¹⁸⁹⁹ Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990–2002* p. 375.

8.4.5.3 Purposive and Pragmatic View of Precision of the Problem

This specification of the nuisance is also subject to a purposive assessment of the communication. Is there in fact a lack of sufficient precision for the addressee to understand what the nuisance is, and thus what has to be done about it? *Myatt v. Teignbridge DC*¹⁹⁰⁰ dealt with an abatement order ordering a Miss Myatt to "cease the keeping of dogs" and "reduce the number of dogs" in the interests of housing welfare and management of the dogs to ensure that they did not cause a nuisance. It was claimed that this did not specify what was wrong. The Court referred to *Miller-Mead*,¹⁹⁰¹ and held that a person needed to know from the notice what had been done wrong and what was required to put it right, and then took a purposive and pragmatic view on the matter, rejecting the formalistic approach. The Court held that the wording of the notice may not seem clear on the face of it, as keeping of dogs in general is itself not a nuisance. However, Miss Myatt kept 17 dogs in a small space, and there had been complaints from the neighbours, especially about the noise from the dogs. It was stated that it must have been absolutely clear to the addressee what was objectionable, and the fact that the addressee did not agree that it was a nuisance did not change the fact of her knowing what the problem was.¹⁹⁰² The Court also took this broad view of the question of what had to be done, and found that his was also clear to the addressee.

Having thus specified the nuisance in an abatement order, the question was what result was required and specified. Basically, the only result that had to be prescribed in the order was the abatement of the relevant nuisance. By stating clearly what was wrong, and that this had to be remedied, the notice stated the required result. Moreover, the abatement notice sometimes deals with nuisances in the future, and may thus direct the addressee to avoid this. This is then a prohibition on the occurrence or recurrence of a stated nuisance. Such a prohibition does not have to explicitly set out in those words in the nuisance, but can be implicit in the substance and intent of the notice.¹⁹⁰³

8.4.5.4 Specifying Desired Results – Limit Values, etc

Another way to specify an order, which has been discussed in the context of Swedish enforcement law, is to prescribe the required results – for example, specific limit values. This is a way of goal and result steering, which puts the responsibility for knowledge, and for activity, on the addressed actor. In English law the enforcing authority is allowed, at its discretion, to go further in its specification of a result and prescribe the upper limits for permissible

¹⁹⁰⁰ *Myatt v. Teignbridge DC (Myatt)* [1995] Env. L.R. 78.

¹⁹⁰¹ *Miller-Mead v. Minister of Housing and Local Government* [1963] 1 All E.R. 459, and [1963] 2 Q.B. 196.

¹⁹⁰² It was noted that she had not used her right of appeal.

¹⁹⁰³ *Stanley v. Ealing LBC* (2000) 32 HLR 745. Also in [2000] Env. L.R. D18.

dB-levels. This was held in *R v. Fenny Stratford Justices ex parte Watney Mann (Midlands) Ltd (Watney Mann)*¹⁹⁰⁴ when the use of dB levels was apparently a new and strange phenomenon. The applicants for review claimed that the enforcer was entitled to make a simple abatement order but not to go further and add to these specific maximum dB-levels. The Court held that there was a wide discretion as to what to include in an order, and that the enforcers could consequently add any term they chose as long as this was practical in its effect, easily understood by those causing and those suffering the effects of the nuisance, and that the appropriate action was specified. In fact, the judges welcomed such provisions in the orders. Lord Justice Widgery stated that the advantages of scientific development gave opportunities to use a more scientific approach to what had in his mind always been a somewhat haphazard assessment, and this opportunity should be taken.¹⁹⁰⁵ This indirectly brings up a point of criticism for not having such a scientific approach, that is, the uncertainty of more purposive, or subjective assessments, and consequent risks of unforeseeability and inconsistency. This is certainly important when non-compliance is subject to criminal sanctions.

On the other hand, as earlier discussed, the only result that has to be prescribed in the order is abatement of the relevant nuisance. By stating clearly what is wrong, and that this has to be remedied, the notice states the required result. This point has been challenged in some cases on noise nuisance where it can often be hard to draw the line between permissible levels of noise and a nuisance. In *Cambridge City Council v. Douglas (Douglas)*¹⁹⁰⁶ it was held by Justice Sir Edwin Jowitt that there was no requirement in law to specify the permissible noise level to be measured in dB nor where it was to be measured. There is only a duty to state that there is a statutory nuisance and that it has to be abated. This is taken back to the discretionary choice of enforcement approach under Section 80.¹⁹⁰⁷ A similar argument can be found in *East Northamptonshire District Council v. Brian Fossett (Fosset)*.¹⁹⁰⁸ Furthermore, in *Godfrey v. Conwy County Borough Council (Godfrey)*¹⁹⁰⁹ it was found that the test for statutory nuisance did not require a particular noise level, or level above background level, to be specified.

In *Godfrey* and *Douglas*, dealing with noise nuisance, it was held that there was no need to have objective criteria, such as dB-levels to be measured by instruments, and sometimes it was not appropriate. The disturbance just cannot be measured in such a way. The judgments emphasised the qualitative aspects of noise being decisive in its classification of a nuisance, and

¹⁹⁰⁴ [1976] 2 All E.R. 888.

¹⁹⁰⁵ *R v. Fenny Stratford Justices ex p. Watney Mann (Midlands) Ltd* [1976] 2 All E.R. 888, p. 893.

¹⁹⁰⁶ [2001] Env. L.R. 41.

¹⁹⁰⁷ [2001] Env. L.R. 41, p. 723.

¹⁹⁰⁸ [1994] Env. L.R. 388.

¹⁹⁰⁹ [2001] Env. L.R. 38.

that specific limit values was therefore inappropriate.¹⁹¹⁰ When it comes to what is prejudicial to health, the reasoning may be slightly different, as we are here talking more about knowledge and experience of what actually damages the health of an average person. This view may be stated generally for environmental law enforcement. Many different kinds of situations and nuisances are handled, and there are different kinds of interests to be protected. This entails a wide variety of enforcement situations, which have to be approached differently. The protection of an interest that has to do with more subjectively experienced quality will often not be possible to state, or to measure, precisely and scientifically. Nonetheless, it also shows the English systems just noted functional and purposive focus on specifying the problem that must be abated. It becomes an opposite way of communicating a duty – to state what is illegal so the person knows clearly what to address. This approach still makes it possible for actors to know how they can avoid the involvement of the authorities, and further enforcement action.

Nevertheless, even if the message is clear about the required results, the subsequent increase of the addressed actor's responsibilities, for information, and for active involvement in the regulation of his own activity, may be criticised for unreasonableness. In *Network Housing*, Mr Justice Buckley argued against a formulation of a notice requiring a result to be achieved (and the relevant results were specified to quite some particularity) and not identifying what work was to be done to that end. He noted that this meant that there was no direction which made it possible for the addressee to guarantee the results in advance. These statements may be interpreted to imply the effect that the addressed actor has to investigate the matter themselves, so as to be able to know how to get the results. This was held to be unacceptable, putting too large a burden and risk on the addressee.¹⁹¹¹ The judgment falls back to the question of distribution of information burdens between the actor and the authority, and the regulatory role of translating the general responsibilities and standards into specified duties. The discussion captures the problem investigated here. I would, however, argue that as a point of departure, the regulation of limit values must be reasonable. This is motivated by the environmental law context of legitimate environmental interests, and actor responsibility for protecting them. In the wide range of situations regulated through environmental law, there will be situations where the regulation of limit values is unreasonable, due to uncertainties in measuring the relevant values, or in the ways to reach them. The *Network Housing* case, however, concerned an owner of a residential property, who was ordered to take measures to provide suitable sound insulation in between

¹⁹¹⁰ *Godfrey v. Conwy County BC (Godfrey)* [2001] Env. L.R. 38; and *Cambridge CC v. Douglas* [2001] Env. L.R. 41, p. 723.

¹⁹¹¹ *The Network Housing Association Ltd v. Westminster CC* [1995] Env. L.R. 182.

the flats. I cannot see how this would put unreasonable burdens or risks on the company responsible for the building.

8.4.5.5 Specification of Prescribed Limit Values

So, a notice may prescribe a specified result to be achieved,¹⁹¹² but it does not have to do this. It may just require abatement of the relevant nuisance. However, when the enforcing authority decides to specify a measurable result in levels of emissions, and so forth, they will also have to specify how and where they are to be measured. This was not sufficiently made in the above-discussed *Watney Mann* case, and the notice was therefore quashed and deemed void for uncertainty.¹⁹¹³ However, this does not entail duty to specify works or steps to be taken in order to reach this result. In *R. v. Crown Court at Canterbury ex parte Howson-Ball (Howson-Ball)*¹⁹¹⁴ the challenge by the appellant in the case was that such a duty arose when a dB-level was prescribed. Looking at the extensive law on precision of works, and most importantly the *Sevenoaks* case,¹⁹¹⁵ counsel for the appellant sought to distinguish the case from *Sevenoaks* on the argument that in the present case a dB-level was specified without specifying the steps to take to abate the nuisance. This line of argument was not supported by the Court. The justices viewed the case as indistinguishable from *Sevenoaks* and stated that the precision of dB-levels did not mean that specific remedying steps or works were ordered, and thus, in accordance with *Falmouth* there was no duty to specify these measures.

8.4.5.6 Concluding Remarks on Specification of the Problem or Result

In conclusion, it can be held that an English abatement order does have to make clear to the recipient what constitutes a nuisance, and case law has taken the route of looking pragmatically at the circumstances of the case, including factors on the part of the recipient, to evaluate if they can be said to understand what they have done wrong, and thus a reasonable amount of responsibility for understanding one's situation is argued to be put on the actor. The notice does not have to state specific technical measurement levels to be followed. Nor does it have to explicitly explain that occurrence or recurrence of a likely nuisance stated in the notice if such meaning is clearly implied. Limit values are nevertheless also often accepted as appropriate and clear specification of the addressee's duties, even though the most central part is the communication of the actual problem, and what to do about it. It

¹⁹¹² The relevant case law has been on noise nuisance, and the prescription of a maximum permitted dB-level of noise, but this principle of law should be relevant also for other kinds of disturbances.

¹⁹¹³ *R v. Fenny Stratford Justices ex p. Watney Mann (Midlands) Ltd* [1976] 2 All E.R. 888; and *Tromans, S., and Poustie, M., Environmental Protection Legislation 1990–2002* p. 376.

¹⁹¹⁴ [2001] Env. L.R. 38.

¹⁹¹⁵ *Sevenoaks DC v. Brands Hatch Leisure Group Ltd* [2000] Env. L.R. 5.

must be remembered that English enforcement is normally carried out in the context of a threat of criminal sanction, as non-compliance with an order – a notice – commonly constitutes a criminal offence. As discussed earlier,¹⁹¹⁶ prosecution of such offences against the control system is prioritised in enforcement and prosecution policy.

8.5 The Netherlands

8.5.1 Introduction – Clear and Precise Regulation

Clear and precise regulation is essential in Dutch law. One expression of this matter can be seen in the above-discussed law on enforcement of the general duty of due care for the environment. Even though the formulation of Wm Art. 1.1a as a duty to take every possible preventive measure, the unspecific nature of such a general duty has been held problematic in view of the rule of law.¹⁹¹⁷ Enforcement of this general duty, directly and independently, has not been accepted in practice. The rule is mostly directed at regulators, who must specify them more in permit conditions or general rules. Then the duties become more precise and breaches of them subsequently become enforceable. But clear and precise regulation is also expressed in demands for specification of enforcement orders, which is an established rule of Dutch enforcement law. This expression will be discussed in this section.

Powers to issue enforcement orders are generally prescribed in Awb, as are the requirements for the formulation of such orders. Both the conditional fine order, and the administrative coercion order, must be adequately specified. The administrative coercion order must clearly and unambiguously state the regulation breached and specify the measures to be taken and how the addressee can respond to avoid such action by the authority, stating a time limit for such prevention (Awb Art. 5:24).¹⁹¹⁸ Moreover, Awb Art. 5:32a demands that the conditional order defines the remedial measures required, as well as a time period during which such measures should thus be taken to avoid paying the conditional fine. The requirement of specifying measures to be taken was introduced in the vierde tranche. Before that, such specification was not expressly prescribed, but the established view was that such measures had to be clearly and unambiguously formulated. This was based upon the principle of legal certainty.¹⁹¹⁹ It should be remembered that

¹⁹¹⁶ Section 4.4.4.6, and 4.5.8.5.

¹⁹¹⁷ Chorus, J., et.al., (Eds.), *Introduction to Dutch Law* p. 380. Compare: Seerden, R., and Heldeweg, M., *Public Environmental Law in the Netherlands* pp. 354–355.

¹⁹¹⁸ Blomberg, A., *Integrale handhaving van milieurecht* pp. 92–93.

¹⁹¹⁹ Damen, L.J.A., et.al., *Bestuursrecht* p. 657.

the Dutch enforcement order is always coupled with a sanction. This is also noted in the legal discourse on precision.

There is considerable Dutch case law on the matter of precision of order, and its basis discussed in the presented core rule of clear and concrete enforcement. The assessment of the precision on order basically departs from the principle of legal certainty and investigates whether the obligation is sufficiently clear, through interpreting the wording of the enforcement order. Some of this case law will be studied next. Because of the fact that the judgments are only published in Dutch, I will only refer to a few cases. My assessment is nevertheless that these judgments reflect the Dutch discourse well. They are referred to in Dutch handbooks, and by Dutch colleagues.

8.5.2 Precision of the Problem/the Offence

An enforcement order must first of all specify the relevant violation. The Council of State Chair dealt with the matter in 1998,¹⁹²⁰ regarding a conditional fine order against an operation involving storage and disposal of waste from slaughterhouses. There had been complaints about odour nuisance from the facility after an incident where the lid of a silo exploded in warm weather. After some communication, the enforcer's order referred to the operation of the facility as being in violation of what had been regulated in the permit. The operator complained that the order was unclear as to what behaviour would lead to them having to pay the fine. The Council of State agreed. They noted that in view of the onerous character of the conditional fine, it must be certain whether there had been a violation, and what measures the order covered. Merely stating generally the measures in violation of the permit did not specify what the permit regulated, or what behaviour the order referred to. It was not clear what behaviour the enforcement authority was acting against.

In a 2002 case,¹⁹²¹ a conditional fine was issued against an unlawful camping site. The enforcement authority claimed that the intent was that a limited amount of sets of camping equipments would be allowed, awaiting a decision. This was not clear from the order, which expressed that no camping equipment was allowed at all. The Court stated that this was against the principle of legal certainty. Because of the (extensive) sanctions connected to it, the order must be so clear and concretely formulated so as to not keep the addressee in the dark about what they must do or abstain from doing, in order to avoid the execution of these sanctions.

Another example of the demand for certainty can also be seen in a case concerning an order to reduce the number of dogs and cats on the premises

¹⁹²⁰ ABRvS (Voorzitter), 2 June 1990, Case no. F03980310, KG 1998, 258.

¹⁹²¹ ABRvS, 13 November 2002, Case no. 200202646/1, AB 2003, 77.

to a number that made it sufficiently likely that nuisance was not caused to the surroundings. This order was not clear enough.¹⁹²²

It seems, from these cases, that the order must be clear in stating with some particularity what behaviour is unlawful, and what must be done or abstained from doing in order to be in compliance with the order, and thus avoid execution of the sanction. The context of the sanction is decisive in the demands for precision. As the Dutch enforcement order is always coupled with a sanction, these precision demands are always relevant.

8.5.3 Precision of Duties – Specification of Steps

Apart from precision of the targeted violation, the order must also state more specifically what the enforced duties entail in terms of what measures must be taken, and how. There is, for example, a case of administrative coercion (*bestuursdwang*) from 2004.¹⁹²³ In this case an enforcement authority had required “MOJO concerts” to remove three of their posters within 24 hours, of which there were thousands posted illegally. The posters deemed illegal, and thus ordered to be removed, were not specified in the enforcement act. The Council of State ruled that this obligation was not sufficiently clear. It held that the principle of legal certainty demands that the notice of administrative coercion prescribes the remedial measures that will be taken, so that the addressee may precede the remediation, and avoid coercive action from the enforcement authority. If the measures are not specified in the order, they cannot be executed either. In the case commentary, Vermeer, argues that it is safer for the authority to specify the measures to be taken, so that they can prove grounds for enforcement.¹⁹²⁴ Similar reasons were stated in a 2002 case concerning the unlawful residential use of a boat.¹⁹²⁵ It should be noted that both these cases came before the statutory requirement for precision of measures. Such a requirement was then seen to follow from the general principle of legal certainty.

8.5.4 Alternative Ways to Fulfil Duties – Result Orientation

Apart from these quite strong statements of legal certainty, and demand for precision, there is also a line of argument in Dutch case law promoting result oriented enforcement. The required result or, the other way round, the stated limit of lawful environmental disturbance that should be kept within, is described as the relevant core of the ordered duties, and the relevant task of the

¹⁹²² ARRvS, 4 September 1985, AB 1985, 326; and Damen, L.J.A., et.al., *Bestuursrecht* p. 657.

¹⁹²³ ABRvS, 11 August 2004, Case no. 200400185/1, 2004, 370.

¹⁹²⁴ ABRvS 11 August 2004, Case no. 200400185/1, AB 2004, 370, Case Comment by Vermeer.

¹⁹²⁵ ABRvS, 8 May 2002, Case no. 200101894/1.

enforcers. In an often quoted case from 2001,¹⁹²⁶ the chairman of the Council of State considered a case concerning a breach of regulated norms on noise nuisance. The case concerned an order stating three different ways of abating the illegal situation, including stopping the noise-producing activity, and taking certain noise reducing measures. The chairman stated that the basis for the order and the following conditional fine was the breach of noise norms, and that it was sufficiently clear that the conditional fine would be collected, should the addressee breach those norms, at a certain date.¹⁹²⁷

The chairman held that that the enforcer could not prescribe just one single way of remedying the illegality if there were several options available.¹⁹²⁸ The chairman of the Court decided that there was no reason to stop the execution of the order. This line of argument departs from the question being raised, whether the relevant authority has a duty to specify several different alternatives, if this is technically possible. In case comment and literature, this case has been argued from the perspective of the requirement that the order must anyway be reasonable and that the actor must not be more than necessarily burdened, according to the principle of least intrusion. This is thus an argument of proportionality.¹⁹²⁹ The addressee cannot be required to carry out a specified remedying measure should there be an alternative and equally effective measure available which is less burdensome for the addressee.

The subsequent question, then, is whether the authority has to specify all the different manners of remedying the illegal situation. Michiels argues, in the case comment, that this is not the case. It would lead to endless investigatory duties on the part of the enforcing authorities. Thus the enforcing authorities are in line with this argument of not being under a duty to specify in the order all the potential measures that the addressee might take in order to remedy the illegal environmental situation, the breach of environmental law. On the other hand they have to allow for ways of remedying the breach other than the ones explicitly specified in the order. The order thus cannot limit the manner of remedying the illegal situation and the taking of alternative effective remedying measures that are not specified in the order and cannot entitle the authorities to collection of the conditional fine. The offender must be allowed to choose the means he intends to apply to remedy the infringement. The key idea here is that the aim of the order is to remedy the illegal environmental situation, not the exact manner in which this is being done. It is suggested that the order states, besides different modes of

¹⁹²⁶ ABRvS (Voorzitter), 24 July 2001, Case no. 200100468/3, AB 2002, 1. The decision concerned the interim stop of execution of the order.

¹⁹²⁷ ABRvS (Voorzitter), 24 July 2001, Case no. 200100468/3, AB 2002, 1, at 2.4.1.

¹⁹²⁸ ABRvS (Voorzitter), 24 July 2001, Case no. 200100468/3, AB 2002, 1, e contrario.

¹⁹²⁹ Damen, L.J.N, *Bestuursrecht* p. 657; and ABRvS (Voorzitter), 24 July 2001, Case no. 200100468/3, AB 2002, 1, Case Comment by Michiels.

remedy, that the breach can be remedied in an alternative and appropriate manner.¹⁹³⁰

A more recent case leads in another direction. This concerned a restaurant with many illuminated signs, some of which were lawful. The enforcement authority had served an order for the removal of such illuminated signs, but it was unclear which signs were covered. The enforcement authority claimed that their assessment considered the complete picture – the total amount of signs. Their conclusion was that there were too many, but they wanted to leave it up to the addressee to choose how to reduce the number. The Council of State noted that this option of how to reach the desired result was not stated in the actual order. Furthermore, this method of enforcement was held not to be in line with the principle of legal certainty. The Council referred to Awb 5:24 where orders are stated to require specification of the measures the addressee can take in order to avoid coercion. This requirement, the Council held, can be read so that it does not allow for leaving it to the addressee to make this choice. However, in the case comment, Vermeer argues that precise formulation of orders does not preclude providing room for choice. Sometimes such choice must actually be left to the addressee. As long as the desired result of the measures is clear, this does not entail any problems from the perspective of legal certainty.¹⁹³¹ Precision of a chosen way of compliance, moreover, is also claimed as not being proportionate when there are different ways to go about the matter.¹⁹³²

In comparison to Swedish law on precision, the Dutch order departs from similar statements of clear and precise enforcement, and result oriented environmental law steering. Nevertheless, it seems the Dutch discourse sets a stable case law practice on precision of orders – of the relevant problem (the violation) and the measures that can be taken to avoid a sanction. There is, however, also an authoritative argument for focusing on the stated result of the order – and that this must be clear. The order can then state alternatives for the abatement. These statements will, however, serve more as a service to the addressee, providing them with suggestions about how to comply with the essential duty conferred in the order – the results. In this case this result concerned a noise nuisance limit value. Case law reflects a focus on the result as the central message, and an interpretation of the order in the individual case, assessing the foreseeability of the duties for the actor.

¹⁹³⁰ ABRvS (Voorzitter), 24 July 2001, Case no. 200100468/3, AB 2002, 1, Case Comment by Michiels, at note 3; Damen, L.J.A., *Bestuursrecht* p. 658.

¹⁹³¹ ABRvS 2 September 2005, Case no. 200403494/1, AB 2006, 22, with Case Comment by Vermeer.

¹⁹³² Damen, L.J.N., *Bestuursrecht* p. 657.

8.6 Comparative Discussion

8.6.1 Introduction

Now it is time to take these comparative observations back to the basis of the research questions of this chapter, to put the issue into a new perspective. With this comparative scope of legal discourse on precision of environmental enforcement orders, the Swedish system can be discussed further. The investigation in this chapter has departed from the public tasks of realising goals and purposes of environmental law and policy. Public regulation will therefore be goal and result oriented. Environmental objectives are, however, often generally formulated in the form of collective responsibilities of framework law. To realise – or implement – such objectives or general rules, they must reflect individual rights, freedoms, responsibilities and duties. Enforcement law, moreover, demands that it is clear to actors what their legal duties entail. Breaches of unknown or unclear legal duties are not enforceable. This is a basic rule of legality and legal certainty, and protects the individual against excessive or arbitrary exercise of public power. The enforcement authorities will have the role of translating the general and collective norms into individual duties, which can be properly enforced.¹⁹³³ This is particularly important in the context of a legal sanction. These fundamental ideas are established in all the studied legal orders.

The authority thus has the regulatory task of the enforcement authority, in normatively formulating the individual duties that must be fulfilled in order to realise the general and collective duties. The consequences of such duties link to the duties of due procedure and investigation. The authority must ensure sufficient expertise, knowledge, investigation into the law, the environmental circumstances, and the individual activity, and assess the materials in view of the environmental objectives, and in consideration of all the involved interests. This leads up to a decision on the actual clear and concrete individual duty, which they must communicate to the addressee, and subsequently be able to enforce. These duties of the authority are expressed in the core rule on clear and precise enforcement, based upon the idea of legal certainty, and expressed in specified orders, stating the problem or the violation, the duty, and the steps that the addressee has to take to fulfil these duties, and abate the problem. Such demands are stated in all the compared legal orders.

However, the matter becomes complex in the context of environmental law steering where actors are fundamentally responsible for such knowledge, investigation, and active involvement in the environmental strategy of their

¹⁹³³ Compare: SOU 1981:46 pp. 44–45 on the task of realising policy and framework law, and the risks and benefits of the administrative discretion that follows.

own activities. They should carry out self-control. Enforcement of duties to take precautionary measures should not mean that the enforcement authority takes over these responsibilities. They should also be enforced. This should mean leaving the matter of finding out what to do and how, to the actor himself. Such arguments have also been heard in the legal discourse of all the studied systems. Some themes for this discussion have touched upon blank or negative orders that indirectly shift the burden of information over to the individual. Similarly, the precision of required results or limits values have been advanced as an essential method of steering. Other approaches have argued a more contextual purposive assessment of precision, rather than a formalistic rule. These themes will now be brought back into the Swedish enforcement system, and discussed further. In the end, I believe, this new perspective can note some areas of further development – in the interests of legal certainty and realisation of environmental objectives.

8.6.2 Blank Orders to Shift the Responsibility to the Actor

8.6.2.1 Blank Enforcement within English Statutory Nuisance Law

One feature of English law stands out in the above made comparison of clear and precise enforcement. In English statutory nuisance law, local authorities can serve a blank abatement notice, simply stating the nuisance, and the duty to abate it. Only when the enforcing authority requires particular steps or works to be done, does this have to be specified in the notification. Otherwise, they can choose to leave it up to the addressee to choose the means of abatement.¹⁹³⁴ This is very much a result oriented enforcement approach, which still has the actor involved in the regulation, and demands their taking responsibilities for information. In the perspective of environmental law objectives and enforcement self-control, this seems

This is then quite different from Swedish and Dutch law, which demand specification of precautionary measures and not merely that they should be taken. It is held that it is for the enforcement authority to decide what the actor must do to be in compliance with the law.¹⁹³⁵

It should be noted that the blank order is only used for statutory nuisance law, which normally involves health issues, neighbour disturbances, etc. These are often in regulation of activities that are not under any permitting requirements. English law on environmental permitting, and so on, does not have the option of stating a blank abatement order. Nevertheless, the com-

¹⁹³⁴ See: *R v. Falmouth and Truro Port Health Authority, ex p. South West Water Ltd* [2000] Env. L.R. 658; Jones, B., and Parpworth, N., *Environmental Liabilities* pp. 460–469; and above in Section 8.4.4.

¹⁹³⁵ See: MÖD 2004:28; Judgment of the Environmental Court of Appeal 19 September 2003 in case M 2909-03; and above under Section 8.3.1 (Sweden). See also: ABRvS, 11 August 2004, Case no. 200400185/1, AB 2004, 370; and above under Section 8.5 (the Netherlands).

parison is still valid for Swedish law, as most of the referred Swedish case law on precision relates to nuisance issues like private sewerage systems and furnaces. Statutory nuisance law is, moreover, also used to regulate large installations, as in the Falmouth case. In that case, Lord Justice Simon Brown presents the typical argument that “the enforcing authority should be wary of being drawn too deeply and lengthily into scientific or technical debate,...”, and further, referring to the earlier case law,¹⁹³⁶ that it may be both fairer and more cost-effective and practicable, both for the addressee and the public, if it is the obligation of the actor to decide on the appropriate steps or works to abate a nuisance. And if the chosen steps prove ineffective, it is not unfair that the authority oblige him to do more.¹⁹³⁷

8.6.2.2 Comparison with Ordering a Prohibition in Swedish Law

The use of blank orders to shift control responsibilities over to the actor can be compared with the use of negative orders – that is, ordered prohibitions. The Swedish Environmental Court of Appeal has turned to ordering a prohibition in cases where the choice between alternative precautionary measures to abate a problem has been disputed, or when there is not enough investigation to decide on appropriate solutions. Instead of the enforcement authority investigating the matter further and deciding which of the solutions to order, the courts have instead simply prohibited the relevant polluting discharge.¹⁹³⁸ The investigation of alternatives and choice is thus left to the actor. The result is basically the same as for a blank order to abate a problem, although indirectly, as the actual order is based upon the always present option to merely refrain from carrying out the activity that is causing the problem. This is a clear alternative, which often does not require further measures to be taken – unless there are issues of reparation of caused damage. However, in the perspective of the actor who carries on the activity – and assumably wants to continue doing that – the prohibition and the blank order have the same meaning and result.

8.6.2.3 Assessment of the Indirect Approach to Enforcing Actor Responsibility

8.6.2.3.1 Clear and Precise Legal Duties as Basis for Exercise of Public Power – and the Avoidance Thereof

In the light of Swedish enforcement law on clear and precise orders and specification of precautionary measures, the blank abatement order can

¹⁹³⁶ *Sterling Homes (Midlands) Limited v. Birmingham CC* [1995] Env. L.R. 121; *Budd v. Colchester Borough Council* [1997] Env. L.R. 128.

¹⁹³⁷ *R v. Falmouth and Truro Port Health Authority, ex p. South West Water Ltd* [2000] Env. L.R. 658.

¹⁹³⁸ Judgments of the Environmental Court of Appeal in: MÖD 2001:34, and MÖD 2004:58, and on 29 December 2006, in case M 169-06.

surely be criticised from a public law perspective. The grounds for clear and precise enforcement are based upon aspects of legal certainty. This involves communicating clearly to the individual his legal duties, so that they know how to comply. In this way individuals may avoid public involvement in their fundamental freedom and autonomy, through exercise of administrative authority. This is a basic notion in the Rechtsstaat. Furthermore, the authority that has to specify clear decisions will also indirectly have to show that it has prepared the case sufficiently. The inquisitorial duties of the authority helps ensure a correct and appropriate decision under the law, and in realisation of the objectives behind the law. But one wonders whether the use of the enforcer's power to serve blank orders does not take away all incentive for the regulator to specify precautionary steps or works.¹⁹³⁹ They can thus escape investigating the possibilities for abating the problem, and the actor will be left in uncertainty about the sufficiency of their remedial measures, and consequently also their compliance with the law. The authority has the power to make the normative assessment of compliance. In the context of generally formulated legal rules, and rules relying on balancing of interests, the actor's legal position may be quite uncertain. The lack of safeguards for legal certainty, and appropriate decision-making moreover suggests an increased risk of maladministration. Either general rules, or administrative decisions, should in this light be clear about the individual's legal duties.

Nevertheless, as shown above, the resolution of prohibiting the activity instead will often have the same meaning and result for the addressee, as will a blank abatement order. This discussion has shown the often fictive differentiation between negative and positive orders. In the perspective of the actor who wants to carry on the activity, his or her duties for precautionary action are no clearer. However clear the order, one cannot carry on the activity without living up to them. The negative order is thus quite similar to the blank order of English statutory nuisance law.

A prohibition can often be motivated through environmental rules on precaution and prevention, and an order to prohibit an activity is more easily formulated so as to clearly and concretely tell the addressee his or her duties. This enforcement order reflects a more simplistic concessional idea, prohibiting in the individual case, for an individual actor, the relevant discharge of polluting matters to air, soil or water, or the use of certain materials; chemical products or raw materials, and so on, or an activity in general, like removing the water toilet in response to problems with untreated sewage water. Such prohibition is then explicitly or implicitly conditional on fulfilment of general actor responsibilities. The order to prohibit is much easier to formulate in clear and concrete terms, specifying what is prohibited. And here the conditions for being freed from the prohibition have not been required to be specified. I believe that this approach is not sufficient by itself to effec-

¹⁹³⁹ Compare: Malcolm, R., *Statutory Nuisance. The Validity of Abatement Notices* p. 895.

tively enforce environmental law and to make the actor involved in self-control.¹⁹⁴⁰ The communication with the regulatory authority becomes important. Exchange of information and communication about possible and appropriate precautionary measures will support effective environmental control. The enforcement authority has the regulatory power to decide which solution is sufficient to comply with law, and the actor will need communication with the authority before the execution of an enforcement decision, in order to ensure legal compliance. Moreover, both the environmental responsibilities in general, and the information responsibilities in the regulatory procedure are shared between the public authorities and the individuals of the public. A communicative regulatory procedure is therefore appropriate. In some very clear and delimited situation a prohibition may suffice, but more often it will necessitate supplementary direction in order to be effective – and legally certain.

8.6.2.3.2 *Reasonableness an Proportionality*

Enforcement through negative or blank orders for that matter may give rise to arguments of proportionality, indicating that it would be too intrusive a measure to go so far as to prohibit the activity. This view has been stated in some Swedish cases, even though it is not always easy to see if it is based upon the reasonableness of substantive demands on the actor, or in proportionality in choosing enforcement measure.¹⁹⁴¹ Generally, the enforcement measure should be more intrusive than is needed to reach the required result. Based upon this it might be perceived as being too intrusive to prohibit an activity without a proceeding order to take specified measures, thus giving the actor the opportunity to act in the right way, before it is completely prohibited to act at all. In older environmental law enforcement this step by step approach was regulated in the rules on enforcement competences, but this changed with the introduction of the Code, and today these arguments are seldom argued by the Environmental Courts.

Arguing an actor-driven environmental law approach, one could state the counter-argument that it would be too intrusive an enforcement approach to state authoritatively in detail how the actor should go about living up to demands to take sufficient precautionary measures. The freedom to do as he pleases, as long as he reaches the appropriate result, is not to be inappropriately infringed upon.¹⁹⁴² Notably, English case law also notes this possible unreasonableness of orders not specifying the necessary steps or orders that

¹⁹⁴⁰ Compare: Lavin, R., *Offentlighetsligt vite I* p. 75, on supplementing prohibitions with a stated alternative of remedying measures, in orders coupled with conditional fine. The discussion is based upon older case law and preparatory works.

¹⁹⁴¹ MÖD 2000:6; MÖD 2003:78; and MÖD 2004:63

¹⁹⁴² MÖD 2001:34, and MÖD 2004:58.

the addressee has to take.¹⁹⁴³ One could argue that the use of blank orders may go too far in demanding actor responsibility, especially when it comes to private individuals. Distinguishing this responsibility for private individuals and knowledgeable perpetrators, such as industrialists, has been suggested.¹⁹⁴⁴ This argument is equally valid for orders to prohibit an activity where there are uncertainties about how to abate a problem. A prohibition seems more appropriate when precautionary measures will not sufficiently remedy the problem, or the risk.

8.6.3 Specifying the Problem or the Result

The specification of limit values, functional requirement, or other levels, is a way for the enforcers of specifying the desired results. This is a typical expression of goal and result steering – focusing on the actual environmental effects and leaving the freedom and responsibility of getting there to the addressee. The limit values, or functional results, or suchlike, may be formulated with great particularity and related to the individual activity, stating exact quantities of emitted substances, etc. This suggests clear and precise regulation without taking over the actor's responsibilities for active involvement in self-control. It gives more concrete information of what the actor must comply with in order to conduct his activities in compliance with the law. Enforcement through the setting of such limits has also found support in the Swedish system. Nevertheless, as discussed above, this approach is not always useful. Some environmental problems are not that easily described or controlled in terms of specified standards or limits – for example, diffuse pollution, or standards of a more qualitative character such as noise nuisance.¹⁹⁴⁵ Nonetheless, limit values are often applied, certainly on noise nuisance.¹⁹⁴⁶

An alternative way of communicating to the actor what he must do to comply with the law is in specifying the environmental problem, or violation which the enforcers have found illegal, and which must be remedied. This is a way of telling the addressee what situation they must get away from, and thus indirectly what has to be done. Statutory requirements for such specification can be seen in the Dutch and the English systems, prescribing definition of the violation of law, or stating the nuisance, etc. The motive is that the addressee must know what the enforced non-compliance is, so that they

¹⁹⁴³ *R v. Falmouth and Truro Port Health Authority, ex p. South West Water Ltd* [2000] Env. L.R. 658, p. 686; *Sevenoaks DC v. Brands Hatch Leisure Group Ltd* [2001] Env. L.R. 586, p. 91; and above: Section 8.4.4.5.4.

¹⁹⁴⁴ See: Malcolm, R., *Statutory Nuisance. The Validity of Abatement Notices*.

¹⁹⁴⁵ As argued in the English cases: *Godfrey v. Conwy County BC* [2001] Env. L.R. 38; and *Cambridge CC v. Douglas* [2001] Env. L.R. 41, p. 723.

¹⁹⁴⁶ See: MÖD 2008:27; MÖD 2005:63 (Sweden); *R v. Fenny Stratford Justices ex p. Watney Mann (Midlands) Ltd* [1976] 2 All E.R. 888; and ABRvS (Voorzitter), 24 July 2001, Case no. 200100468/3, AB 2002, 1 (the Netherlands).

understand what they must do to remedy it.¹⁹⁴⁷ This may be seen as a result oriented steering method, which may be appropriately moulded to the specific case, and which involves more qualitative considerations. As the discussed English cases describe, it may often be understood from the statement of the problem what the desired result is. I would nevertheless argue that the formulation of a specified level will often better indicate what the actor should achieve and thus reflect clearer steering of environmental actors. It goes beyond stating what is wrong, but sets a limit for what is stated to be right. The case of specifying a problem or a violation to be remedied seems similar to the situation of ordering “sufficient precautionary measures” in order to abate an indicated problem. Such imprecise enforcement has not been accepted in Swedish law.

However, the enforcement of limit values may sometimes put the addressee in a similar position as being served a blank order or a prohibition. They will have little guidance from the authority about how to act. They do have a limit value that they know sets the limit for their actions, but they have to find the behaviour that suits such limits. This may put them in a difficult situation, and effective steering of the actor’s behaviour – in order to realise the environmental objectives – may need support from the public authority as to communication about suitable action.

8.6.4 Combining Result Oriented Enforcement with Suggestions for Solutions – A Communicative Approach

8.6.4.1 The Step by Step Approach

Swedish case law has promoted the step by step approach to enforcement, which relies on shared responsibilities for investigation and control, and the communicative administrative procedure. In this procedure, the authority keeps the initiative, and the normative role, while the actor is involved in the regulatory procedure through submitting specified and limited amounts of information. This suggests proper administrative procedure, but with reliance on actor involvement. However, Swedish environmental law, and its enforcement policy, relies on the actor having a further role in the regulatory procedure. They are to take initiatives, investigate, assess, and choose ways of environmental control. I believe the enforcement procedure could be supplemented by such tools in order to give more room for the actor’s more active involvement.

8.6.4.2 The Actor’s Suggestions

One way to achieve a further communicative procedure which provides more room for the actor is to order the actor to make suggestions about cer-

¹⁹⁴⁷ See: Sections 8.4.5.2, and 8.5.1.

tain precautionary measures, technical solutions, etc. This strategy has been debated in Swedish enforcement law, but has not won acceptance.¹⁹⁴⁸ The idea is that the enforcement authority will subsequently assess the actor's suggestions and make an order based thereon – if the matter is not resolved through informal steering and voluntary measures. The actor is through this procedure actively involved in the control of their own activity, and the enforcement authority will have the more passive role in the investigation, but still keep the role as authoritative decision-maker who determines normatively the actor's duties. I believe that these measures are a good way for result steering and enforcement with respect to actor responsibilities.

The main argument against the possibilities open to require the actor to submit suggestions for necessary precautionary measures is that it is for the authority to investigate the case and to come to a normative decision on what the actor should do. This cannot be left to the actor. But in environmental law, such duties have been left to the actor. They are drawn from general rules of consideration, in the rules on self-control, etc. The enforcement authorities may enforce these duties through orders demanding information and investigation, and improved self-control. Consequently, the demand for making suggestions for necessary precautionary action is well supported. This involves asking the actor to do what they should normally do in their self-control, and their exercise of due care under MB 2:3. The argument that the authority must carry the role of the authoritative regulation, the one who makes the normative decision on what is legal and what is not, does not hold. The authority still has that role. The actor does not decide, they only investigate the matter, but more purposively, with the view of finding practical solutions that work in their operation.

Moreover, in comparison with existing law, the order to submit suggestions will keep better with the idea of an authority being responsible for normative functions, and for proper procedure, than with other ways of enforcing actor responsibility. In comparison to enforcement through blank orders and prohibitions, requiring the actor to suggest suitable steps or techniques, and the like, seems more reasonable and clear for the addressed actor. The discussed enforcement approaches which indirectly shift the burden over to the actor do not connect expressly to the support of a communicative procedure, or shared regulatory responsibilities. It just prohibits the activity, or tells the actor to abate the problem. Ordering purposive suggestions from the actor makes them actively involved in a communicative procedure between parties with separate, as well as shared responsibilities.

8.6.4.3 The Authority's Suggestions

Another way to be able to steer the actor towards the desired environmental result without having to specify the exact way to get there is to combine a

¹⁹⁴⁸ See, for example: MÖD 2004:67; and above under Section 8.3.4.

result steering order – stating a limit value or qualitative standard – and suggest some ways to achieve such results.¹⁹⁴⁹ This way the focus of the order is on the actual environmental result, and the actor is given the freedom and opportunity to choose another means of getting there. Such an approach has been discussed above, in a Swedish¹⁹⁵⁰ and a Dutch¹⁹⁵¹ case, both regarding noise nuisance, and suggested measures for bringing them under a specified dB level. The Dutch case has been interpreted to mean that the enforcement authority must not specify in the order all the potential measures that the addressee might take to remedy the problem. They, moreover, have to allow for other measures than the ones explicitly specified in the order. The object of the order is to remedy the environmental problem, not to steer the manner in which this is done. The enforcement order in the Swedish case specified a dB level, and exemplified noise-reducing measures with the putting in place of such a fence. They further stated the option of taking other noise-reducing measures so that the stated noise levels were not exceeded anywhere in the relevant area. This exemplification thus supports the ordered duty – keeping under the dB level – but without becoming part of the normative order. The non-determined suggestion of practical solutions and steps to take does not seem to make the order unclear either. It presents an option on how to live up to the ordered duty. This method may be useful to support the result steering enforcement, through providing more information and recommendation, but leaving it open to the actor to take their own initiative and thus optimise their activities within the set environmental limits.

8.6.4.4 Concluding Remarks So Far

So far, I have noted that blank orders and prohibitions to meet the difficulties of specifying precautionary measures should be supplemented with some kind of support from the authority. Even though the actor has a fundamental environmental responsibility, which is stated in law, it will be easier to live up to this responsibility with the support of the responsible authority. Moreover, the authority is the one that decides whether the actor's measures are appropriate or not. A communicative procedure will better promote appropriate work, which will in the end be approved by the enforcement authority in its compliance control. It will also promote the certainty of individuals as to their legal duties and what they must do to avoid intrusive enforcement. One way of getting there is the promotion of a communicative enforcement procedure where the authority leads the investigation, but involves the actor in it step by step. This procedure, as it holds today in Swedish law, could be supplemented with the possibility of asking the actor to make suggestions for

¹⁹⁴⁹ Compare: Lavin, R., *Offentlighetsligt vite I* p. 74.

¹⁹⁵⁰ MÖD 2000:32.

¹⁹⁵¹ ABRvS (Voorzitter), 24 July 2001, Case no. 200100468/3, AB 2002, 1, Case Comment by Michiels.

solutions to specified problems. In this way they are fulfilling their actor duties without taking over the authority's regulatory role. Moreover, enforcement can be focused on setting limit values or other kinds of specified results. This constitutes true goal steering which clearly communicates the actor's duties. Nevertheless, the coupling of such an order with suggestions for measures will support its implementation without having to decide normatively what solution is the best for that activity. As long as such an order also indicates that the actor can take other measures that ensure the limit value, the order is not unclear or imprecise a duty in relation to these recommendations. I believe that these communicative supplements to the enforcement procedure would make it more effective and still safeguard proper administration.

8.6.5 Legal Certainty in Context – Moving from Formalism?

8.6.5.1 Introduction

Another comparative observation on the English discourse on moving away from old-fashioned formalism towards a more purposive and contextual approach was expressed in the Miller-Mead case and the “test of certainty”.¹⁹⁵² English case law following this authority, will generally and as a rule, approach each situation in that actual and individual situation, and the general assessment according to tests of certainty, and so forth, will naturally consider the context of the enforcement order as a whole.¹⁹⁵³ This pragmatic, purposive and non-formalistic assessment of the individual case, echoes the earlier described common law tradition and style.¹⁹⁵⁴ This approach will now be brought into the Swedish enforcement law system, to look for similar expressions of contextual and purposive assessments of certainty in relation to precision of orders.

8.6.5.2 The Miller-Mead Test of Certainty

The Miller-Mead case and the so-called test of certainty mark a move from formalism to a more purposive and pragmatic assessment of the core rule of clear and precise enforcement in the individual case. The reiterated core rule is similarly referred to in all the studied legal orders. In Swedish case law it requires that an order be formulated so that the addressee without any difficulties or risk of misunderstanding may get a clear understanding of what he

¹⁹⁵² *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 Q.B. 196. See, above: Section 8.4.3.

¹⁹⁵³ See: *Ormston v. Horsham Rural DC* (1966) 17 P & C.R. 105; *Kaur v. Secretary of State for the Environment* (1991) 61 P & C.R. 249; *Payne v. National Assembly for Wales* [2007] 1 P. & C.R. 4; and *Buckinghamshire CC v. North West Estates Plc* [2003] J.P.L. 414.

¹⁹⁵⁴ See: Section 4.1.

or she should do.¹⁹⁵⁵ The discussed English case law still fundamentally demands that an order – a notice – prescribe the relevant contravention of law, and the steps that must be taken to remedy the problem. If it does not, it is illegal. This is hardly questioned in practice.

The interesting cases, however, are those where the orders make statements about the problem and the duties to remedy them, but there is a question of sufficient clarity. In this assessment, English case law points to a test of certainty, instead of formalistic requirements on the form of the notice. This entails a more comprehensive and contextual application of the core rule to the individual case. The addressee of an order had complained that the order was not sufficiently clear, and that it did not matter that the facts were all known to the addressee (but not the authority). The Court rejected this complaint and held authoritatively that formal requirements of the accuracy and particularity of the notice should not determine the protection of the certainty of the addressee. Such assessment was described as an old-fashioned formalism, and exaggerated in its demands for specification. It was also argued that these strict formalities had been taken undue advantage of in order to defeat the public good. A more reasonable view of the matter was therefore advanced. This is the test of certainty, which asks in the actual circumstances of the individual case: Does the notice tell the addressee fairly what he has done wrong and what he must do to remedy it?

Application of this test of certainty has entailed consideration of the pre-enforcement communication between the authority and the actor, and of the presumed knowledge and insight in the case on the actor's part. The courts in essence asked if it was reasonable in the individual case to expect that this particular addressee understood the order and got the message of what was expected of him. To some extent this comes closer to a real and concrete protection of the individual's legal certainty. The question is in fact: Was this individual properly protected against arbitrary or excessive exercise of administrative power? Did she have the opportunity to avoid further involvement by the authority, and did she have sufficient understanding of the decision to be able to defend her legitimate interests?

This seems to challenge above discussed Swedish law on the matter. I have searched the environmental law practice for signs of the argued contextual and purposive assessment of clear and precise enforcement. Some aspects of this may be noted. To some extent legal practice shows that things like the character of the addressee, the activity, and communication outside of the actual order, may affect the assessment of how much precision is necessary. One contextual consideration is that of earlier communication between the enforcer and the addressee; consultation and information advice

¹⁹⁵⁵ See for examples: the Judgments of the Environmental Court of Appeal of 19 September 2003, in case M 2909-03, and MÖD 2004:28. See, moreover: MÖD 2004:67 with a similar statement, adding the words "to live up to the substantive regulation".

discussed, or suggestions and prospects submitted by the addressee, in the auspice of inspections or generally.

8.6.5.3 The Context of Earlier Contacts and Related Information

8.6.5.3.1 Cautious Opening for Contextual Understanding of Clear and Precise Enforcement

Legal practice sometimes indicates potential exceptions from the demand for specification of precautionary measures. An unspecified order may be legally acceptable if its close meaning can nevertheless be perceived as being clear to the individual addressee. This rather pragmatic view has been applied in cases where the earlier contacts in the case supply a clarifying context, where generally formulated orders of precautionary measures have been accepted.¹⁹⁵⁶ In the Judgment of the Environmental Court of Appeal on 19 September 2003, in case M 2909-03, the main question was the enforcer's choice of enforcement instrument. Nevertheless, the Court discussed general formulation of the order. It started by noting the core rule and the advantages of clear and precise orders for effective enforcement. Nevertheless, this was such an exception where the meaning of the order could anyway be seen as clear to the addressee. This was based up on the pre-enforcement contacts in the case. The addressee had already accepted the suggested measures, in the form of advice given at the inspection, and had not submitted any comments on the formulation of the order. In this case, the meaning of the order was not disputed and the addressee had accepted fully the suggested measures, so the general formulation of the order was accepted.¹⁹⁵⁷

The Court argued in a similar manner, and with reference to the described case, in MÖD 2004:28,¹⁹⁵⁸ noise disturbance from a stretch of railway. The very precise order for precautionary measures was not disputed for any lack of clarity, but the Court still chose to address the matter. It held that the previous contacts between the enforcer and the addressee provided a context that clarified the closer meaning of the order. It was known that the parties had communicated extensively with each other on the matter. It was gathered that the parties had discussed different solutions to abate the noise problems in the areas, and that the ordered measures described one of them. It could therefore be gathered from the pre-enforcement context how the re-

¹⁹⁵⁶ MÖD 2004:28; and Judgment of the Environmental Court of Appeal on 19 September 2003, in case M 2909-03. Perhaps this is also the reason for accepting a generally formulated order to take measures to improve a sewerage installation in the Judgment of the Environmental Court of Appeal on 14 January 2005, in case M 5977-04.

¹⁹⁵⁷ The context of earlier contacts is given as an example of an exception situation, but to the best of my knowledge, this is the one situation where these statements of situations where generally formulated enforcement orders may be acceptable.

¹⁹⁵⁸ MÖD 2004:28.

quired noise reducing installations were expected to be constructed, and where.

8.6.5.3.2 *Stricter Demands before the Environmental Code?*

Older Swedish practice from the National Licensing Board for Protection of the Environment seems stricter in demanding precision in the formulation of the actual order. In decision B 212/92,¹⁹⁵⁹ the Board found that an unspecified order could not be accepted on the grounds that complementing information had been given by other means, which involved sending information brochures to the addressee. The Board found that as a minimum, this kind of order (once again on private sewage treatment) is that the different kinds of solutions that can be accepted by the enforcement authority, are indicated. Also, in the earlier referred decision B 50/93,¹⁹⁶⁰ the Board did not accept an order demanding, among other things, that the operator of a camping facility installed a sewage treatment solution approved by the enforcers. Such a demand was not clear and precise enough, despite the noted enforcement context, with a long history of many pre-enforcement contacts. The enforcers had communicated advice and information on solutions to the sewage water problem several times over the past decade. The Board, however, referred to the statement in the preparatory works on concrete technical or other measures, and that the enforcement authority must state what measure or measures must be taken. It also referred to the step by step approach of ordering investigations to be able to decide on, and order, a specified solution. This suggests that there is more room today in Swedish environmental law enforcement for considerations of the enforcement context.

8.6.5.3.3 *General Administrative Law Discourse – Comparative Note*

The environmental law practice may be compared to a general administrative law discourse expressed by the Supreme Administrative Court, which stated strict demands for precision of the order coupled with a conditional fine. The Court stated further that this precise indication of what kind of performance was demanded of him, was to be read in the actual order that the fine was tied to. It did admit to some room for interpretation of the order in context of what had surpassed earlier in connection to the relevant activity. It, however, immediately stated that this room was limited with regard to the obligatory clarity of the meaning of the order.¹⁹⁶¹ The same reasoning can be found in environmental law and in the statements on general administrative law, in the context of regulation of television broadcasting, which this

¹⁹⁵⁹ National Licensing Board for Protection of the Environment, 17 November 1992, in Decision B 212/92.

¹⁹⁶⁰ National Licensing Board for Protection of the Environment, 20 April 1993, in Decision B 50/93.

¹⁹⁶¹ See, also: Lavin, R., *Offentlighetsligt Vite I* pp. 84–85.

case concerned.¹⁹⁶² The difference may be seen in nuance, perhaps, where the Supreme Administrative Court emphasised more the limited possibilities for such contextual approach. Nevertheless, the contextual approach has reference to the administrative law discourse.

8.6.5.4 Factors on the Part of the Addressee and the Relevant Activity

Apart from considering the context of further communication between the enforcer and the authority, one might consider factors on the part of the addressee. Such considerations have been discussed earlier in Chapter 7.¹⁹⁶³ MÖD 2004:67 questions the appropriateness of addressing the order to submit suggestions towards a private person. The Court argued that the order should provide the addressee with clear notice of what to do to live up to the substantive regulation. The Parliamentary Ombudsman has also stated, within the context of clear and understandable communication of administrative decisions, that the authority should to some extent consider who the addressee of the decision is.¹⁹⁶⁴

Perhaps the case law on private furnaces shows a more specific formulation of enforcement orders addressed at private persons. It seems the enforcers will specify to some detail how the addressee should use the furnace and during what times, in order to abate to a reasonable extent the nuisance to the neighbours.¹⁹⁶⁵ A prohibition seems unreasonable and disproportionate. A limit value for smoke emissions, or the character thereof, would be difficult for the private person to control. In short, the private character of the addressee and the activity affects the assessment of the appropriate formulation of the order so that there is precision on exactly what steps to take; the nature of the materials burnt; the exact times when the furnace may be used, or how many times a week; and for how many hours.

It should be noted, however, that the environmental law considerations of reasonable demands of precautionary measures are not designed to consider factors on the part of the actor. The main idea is that the environmental risk involved is to determine what demands are reasonable. Merely the actor's identity or character should not be considered. However, the character of the activity as private may sometimes affect the assessment of the degree of precision needed to pass a test of certainty, such as in English law. The issue is then whether the relevant actor may reasonably be expected to clearly and precisely understand his or her duties to be enforced through an administrative order. Comparatively, in the English case of *Buckinghamshire CC v. North West Estates Plc*,¹⁹⁶⁶ the Court dealt with a bundle of orders challenged for lack of clarity because of its complexity and reference to existing permits

¹⁹⁶² RÅ 1994 ref. 29.

¹⁹⁶³ See: Section 7.5.3.5.

¹⁹⁶⁴ Decision of 30 November 2004 (case nr. 144-2004).

¹⁹⁶⁵ MÖD 2003:78. See, also: MÖD 2004:63.

¹⁹⁶⁶ [2003] J.P.L. 414.

and maps, etc. It held, after studying the orders, that the addressee could be expected to have the professional knowledge and insight to understand what the orders stated in terms of the relevant contravention and remedial duties.

This reasoning implies that the identity of the addressed activity – and indeed of the actor – may influence the assessment of the degree and character of the specification of orders. A professional operator, for example, an industry of some kind, may be expected to have further insight into technical matters, and so on, than a private person operating a furnace to heat up his home. The order addressed at the professional operator should often be able to expect a certain amount of pre-understanding of the matter.

8.6.5.5 Considering the Underlying Actor Responsibility for Information

As has been noted, there seems to be some, but very limited, acceptance for considering the enforcement context in the assessment of the order in its being sufficiently clear and precise. I believe, however, that such a comprehensive and contextual assessment would be beneficial for the combination of the demands for legal certainty, goal oriented enforcement, and actor responsibilities. The addressee's certainly is thus evaluated from his actual position, and there is still potential for leaving some room for the actor's own assessment of how to reach the relevant results and goals. I would suggest that in this way, the professional actor can be expected to know and understand more. Formal requirements of particularities of the order may be practical for stating clear and precise rules for the authorities to follow in their enforcement, but it may not always make for appropriate consideration of the individual addressee.

Having thus argued for a more purposive and contextual assessment of appropriate degree and character of the specification of enforcement orders, the underlying actor responsibilities for information must be further noticed. These actor responsibilities for knowledge, investigation, proof, and self-control – as analysed in Chapter 7 – actually mean that each and every person has a legal duty to keep sufficiently informed, to share this information, and to take precautionary measures on their own initiative. This factor must be considered in the assessment of sufficient precision of orders. A legal demand to inform actors about things that they should have found out for themselves seems inconsistent and unsatisfactory. This compares with the earlier discussed assessment of reasonableness of demands for information, which departs from what the actor actually has done, rather than what they should have done¹⁹⁶⁷. The certainty of the addressee of an order should thus be determined by the normative as well as the factual matters of the case. The actor's information responsibilities should be adequately weighed in. This does not mean that each and every person covered by the Environ-

¹⁹⁶⁷ See MÖD 2006:60. See, also: MÖD 2004:64.

mental Code rules of consideration could be served a blank and unspecified order to remedy the problem. Rather, it could entail that a business which stores chemical waste should be able to act on blank orders for the “appropriate disposal” of it. It must be expected that they know what is there and what to do about it – that is their business. Specification of precautionary measures in enforcement orders should therefore depend on the character of the activity, and the professionalism involved. Formalistic requirements of specification of this matter that the addressee should know better than the authority, may risk being misused by non-cooperative actors wishing to escape regulation altogether. The common argument that it is for the authority to investigate and decide which measures must be taken, is not entirely relevant for the environmental law case, where the actor has information responsibilities. These must be taken into account in a purposive and concrete assessment of sufficient clarity and precision of the enforcement order in the individual case.

8.6.6 The Context of Sanctions

8.6.6.1 Introduction

One aspect on clear and precise enforcement that has been discussed in all the studied legal orders is in the context of sanctions. Safeguarding the legal certainty of the individual is particularly important when enforcement is supported by the threat of sanctions. This is especially important in the context of criminal liability, but also different kinds of administrative penalties or coercive instruments may, to different extents, also be affected by this rule. Public law safeguards of the individual’s fundamental rights and freedoms will generally be qualified in the context of sanctions, especially criminal law sanctions. This has been discussed in Chapter 2 regarding legality,¹⁹⁶⁸ but also in Chapter 7, regarding the distribution of information duties.¹⁹⁶⁹ A further, and associated, influence might be seen in the demands of formulation of enforcement orders, as to the specificity in communicating the legal duties, the non-compliance with which are subject to some kind of sanction. In short, enforcement orders may have to be more precise if there is a threat of sanctions if one does not follow the order.

All exercise of administration is to some extent connected to a threat of coercive measures or sanctions, at least indirectly. The role of regulation through legal instruments, in the system of environmental policy and steering, is authoritative steering. This means to be able to put the force of the legal order behind the directing statements, which is more than “soft steering” of voluntary action. It is most clear in the criminal procedure, which is

¹⁹⁶⁸ See: Section 2.2.2.1.

¹⁹⁶⁹ See: Section 7.2.2.2 and 7.7.

all about punishment of illegal action. But it is also indirectly present in the pre-enforcement stages of consultation and advice, as the competent authority may normally up the stakes by coercing the actor into action or making threats of a sanction. The enforcer always has some kind of “axe on the wall”, whether administrative and preventive, or criminal and repressive. In Swedish law the main coercive enforcement authority is the conditional fine. The enforcers may couple an order with a conditional fine when they find this warranted (MB 26:14).¹⁹⁷⁰

The English and Dutch enforcement order is always tied to a sanction. In English enforcement law, non-compliance is a criminal offence, which can and will be prosecuted by the enforcement authority itself. In the Dutch system, the order is always made with the threat of a conditional fine or administrative coercion. They are thus referred to as sanctions generally. This is not the case in Swedish law, where the authority will generally only resort to threats of sanctions when there is reason to believe that such coercion will be necessary. There is therefore a wider range of presence of coercion or punitive sanctions in the Swedish enforcement context. The threat of a future sanction may nevertheless always be indirectly implied.

In the following, the influence of the context of sanctions on the demands for specification of orders will be studied, mainly from the Swedish perspective, where the sanctions may be involved to different degrees. One aim of this study is finding out whether the degree of demanded precision will vary correspondingly. In the other countries studied sanctions are always involved, and the case law also recognises the consequent need for safeguarding the individual’s legal certainty.

8.6.6.2 Administrative Law on the Context of Sanctions

Swedish statutory law prescribes several formal requirements on the order coupled with a conditional fine, but not explicitly the steps or measures to be taken. Such a demand is nevertheless required by law according to a steady case law, administrative practice, and doctrine. The preparatory works of the Conditional Fines Act¹⁹⁷¹ comment on the precise formulation of such an order. It must indicate the time frame, the name of the addressee, and it must communicate what to do and when, on whether or not the fine is awarded. The Supreme Administrative Court holds, for example in RÅ 1994 ref. 29, that an order coupled with a conditional fine must be formulated so that it becomes completely clear to the addressee what is required of him, so that he may avoid having to pay the prescribed fine. For the awarding of a conditional fine it is necessary that the fine is tied to a clearly defined performance or omission.

¹⁹⁷⁰ See: Section 3.5.5.2.

¹⁹⁷¹ Prop. 1984/85:96 p. 48.

The Parliamentary Ombudsman has, moreover, criticised the formulation of administrative enforcement orders in connection with inspection of municipal boards functioning as local enforcers of environmental and animal welfare law.¹⁹⁷² Ombudsman practice has involved arguments about the importance of handling these coercive instruments with the greatest care and precision. This is crucial for the legal certainty of the addressee and for the effectiveness of the sanction. If the order lacks in clarity, the fine cannot be awarded. Several aspects of insularities are criticised; for example, with regard to indication of a specified point in time at which the ordered performance is to be carried out, but also with regard to formulation of the action that the addressee has to take, and how different steps of this performance are tied to the prescribed fine.

In one case, the Ombudsman criticised the ordering of unspecified “noise-reducing measures so that the neighbours are not subjected to health nuisance”. The enforcers stated that there were many different ways to sufficiently reduce the noise, and they did not want to bind the addressee to one specific solution, mainly due to the cost aspects. The important thing was the result - that is, that the noise nuisance was abated. The Ombudsman did not agree and but argued emphatically that it is most crucial that an order coupled with a conditional fine is formulated so that it becomes clear to the addressee what is demanded of him to avoid the prescribed fine. If the order entails a duty to take measures, the stated sum of the fine must be tied to a clearly defined performance. Otherwise the court cannot award the fine.¹⁹⁷³

In another case, concerning an order of four different points of specified measures, pertaining to the addressee’s keeping of animals, the Ombudsman criticised lack of clarity in connection with the fine. Arguing in similar words as in the decision referred to above, he stated that the sum of the fine was tied to a clearly defined performance, which meant in this case that the order would have to state specifically the connection between the fine and each corresponding point to which the measures related. He tied this to the wording of the general law on conditional fines (VitesL Section 2 para. 1) stating “a certain measure”. It was found that it was also common practice of the enforcers to use a better formulation to prescribe a fine for “each of the below stated points”.¹⁹⁷⁴

8.6.6.3 Environmental Law Cases on the Context of Sanctions

Using examples from Swedish environmental law practice, it is clear that the threat of a conditional fine influences the demands on precision of orders. In the earlier practice from the National Licensing Board, high demands on precision are set when it comes to orders coupled with a conditional fine. In

¹⁹⁷² Decisions by the Parliamentary Ombudsman in JO 1990/91 p. 270 and JO 1991/92 p. 324.

¹⁹⁷³ JO 1991/92 p. 324.

¹⁹⁷⁴ JO 1990/91 p. 270.

decision B 47/94, the Board quashed, partly on grounds on imprecision, such an order requiring the “removal of all scrap matters containing waste oil or other environmentally hazardous liquids” from the specified properties, to an “authorised location where no leakage can occur”.

In Decision B 213/93, the problems of precision demands, and the reliance on the enforcer to decide on the appropriate measures, are illustrated. Here the enforcers had delivered a specified order on the installation of a noise reducing screen at a specified location, to reduce the noise nuisance from a road. The order specified the height of the screen, and the distance from the middle of the road where to place the screen. The effectiveness of this measure in the solution of the noise problem was discussed. The Board noted that noise-reducing measures were needed, and that the actors could carry out this measure. Nevertheless, they found that there was a risk that this would not be enough to reach the required noise levels under recommended limit values, and the addressee should not risk further demands if the measures were taken. Here the Board demanded that the enforcers should decide once and for all the final solution to the problem, and deliver their decision to the addressee – and that’s it. They should not come afterwards and demand more.¹⁹⁷⁵ The practical consequences of this reasoning, is that the enforcement authority is responsible for all the investigation to be able to ensure the choice of the definitely right solution of the noise problem. They had to be sure about their decision and deliver it to the actor. There is no mention of any precautionary considerations in this choice.

The connection to conditional fines sharpening the demands on precise and concrete enforcement orders is affirmed by the Environmental Court of Appeal in the above-discussed cases on contextual approach to precision. The Court argued the possibility of an unspecified order to take measures if the closer meaning was clear, for example, in context of earlier communication with the addressee, but noted with emphasis the extensive demands for precision of an order coupled with a conditional fine. The Court stated that there is then particular reason for close consideration and thorough specification in the order, or the measures that the addressee must take.¹⁹⁷⁶ In administrative law literature, Lavin argues strongly for clear specification of measures in the actual order.¹⁹⁷⁷ This argument can sometimes also be noted in environmental law cases. For example, in the Judgment of the Environmental Court of Växjö,¹⁹⁷⁸ the Court quashed an order on the grounds that it

¹⁹⁷⁵ This seems to me to carry the demands for legal certainty too far. “Negative” administrative decisions, that entail duties or are in other ways negative for the actor, do not as a rule have legal binding force in the Swedish administrative law tradition. They can generally be changed both in positive and negative directions.

¹⁹⁷⁶ MÖD 2004:28; and Judgments of the Environmental Court of Appeal on 19 September 2003, in case M 2909-03

¹⁹⁷⁷ Lavin, R., *Offentlighetsligt vite I* pp. 79–93.

¹⁹⁷⁸ Judgment of the Environmental Court of Växjö on 3 June 2009, in case M 3537-08.

did not fulfil the fundamental demands of precision that have to be put on an order coupled with a conditional fine, so that the fine can subsequently be awarded. The order stated demands of “regular” emptying of sludge from a sewage water treatment installation, but not how to do this – for example, instructions as to their dealings with the contracted service company in ensuring appropriate time intervals. The Court stated explicitly that the addressee must be able to read directly from the order what to do and when. These demands for precision are stated as being especially important when the order is coupled with a conditional fine.

The message of particular importance and perhaps also stricter demands for precision is thus found in the practice of the National Licensing Board for Protection of the Environment, as well as in the Environmental Court case law. This is logical, as these rules on formal demands in view of sanctions stem from a principal administrative law discourse, and not the environmental law developments. The central question here, nevertheless, is if the developments of environmental law actor responsibilities, and their integration into enforcement procedure, influence the demands of the enforcement authority to spell out exactly what the actor should do, in context of a fundamental demand for constant self-control and active and precautionary measures. Few cases on precision of orders coupled with a conditional fine are handled by the Environmental Court of Appeal. Enforcement guidance points to stable practice in the area. Nevertheless, the Court’s opening up to a more contextual approach to precision has led to some discussion in the stated cases.

Moreover, Swedish environmental law discourse, both before and after the Environmental Code reform, accepts the setting of emission limit values, or other measurable limits of environmental effects in an order coupled with a conditional fine, or to order generally the taking of measures to reach such limit values set in permit conditions.¹⁹⁷⁹ A prohibition, typically a prohibition on the discharge of sewage water that has not undergone further treatment than sludge removal, is also precise enough.¹⁹⁸⁰ It seems it is only in the case of ordering the taking of positive measures where precision is needed and the importance and the demands of such precision is stricter in the context of a conditional fine. As argued earlier, these different kinds of orders may

¹⁹⁷⁹ Prop. 1997/98:45 Part 1 pp. 494–495 (referring to stable practice); MÖD 2005:12 (also referring to valid practice); National Licensing Board for Protection of the Environment, 2 February 1990, in Decisions 8–9/90. See, also the Judgments of the Environmental Court of Växjö on 21 December 2006, in case M 739-06, and on 16 March 2010, in case 2817-09. The cases concerned specified maximum noise levels, where in the first case the order was appealed, all the way to the Environmental Court of Appeal. Leave of appeal was not granted, which may be understood as an indication of the stable practice of such orders. The latter case concerned the awarding of the fine, following a breach of the said order.

¹⁹⁸⁰ National Licensing Board for Protection of the Environment, 1 November 1995, in Decision B 202/95; on 3 November 1995 in Decisions B 212–214/95; and 6 November 1995 in Decisions B 215/95 and 217–221/95; and MÖD 2004:58.

nevertheless mean the same thing for the addressee. He is threatened with a sanction for a course of unacceptable behaviour, while being provided with little guidance as to the correct behaviour. For a person with a private sewerage installation, the prohibition, the emission limit value, or the blank order will in practice put the actor in a similar position – unless they are to use the bathroom in a nearby gas station. They will still have to put some effort into finding out how to make their installation legal and acceptable in the eyes of the enforcer.

It should be noted also that case law can seem somewhat inconsistent in its assessment of the stricter demands for precision in context of sanctions. In MÖD 2004:41, the Environmental Court of Appeal confirmed an order requiring, under threat of a conditional fine, restoration of the piping connected to a dam's flooding protection, through cleaning, mending or replacing the pipes, to functioning condition. The measures were recommended to be appropriately taken in the way suggested in an attached investigation by the Swedish Board of Agriculture (Jordbruksverket). The precision of the order was discussed, but the Court only found it necessary to clarify that the order only referred to the piping on the addressee's own property. The court thus accepted an order only indicating the restoration to functioning status, without any more specification, and only non-binding advice on some alternative means to do so. The crucial part of the order was obviously the functional status of the piping, and the court seemed to find that clear enough. It seems in this case, it was enough to order the achievement of a functional result. Specification of steps to get there was not indicated. There are some comparable formulations in other areas of administrative enforcement law too – for example, in case law on the work environment.¹⁹⁸¹

8.6.6.4 The Context of Administrative Sanctions Influencing a Wider Range of Enforcement Measures

To some extent the calls for stricter demands on the formulation of an order in context of an administrative sanction may “spill over” to the non-coercive stages of enforcement. As discussed earlier in this chapter, the demands on specification of precautionary measures are high – regardless of the involvement of a conditional fine. Moreover, in an illustrative example from administrative practice, the Parliamentary Ombudsman argued the need for specification of measures that the addressee must take, even when enforcers act in their advisory capacity, stating non-binding recommendations. In a 1997 decision,¹⁹⁸² the Ombudsman investigated a recommendation of a local enforcement authority to a couple concerning smoke nuisance from their private furnace. The enforcers advised the couple that they should take the

¹⁹⁸¹ Judgment of the Administrative Court of Appeal on 28 June 2005, in case 6994-03, referring to earlier Judgments on 27 October 1999, in cases 7675-1997 and 9405-1998.

¹⁹⁸² JO 1997/98 p. 418.

necessary measures for preventing the occurrence of health nuisance caused by smoke from the furnace. They also informed the couple that they may pursue with orders of prohibitions or the taking of measures under a specific statutory provision, should the couple not follow this advice. They thus refer to their competence under health law to exercise authoritative enforcement should they not abate the problem voluntarily. The addressees found the decision difficult to interpret, and referred to documentation of the preparations of the decision, which did not come to any certain solution. They argued that it was remarkable that the advice had not been specified but only delivered in sweeping statements, at the same time as excluding measures on the neighbouring property that limited their options.

The enforcers claimed that it was not demanded in the health law regulations on their advisory duties, any formal requirements to specify the measures that may be needed. They argued that this would be irrational, as there are often several alternative solutions to the health nuisance problem. They also pointed to the complex assessments involved in finding the appropriate and sufficient solution in this situation. They also motivated the “exclusion” of measures on the ventilation installation of the neighbouring house.

The Ombudsman held – to begin with – that the decision was intended to communicate advice and instruction, which should (under the then valid legislation) normally precede a formal order or prohibition. The communication lets us know that the enforcement authority finds that a health nuisance exists, and that necessary measures should be taken, but these measures are not specified. The Ombudsman emphasises that the duty to deliver advice and information, obviously includes the stating of necessary concrete measures to abate the noted problems. He links this to the knowledgeable and authoritative position of the enforcement authority, and its duty to come to a decision. The reviewed notice of advice had, however, meant that the enforcement authority shifted the choice of the right measures to the addressee. The Ombudsman held it remarkable that the enforcement authority as expert in the field had refrained from stating any opinion on the matter, and noted the problematic consequences of such an order. If the enforcers saw it as their duty, he argued, to merely decide if nuisance exists, one could put the individual actors in impossible situations, where they would have to carry out one costly measure after another without receiving any authorisation or approval of the authority. The Ombudsman refers to case law on precision of orders which are not coupled with conditional fines, and states with reference to his own research,¹⁹⁸³ that the Supreme Administrative Court generally rejects simply referring to abstract and general formulations of the relevant legislation - for example, in cases referring to avoiding health nuisance.

The Ombudsman links his statements to the arguments on demands of safeguards of legal certainty, in that the addressee should be told clearly

¹⁹⁸³ Lavin, R., *Offentlighetsligt vite I* p. 87 and forward.

what he has to do to avoid a conditional fine, but extends this to the addressee being able to avoid an order coupled with a threat of a conditional fine. As advice and information entails a preceding step to the order or prohibition, he argues that it should therefore give an indication of what a detrimental decision might state. It is also easier to ascertain whether the actor is not cooperating if the appropriate action is stated clearly.

The reasoning of “spill over” effects is sometimes understandable. The enforcement measures of an authority are not always that clearly defined. Enforcers may formulate decisions that are hard to place in the enforcement law terminology. They may “recommend”, “urge”, or state that the addressee “should” take some action, or “inform” them of their legal responsibilities and potential liabilities”. They may “inform of” or “note” their authoritative competence, or the criminal liabilities involved in the area, or state that they will go on to using such authoritative instruments or report to the police, if the “non-binding” recommendation is not followed. Such expressions may communicate a very authoritative threat of sanctions even if they are called “advice” or stated under the heading of “general information”, and the actual effects of it might in reality be similar to that of a binding decision.¹⁹⁸⁴ Arguments to this point may be seen in practice discussing the access to appeal,¹⁹⁸⁵ and in the context of public liability,¹⁹⁸⁶ but also generally in the statements of the Parliamentary Ombudsman on the importance of clear and concrete exercise of authority in different situations.¹⁹⁸⁷ However, a general demand for far-reaching specification of precautionary measures, also in non-binding advice, and in orders not directly linked to sanctions, would carry the matter too far. It would demand over-particularity of the authorities. I would suggest that it would moreover make it impossible to have a constructive dialogue where the actor’s own initiative and active involvement in self-control is supported and steered. Enforced self-control or system regulation is difficult to combine with detailed command and control from the public authorities. Such precise steering should at any rate be reserved for cases where there is a concrete threat of a severe sanction. The administrative steering procedure should involve a more appropriate range of safeguards.

¹⁹⁸⁴ Sundberg, H., *Allmän förvaltningsrätt* p. 676.

¹⁹⁸⁵ RÅ 1996 ref. 43, and RÅ 2004 ref. 8.

¹⁹⁸⁶ NJA 1990 p. 705.

¹⁹⁸⁷ See for example the Decisions of the Parliamentary Ombudsman on 13 December 1993 (dnr 3053-1993); on 30 September 1994 (dnr 1968-1993); on 10 March 1997 (dnr 1857-1996); and on 11 June 2002 (dnr 189-2001).

8.6.6.5 Noting the Criminal Liability of Breaches of Individual Regulations in Permit Conditions

As described earlier,¹⁹⁸⁸ there is a parallel Swedish discourse on precision of permit conditions. This discourse falls outside the scope of this thesis, but it is interesting to note the existence of such debate, and also the arguments of the Supreme Court on the context of criminal liability. The clear and concrete formulation of permit conditions were emphasised in the preparations of the Environmental Code, particularly in connection to administrative and criminal enforcement.¹⁹⁸⁹ The conditions thus serve to communicate to the permit holder what is regulated for the operation, and sets out limits of the enforcement competences of the administrative authorities. It is also noted that the breach of permit conditions is criminalised, which indicates a function of specifying the relevant criminalised behaviour, or rather what should be done to avoid committing such an offence.¹⁹⁹⁰

The Supreme Court argues in NJA 2006 p, 310, the demands of legal certainty that follow from the fact that the permit conditions are coupled with heavy sanctions. Non-adherence may lead to revocation of the permit in accordance with MB 24:3, and also constitute an offence under MB 29:4, punishable with criminal fines or imprisonment for up to two years. The disputed permit condition, which was subsequently rejected by the Supreme Court for lack of precision, stated that only such chemical products could be used in the operation, for which there were documented knowledge about the risks of environmental nuisance, because of some stated hazardous characteristics. The Supreme Court acknowledged the central meaning and interest of the knowledge responsibilities in the Code, and that these were enforceable through administrative enforcement, also with the threat of a conditional fine. The knowledge responsibility, and other general rules of consideration, was in the Environmental Code reform found not to be sufficiently precise to criminalise.¹⁹⁹¹ This statement suggests the idea that there needs to be an intermediate specification of sanctioned duties, especially perhaps in the context of criminal liability. The permit condition functions as such intermediate regulation. The Supreme Court holds, with support of the preparatory works, that permit conditions should be formulated so that they can serve as grounds for establishing an offence, and for imposing sanctions. The Supreme Court reminds us of the extensive safeguards of legal certainty in the criminal procedure.¹⁹⁹² For the breach of permit conditions to entail criminal liability, it is demanded that the conditions are so clearly and precisely formulated that an offence can be established. This precedent on precision of

¹⁹⁸⁸ See: Section 8.2.3.3.

¹⁹⁸⁹ SOU 2004:37 p. 244.

¹⁹⁹⁰ SOU 2004:37 p. 246.

¹⁹⁹¹ Prop. 1997/98:45 Part 1 pp. 524–525.

¹⁹⁹² Referring to NJA 2006 p. 188 making a restrictive interpretation of the criminal rule and rendering problematic the criminal sanctioning of target values.

permit conditions has been further developed into other aspects of the precise regulation in permits, as well as in the specification of limit values and the monitoring thereof.¹⁹⁹³

This development can be discussed from different aspects. An important aspect of the matter is that the permit conditions, while prescribing grounds for criminal enforcement, basically have other functions. The regulation of actors should be aimed at directing them towards compliance, and also to continually investigate, control, plan, and improve their precautionary measures. The administrative enforcers will thus want flexible regulation – related to BAT, or other dynamic norms. The point is that the actual realisation of these duties may be varied is not a bad thing in this sense. It is warranted and wanted. In some cases, the matter may be too much an issue of uncertain direction, and then the condition will not serve as sufficient grounds for prosecution. But they may be applied and enforced through other, less severe enforcement methods. The demand for writing permit conditions to fit with criminal charges is very limiting, and does not leave much room for the wider range of steering. If the matter of the sufficient clarity for criminal punishment would be determined in the criminal procedure, then the full functional potential of permit regulation could be used.

8.6.6.6 Comparative Remarks

Finally, we might recall the observation that the Dutch and the English systems will always involve a threat of sanctions. In the Dutch system, the administrative enforcement order is always coupled with a “sanction” – a conditional fine, or actual administrative coercive action, at the expense of the actor. In the English system non-compliance with an administrative order will generally amount to a criminal offence. This should mean that the demands for precision are always present. And as noted,¹⁹⁹⁴ Dutch case law will generally state strict demands for precision, based upon the principle of legal certainty, and motivated by the connection to an administrative sanction. The enforcement order always has to provide a clear and concrete indication of what the actor must do. In some cases the order may leave the matter open to some choice by the actor, if this is stated clearly, and is supported by a clear definition of the ordered result – typically a limit value.¹⁹⁹⁵

In English law on clear and precise enforcement, legality issues due to the context of potential criminal enforcement have been discussed. The threat of criminal sanctions constitutes a key argument for extensive responsibilities for specification of results, steps and works required. Such arguments can be noted in many cases,¹⁹⁹⁶ for example in *Miller-Mead*, where the appellants

¹⁹⁹³ See, for example: MÖD 2009:2.

¹⁹⁹⁴ See: Section 8.5.

¹⁹⁹⁵ See: ABRvS (Voorzitter), 24 July 2001, Case no. 200100468/3, AB 2002, 1.

¹⁹⁹⁶ See, for example: *R v. Wheatley* (1985-86) 16 Q.B.D. 34, p 38; *R v. Falmouth and Truro Port Health Authority, ex p. South West Water Ltd* [2000] Env. L.R. 658; *Kirklees Metropolitan*

emphasised the context of the penalties involved for non-compliance. They argued that it is especially important in this context that the actor understands fully what to comply with – it matters not that the facts are all known to the addressee but not to the authority. It was for the planning authority at its peril to get to know all the relevant facts and state truly the offence committed, otherwise the notice was null and void without a court having to state so on appeal. As referred to earlier, their arguments were met with force by the appellate court, marking the case a turning point in enforcement law, moving away from a strict formalistic approach towards a more purposive assessment of certainty. It was explicitly argued about such inappropriate formalism, that it seemed to parallel the order to a criminal charge.¹⁹⁹⁷

Arguments about the context of criminal enforcement were decisive in the statutory nuisance case of *Kirklees*, requiring specification of remedial steps. The case was subsequently overruled by *Falmouth*,¹⁹⁹⁸ which established that precisions of steps and works to be taken are not generally required of abatement orders. The practical procedural impact of *Falmouth* is that the burden is on the addressee to prove that he or she has done everything possible to abate the nuisance (by using the defence of “best practical means” where available), or to abate the nuisance with every means necessary, with the burden of knowledge and investigation in finding out what was necessary to abate.¹⁹⁹⁹ Where the defence of best practical means is not available, appeal could be made on the grounds that the requirements are unreasonable. Interestingly, the balancing arguments in this case law involve considerations of the purpose of the health and environment legislation, the interests of the public, and the idea that the burdens and risks of having to know or find out what measures need to be taken to achieve the ordered abatement results, is more fairly and effectively left to the addressee.

In English law, there has also been some discussion about potential conflicts with the provisions on legality in ECHR Art. 7.²⁰⁰⁰ This is mainly tied to the fact that non-compliance with a thus unspecified order is criminalised. The connection of Art 7 to the criminal procedure means that the discussion is not directly applicable to administrative enforcement of Swedish environmental law. It will therefore not be debated further.

tan Council v Field & Others [1998] Env. L.R. 337; and *Brighton and Hove BC v. Ocean Coachworks (Brighton) Ltd* [2001] Env. L.R. 4.

¹⁹⁹⁷ *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 Q.B. 196, p. 220.

¹⁹⁹⁸ *R v. Falmouth and Truro Port Health Authority, ex p. South West Water* [1999] Env. L.R. 833.

¹⁹⁹⁹ Tromans, S., and Poustie, M., *Environmental Protection Legislation 1990–2002* p. 378

²⁰⁰⁰ See, for example: *Godfrey v. Conwy County BC (Godfrey)* [2001] Env. L.R. 38, referring to *Murdoch v. Glacier Metal Company Ltd* [1998] Env. L.R. 732; and *Westminster CC v. McDonald* [2005] Env. L.R. 1, p. 9. The Case Commentary, however, argued that the issue remained alive, and had not been properly addressed in *Godfrey*. The cases referred to the case law of the European Court for Human Rights: *Kokkinakis v. Greece*, Judgment of 25 May 1994; *S.W. v. the UK*, Judgment of 22 November 1995.

The main comparative remark in this context is that the matter is recognised in all the studied legal orders, as sharpening the demands for precision. It may nevertheless be noted that the English case law which perhaps involves the least procedural safeguards for precision is also the one involving the most severe sanctions. Moreover, it can be noted that the Swedish order comprises enforcement approaches of different degree of link to threat of sanctions. I would nevertheless argue that the demanded degree of specification in the enforcement orders does not clearly follow the degree of such threat, or the severity of the sanction. It seems the demands for precision are rather similar all along this spectrum. The context of sanctions also seems to reflect when such sanctions are only indirectly implied as a future possibility. This may lead to unnecessary command and control action, rather than directing the actors towards self-control and management. In view of the objectives and the fundamental principles of environmental law, this seems unsatisfactory. The reiterated emphasis of clear and precise regulation in the context of severe sanctions should therefore be reflected in a varying view of detailed regulation – and in less such particularity and top-down steering, where such sanctions are not yet part of the picture. The direction can subsequently be made more precise where warranted by issues of legality and the concrete threat of a sanction.

8.7 Concluding Remarks

In this chapter, a core rule of clear and concrete exercise of authority, and an administrative responsibility for precision of enforcement orders have been presented. I have discussed the problematic encounter of this perspective with the environmental law perspective of goal steering and actor responsibility. Environmental law enforcement practice in Sweden, the United Kingdom, and the Netherlands, have been studied in comparison. The combination of administrative safeguards of the individual's legal position, and the environmental law strive to make actors work effectively towards the aims of sustainability have been analysed. Some comparative observations have thereafter been raised for discussion in light of the analysed encounter of legal cultures. The grounds and consequences of the typical practice, and its handling of this encounter, have thus been critically analysed. The analysis is made with a Swedish perspective, but set in a comparative context.

All the studied legal orders state the core rule of clear and concrete enforcement, but the implementation and the interpretation of this rule differs. It is therefore interesting to mirror the Swedish discourse, its statements and the reasoning behind them, to this foreign discourse. It has been noted that the rule of precision of orders is often expressed in requirements for specification of precautionary steps and works in the enforcement notices. Such precision will to some extent mean that the authority investigates the situa-

tion to find out what must be done about it, and subsequently specifies normatively an order to do so. This is classic command and control. Environmental law, however, requires that an actor undertake self-control and is actively involved in the investigation and choice of precautionary measures. The enforcer's prime concern is to reach required or desired results and objectives in the environment, and to compel actors to shoulder their responsibilities. But the demand for precision of orders means that enforcers assume such responsibility rather than enforcing the actors' failure to do so. This is unsatisfactory.

The motives of demands for precision are founded on the notion of legal certainty – on clear and precise administrative regulation, which individuals may understand so as to avoid further involvement of the authorities – and sanctions – and thus look after their own interests and to defend themselves. The authority, moreover, has the functional role and task of ensuring sufficient decision-making information, and making the normative regulation of the actor's duties. It is argued that this function cannot be shifted on to the actor. But in environmental law this description is not entirely valid, since these responsibilities are to some extent shared. The authority does have the final say about what is demanded of the actor, but it should only exercise such power to the relevant extent. Room should be given for the freedom and responsibility of actors to control and optimise their own operations, also in the enforcement situation.

There are different ways and means of shifting responsibilities to the actor accountable in the enforcement situation. Some of them are: the ordering of blank abatement notices; prohibitions; limit values; preliminary enforcement steps of ordering duties to investigate and make suggestions; and to be able later on to serve an order specifying a solution. Prohibitions and blank orders may move the responsibilities over to the actor, and perhaps too much at the expense of legal certainty. Orders based upon limit values and the like seem to be the perfect, clear and precise, goal steering measure. This is also widely accepted. I have nevertheless suggested that this approach may not always be helpful or useful and might sometimes show cause for concern about the certainty of the actor, depending on the circumstances of the case. There is therefore a need for further communication between the authority and the actor, in light of these shared responsibilities. I have suggested the application of orders stating a range of alternative measures, but still leaving the choice to the actor as long as the stated result is attained. I have, moreover, suggested the possibility of making actors investigate and submit suggestions for precautionary measures. This is part of their self-control responsibilities and can be enforced. The authority would still retain functional responsibility for the final normative regulation of duties. But the actor would be involved in the regulatory procedure and carry his responsibilities – with support of the enforcement authority.

Finally, a contextual approach to clear and precise enforcement has been discussed. I have proposed the application of a more functional and purposive assessment of the certainty of the addressee in the individual case. Considerations of the enforcement context and the kind and professionalism of the activity can be made here. The context of sanctions should also influence the assessment so that more specified normative direction is given in situations of an actual threat of a strict sanction, rather than direction of the actor in the pre-enforcement stages and where sanctions are not yet involved. The discussed considerations should provide more appropriate and relevant protection of the addressee's legal certainty, without unnecessary formalism that may be exploited by non-cooperative actors. Such assessment may to some extent also mitigate the alleged over emphasis of the formal legal certainty of the addressee, at the expense of other interests.

9 Enforcing Environmental Responsibilities – Concluding Words

9.1 Remembering the Journey Plan

This thesis has now reached its conclusion. Journey's end often feels more enjoyable when one takes the time to recapture some of the experiences of the way. Such recollections will never quite communicate the full adventure, with all the experiences and insights gained. Concluding words will nevertheless provide an opportunity for reflecting some of them. In this chapter chosen observations and results of the analysis will be recollected and reflected upon. Remarks will be made on the shared interests and responsibilities of environmental law, and on the enforcement of environmental law. Such comments are made from the perspective of the legal certainty of the actor, as well as that of effective enforcement of the actor's responsibility. I shall discuss comparative observations of a more purposive assessment of legal certainty, and the impact of some aspects of the regulatory system's structure and organisation on proper administrative enforcement. These remarks reflect the observations and conclusions made in this thesis. They should, however, not be taken as a summary of the thesis discussion as a whole.

First of all, the conclusion of any thesis warrants a reminder of the aims and tasks of the work – the journey plan.²⁰⁰¹ The general objective of this thesis has been to investigate how environmental law principles and objectives challenge the existing structures and principles of administrative enforcement law. The more specific aims have been to study the integration of environmental law in the enforcement procedure and to investigate administrative law structures that might delimit such integration, as well as discussing some appropriate reinterpretation or reconstruction of such structures of limitation. These tasks have been realised in two parts – firstly, the recounting of the relevant enforcement system and the administrative and environ-

²⁰⁰¹ Discussed in Chapter 1 and summarised in Section 1.3.

mental law traditions that support it.²⁰⁰² Secondly, the enforcement of environmental law responsibilities has been analysed more closely, centring on information responsibilities.²⁰⁰³ This study has been comparative in its investigating the Swedish, English and Dutch systems. The focus of the analysis – and of these concluding remarks – is nevertheless on the Swedish enforcement system.

9.2 Comparative Remarks

9.2.1 Similar Basics and European Law

Comparison of the Swedish, English, and Dutch systems for the enforcement of environmental law has shown that the systems are in many ways similar. The countries of all the compared legal orders are members of the EU and have ratified the ECHR. This basically means that they have much EU environmental law in common together with the demands for its effective enforcement.²⁰⁰⁴ When it comes to public law, the systems have different traditions. The common law system of the United Kingdom stands out, with its different doctrine and terminology of constitutional regulation and administrative law principles.²⁰⁰⁵ All of the studied legal orders, however, centre on the principles of the Rechtsstaat – or the rule of law. These fundamental doctrines have been studied and compared and found to have many basic similarities.²⁰⁰⁶ The administrative law orders are also increasingly drawn towards a European administrative law, containing constantly developing principles of good administration, protection of fair trial rights, and so forth. The systems, therefore, are largely comparable.²⁰⁰⁷

9.2.2 Environmental Law; Noting the Comprehensive Scope of the Swedish Environmental Code

When it comes to environmental law regulation its history has similar traits. Modern environmental law – especially pollution control – has been characterised by the establishment of concessional systems, the permit regimes. These procedures, as well as environmental law regulation at large, have

²⁰⁰² The enforcement systems of the Sweden, the UK, and the Netherlands, have been presented in Chapters 3–5, and discussed in comparison in Chapter 6. In Chapter 2 the encountering legal fields – and cultures – have been elaborated.

²⁰⁰³ Chapters 7 and 8.

²⁰⁰⁴ Sections 1.2.4, 6.1.2, 6.2.1.2, and 6.3.1.

²⁰⁰⁵ Section 4.2.

²⁰⁰⁶ Summarised in: Section 6.2.1.1.

²⁰⁰⁷ Section 6.2.1.2.

grown first sector by sector, and then developed towards a more comprehensive and integrated regulation of environmental law.²⁰⁰⁸ I have found that in comparison with Dutch and English environmental law, the Swedish Environmental Code has a wider application and a more comprehensive approach to environmental regulation. This is illustrated in particular by its directly applicable general rules of consideration.²⁰⁰⁹ Another feature found in all the systems, but having a wider and more central role in Swedish environmental law, is the focus on actor responsibilities and enforced self-control. Environmental management is driven by each and every actor, with the public authorities assuming a secondary and supportive role. This approach is based upon older Swedish law on pollution control and water installations, but was made generally applicable with the Environmental Code reform.²⁰¹⁰ This comparative observation supported the subsequent analysis of enforcement of information responsibilities. In that investigation I found that while Swedish environmental law enforcers had more extensive and widely applicable powers to involve the actor in the control procedure, the main method for compliance control in the Netherlands and United Kingdom seemed to be focused on inspections and command and control – at least outside the permit regulation.

9.2.3 Enforcement of Environmental Law – Structural Differences

The enforcement systems of the compared legal orders manifest some interesting differences. First of all, the Swedish system separates the permitting authority and the administrative enforcement authority's compliance control. In a way this signifies a separation of normative regulation and the control of compliance with these rules. In the Dutch and English systems permitting and compliance control are generally handled by one and the same authority. This means that they have a wider range of regulatory approaches at hand. The Dutch and English enforcement authorities can regulate through review of the permit; for example, in adding on monitoring and reporting requirements, or by revoking a permit. The English authority, moreover, has powers to prosecute environmental offences. Non-compliance with an administrative order will constitute a criminal offence, which the authority will often prosecute. Furthermore, these features make the English administrative authority's powers quite strong and comprehensive in comparison with its Swedish counterpart. Generally, this access of the Dutch and English administrative enforcers to further regulatory approaches provides enforcers with more comprehensive duties and stricter sanctions.

²⁰⁰⁸ Sections 3.3, 4.3, 5.3.1, and 6.3.

²⁰⁰⁹ Section 6.3 and 7.3,

²⁰¹⁰ Sections 3.3.1, 3.5.2, 6.4.1, and 7.3.

The administrative order in some form, however, is the typical administrative enforcement instrument, supported by pre-enforcement communication and different kinds of soft-steering. Its function is to steer actors in the direction of compliance with environmental law – to direct their behaviour. English and Dutch enforcement orders are always coupled with the threat of a sanction. In the Swedish system an order is only coupled with a conditional fine when this is deemed necessary to steer the addressee. All the enforcement systems have now introduced different forms of punitive monetary sanctions which are accessible to the administrative authorities.

In conclusion, the instruments and purposes of the different legal orders are essentially similar. The systematic structure is nevertheless different, as is the scope of environmental responsibilities, and the Swedish focus on enforced self-control. This suggests a very different enforcement law practice. These differences have led to the study of differences and similarities in the enforcement approach – on how enforcement powers are applied, and whether or not the different structural and ideological cultures have visible effects on administrative enforcement practice. I have chosen to focus this analysis on the enforcement of information responsibilities, which are more pronounced in the Swedish system. Some comment on these matters is therefore now appropriate with main focus on the analysis of the Swedish order, combined with some comparative remarks.

9.3 Common Interests and Shared Responsibilities

9.3.1 Environmental Responsibilities

A fundamental issue of this thesis is that of shared environmental responsibilities.²⁰¹¹ Environmental law and policy involve wide state responsibilities for protecting the environment and realising environmental goals. These responsibilities are established at all levels of law – from international declarations through EU law and national constitutional law, to enforcement policies. There is therefore a duty for enforcement authorities to ensure environmental protection and to strive to achieve and maintain sustainability. They must thus subsequently enforce environmental law effectively.²⁰¹²

These environmental responsibilities are shared with environmental actors – each and every person who acts in some way that has some significance for the environmental objectives. Even though public authorities have a leading role in ensuring and furthering the necessary preconditions for such work, sustainable development and resource management should, according

²⁰¹¹ Section 1.2.1.

²⁰¹² Remember also Section 1.2.4.

to valid environmental law, rest on these actors. Individual actors should subsequently formulate their own environmental policy strategies based upon the framework and platform of environmental legislation. The actor's responsibilities thus include duties to ensure proper knowledge, to investigate the activity in question, its environmental effects, and the appropriate precautionary measures to be taken, and so forth, but furthermore to prove to the public authorities concerned that it is conducted in compliance with the law. This responsibility is more pronounced in the Swedish system, where legislation and preparatory works emphasise the focus on self-control and active involvement by the actor in the constant investigation and improvement of the particular environmental work.

These shared environmental responsibilities are somewhat different from the common perception of individuals seeing to their own interests, with the public authorities pursuing the more general "public interest". The sustainable development doctrine of common and shared resources and the sustainable and equitable management thereof, entails a sort of extended intergenerational and intragenerational "neighbour" relationship. Any person significantly affecting the environment must respect the legitimate claims that other persons or collectives have in relation to the well-being of that environment. Actors have a direct responsibility to protect the interests of others.²⁰¹³ This is different from the state protecting "the public interest" as a general objective of the relevant law or policy. I have suggested that the actor's responsibility, emanating from the idea of common and equitably shared environmental resources, is so fundamental that one can hardly speak of individuals being free or autonomous in their environmentally hazardous activities. Their environmental responsibilities will always follow. This reasoning is linked to the claim for environmental rights and a contemporary fundamental rights discourse on competing rights and legitimate interests. In this complex picture, environmental interests are allowed to influence the conception of established rights – both through legitimate infringements and the development of the conception of these rights in itself.

9.3.2 Responsibilities for Proper Administration

Despite the individual and decentralised environmental responsibilities, public authorities will inevitably need to ensure compliance with these actor responsibilities. The administrative enforcement authorities inspect and supervise activities and impose control measures on environmental actors, thus steering them into compliance. Such measures include soft-steering through information and advice, but also by way of authoritative orders, coercion, and sanctions. The exercise of this kind of public authority in the enforcement of environmental responsibilities will be governed by rules and princi-

²⁰¹³ See: Sections 2.3.1.4, and 7.3.2.

ples regarding proper administrative procedure.²⁰¹⁴ The purpose of this essential administrative procedural law is to safeguard the appropriate realisation of public tasks, and the legal certainty of the individual against the excessive and arbitrary exercise of public power. The authority therefore has procedural responsibilities of somewhat different purpose and aim than their environmental responsibilities. These responsibilities are rooted in the Rechtsstaat doctrine and demand that the authority shows legal pedigree and ensures the appropriateness of its exercise of power. This entails duties for investigation and proof, and for making clear and correct normative decisions. These duties are generally not shared with the actor.

The case of administrative enforcement of environmental law will thus involve different kinds of responsibilities. Environmental responsibilities are held by both the individual and the public authority. The responsibility for proper administration is exclusively held by the public authority. The authority and the actor have different roles. It is essential for proper and effective enforcement that these roles and responsibilities are appropriately distinguished and respected. I have found in my analysis that this essential structure is not always appropriately respected.²⁰¹⁵

9.3.3 Responsibilities for Information in the Enforcement Procedure

The problem then, in the context of this thesis, is that the environmental responsibilities and the responsibilities for proper administration both involve responsibilities for information – for the decision making materials. These seem to overlap and thus cause conflict. Case law involves the reasoning that the investigation is an administrative task that cannot be shifted on to the actor, that this conflicts with the principle of legal certainty. It seems that in such conflicts the arguments for legal certainty have a stronger position and will supersede the actor's responsibilities for information. This is unsatisfactory in view of a wider concept of legal certainty, involving the realisation of the objectives of relevant law and policy, and the protection of the legitimate interests of the public and of other individuals and collectives. Burdens of investigation and proof, and so on, in the enforcement procedure should be distributed between the authority and the actor more appropriately, with conscious regard to the underlying purpose and effect of the relevant information responsibilities. I have analysed several enforcement situations in light of such considerations. Some of them will now be discussed.

²⁰¹⁴ Sections 2.2, 7.2, and 8.2.2.

²⁰¹⁵ Sections 7.8, 8.2.3.1, and 8.7.

9.4 Environmental Enforcement and Safeguarding the Legal Certainty of the Individual

9.4.1 Enforcement under Principles of the Rechtsstaat

It should first of all be recognised that no matter how environmental responsibilities are distributed between the state and the individual, the exercise of public authority towards an individual will in the Rechtsstaat always be governed by principles and procedural rules protecting legal certainty. Public power must always be provided by law, and the exercise of such power must keep within the purpose and intent of the thus prescribed competence. It is the authority's responsibility to make sure that this fundamental rule is respected. This means that it must investigate the case in question and consider all the relevant information – and disregard irrelevant information – and demonstrate in various ways that it has done so. This is accomplished through transparency, by clear and concrete communication stating reasons for decisions, etc. This makes it possible for individuals to defend their rights and interests towards the public authority, and for other public bodies to impose control over the proper exercise of authority.

9.4.2 The Authority's Information Responsibility – Ensuring and Manifesting Legitimacy of Exercise of Power

In the enforcement of environmental law the authority will thus have investigatory duties. The general inquisitorial principle of Swedish administrative law holds that authorities must ensure sufficient information for proper decision-making, and that they must prove that they have made the right decision. This burden is flexible the fact that individual cases and their contexts differ from one another. But as a rule it is focused on the authority showing legal support for intrusion into the individual's freedom.²⁰¹⁶ In the environmental case this basis comes into a different light, since actors have a basic duty to know and investigate, to monitor and actively improve their precautionary work. They also have the general duty to prove that they are complying with environmental law – including their various precautionary responsibilities.²⁰¹⁷ Persons with a private sewerage system on their property must know how it works, what environmental effects their remaining emission is causing, and whether the installation is functioning appropriately. In case of poor functioning they should investigate how the situation could be improved and what environmental impact the improvements would entail, and so on. And they should in the enforcement situation show the authority evi-

²⁰¹⁶ Section 7.2.

²⁰¹⁷ Section 7.3.

dence of their appropriate treatment of the sewage water under environmental law.

The authorities can therefore to some extent rely on the actor to ensure sufficient information, and to prove that there is – quite conversely – no reason for the enforcement authorities to intervene. But despite this reliance on the actor's involvement and standing the risk for lack of evidence, the enforcement authority will still have to ensure sufficient support for initiating action.²⁰¹⁸ Based upon the example above, they must ensure that the sewerage in question is actually covered by the relevant environmental law, and that it warrants enforcement action. Such warranting information may be that the sewerage system is too old and that there may have been eutrophication problems or that neighbours have complained of trouble with bacteria in their well. If the authority finds such warranting indications, then it may ask the actor for the relevant information to base further assessment of the installation's lawfulness, and the grounds for imposing enforcement orders and sanctions on to the responsible actor. If the information shows that the sewerage is not working to satisfaction the authority may go further and require precautionary measures and/or stop and prohibit the emission of sewage water. Such enforcement action is also warranted when the actor does not know whether or not the sewerage is working and therefore cannot prove legal compliance. The actor has the burden of proof and therefore stands the risk of lack of information. This seems strange in the light of the administrative responsibility for showing legal pedigree for the exercise of authority against the individual, but it is anchored in the shared environmental responsibilities as expressed in the precautionary principle, and in the actor's responsibilities for information regulated in the Environmental Code and legitimised by the protection of the interests that are common and shared with many others.

The Swedish Environmental Code applies widely to all acts or activities which have significance to the aims of the Code. Such significance is linked to the principles of prevention and precaution, and entails management and regulation of risks. Administrative enforcement powers apply equally widely. It is therefore the risk of environmental impacts covered by the Code which warrants enforcement action. The enforcement authority will thus generally have to ensure that there is sufficient indication of such risk. If that threshold is reached, it has shown legal pedigree or enforcement, and the actor's responsibilities within the regulatory procedure are triggered. The authority's procedural responsibilities are still theirs, but they are made lighter by the regulated responsibilities for the actor, and by the preventive and precautionary approach of environmental law regulations.

It should be noted that it is commonly not enough to reach the threshold when the case is initiated. The authority has the responsibility for leading the

²⁰¹⁸ Section 7.6.4.

regulatory procedure and bringing it to conclusion with a decision. It cannot leave the regulatory procedure to the actor completely, even when the actor does all the actual investigation. During the continuing procedure, and in the concluding decision, the authority will again have to ensure appropriate support for its action.²⁰¹⁹ But it only leads the procedure and ensures its sufficiency with regard to the environmental law context. The actor still has the responsibility for producing sufficient information, and stands the risk for not doing so.

9.4.3 Clear, Concrete, and Foreseeable Regulation

Another aspect of the Rechtsstaat doctrine is that the actor is fundamentally free and autonomous in relation to public authorities and only has to tolerate such intrusion by the authority that is warranted and clearly prescribed by law – and thus democratically based upon legislative authority. Individuals must be able to foresee and understand their duties under the law so that they can avoid intrusion from public authorities into their fundamental freedoms and autonomy. They must also be able to defend themselves against exercises of power which do not respect such freedoms. This validates clear, concrete, and foreseeable regulation of the actor's duties under the law.²⁰²⁰

Environmental law is goal and result oriented. It is directed at reaching more or less specified environmental quality standards or other results in the environment. Moreover, environmental law is characterised by the approach of avoiding future problems – prevention and precaution.²⁰²¹ This means that the actual duties are not always clear, concrete, and foreseeable. Moreover, much information may be needed to ascertain the duties. The duties for information lie heavily on the actor. Actors will therefore have fundamental duties of finding out for themselves what their duties are. This may be held to conflict with the demands for legal certainty.

Some examples of such duties for actors to find out for themselves what they need to do can be seen in the application of blank abatement orders in English statutory nuisance law.²⁰²² These will tell the actor what the relevant nuisance is and ordering a solution to the problem, but not how to do it. These kinds of duties are generally not accepted in the Dutch and Swedish systems. However, the Swedish enforcement system involves a practice of ordering prohibitions where it is not clear what the actor should do to bring the activity into compliance with environmental law.²⁰²³ It is clear to the actor that he or she cannot carry on the activity in the current manner, but not what should be done to comply. Actors have to find out for themselves. The

²⁰¹⁹ Compare: Section 7.5.3.3.

²⁰²⁰ See: Section 8.2.2, compared to Section 2.2.1.

²⁰²¹ See: Section 8.2.1, compared to 1.1, and 2.3.

²⁰²² Section 8.4.4.

²⁰²³ Section 8.3.5

ordering of limit values may sometimes have similar effects, since the essence of such a message may in some cases only communicate the present unlawfulness, not how to do something about it.²⁰²⁴ These kinds of enforcement orders all shift the burdens of finding out what to do on to actors. This is quite appropriate in view of their environmental responsibilities, but may be criticised from the perspective of clear, concrete, and foreseeable regulation. The message might be clear on what the problem is, or of the illegality of the present situation, but not on how the actor should act in order to avoid the illegality. The purpose behind the demands for clear and certain regulation may therefore not be fulfilled through these kinds of enforcement orders. This is the reason why orders merely demanding the actor to “take necessary precautionary measures” are not accepted in Swedish legal practice. But it should be noticed, using the above chosen example, that from the perspective of the actor an ordered prohibition of discharge of sewage water because of a malfunctioning sewerage installation, will generally have the same meaning as an order to “take the necessary precautionary measures” to put right the malfunctioning sewerage works. The difference in clarity and precision seems formalistic and unsettling.²⁰²⁵

9.5 Holding Actors to their Responsibilities – Room for Improvement

9.5.1 Introduction

Departing from the conclusion about problems with clear and foreseeable regulation of environmental responsibilities, I have set out to investigate the possibility for enforcers to rely on the actor’s responsibilities for knowledge, investigation, and proof. I have suggested that there are considerable grounds for such reliance. Environmental legislation provides widely applicable and extensive duties for knowledge, investigation, self-control, reporting, documentation, and proof. These responsibilities should not be taken over by the administrative authority in the enforcement procedure. I have argued the importance of a communicative enforcement procedure, and a more purposive assessment of legal certainty in view of the actor’s information responsibilities.²⁰²⁶

²⁰²⁴ Section 8.3.3.

²⁰²⁵ The matter is discussed in Section 8.7.

²⁰²⁶ Summarising discussions are found in Sections 7.8, 8.2.3, and 8.7.

9.5.2 Communicative Approach

Administrative procedure is ideally a communicative approach, where the authority's case handling and decision making preparations are characterised by transparency and consultation, and the concerned parties have appropriate procedural access to make statements and defend their interests. Such a communicative procedure might provide sufficient support for the above-discussed shift of actor responsibilities. The Swedish courts have often argued a kind of step by step procedure, where the authority leads the enforcement procedure, but the actor is involved through specific orders to produce information.²⁰²⁷ The authority will subsequently assess the thus produced information and make the authoritative decision on what the actor should do. This maintains the authority's administrative responsibilities, but at the same time involves the actor in the regulatory procedure. Based upon the studies of legal practice and the principal purposes behind the procedural safeguards, it seems that this step by step approach is an appropriate foundation in many situations. This is well in line with the general administrative law inquisitorial principle. My critical view is that the environmental law enforcement case should provide more room for the actor's involvement in the procedure – thus holding him to his information responsibilities. I have suggested a more purposive assessment of the actor's certainty, and of the reasonableness of the demands for information, as well as the legitimate demands for new ways of actor involvement. These suggestions aim at keeping the functions and roles of the authority and the actor, while optimising effective enforcement and legal certainty.

9.5.3 Bringing in Actor Responsibilities in the Assessment of Burdens

9.5.3.1 Pre-regulated Responsibilities Should Reflect in the Reasonableness of Enforced Duties

In the thesis analysis, I have discussed several situations where the reasonableness of the information burden is in some sense assessed. Such assessment is made in the establishment of reasonableness in the enforcement authority's request to the actor to produce information and undertake investigation.²⁰²⁸ The standard of proof required may also include an indirect indication of such assessment²⁰²⁹. These assessments of reasonableness will generally function as a factor that delimits demands for knowledge, investigation and proof from the actor. I have suggested that the consideration of the actor's fundamental responsibilities – for information and precaution –

²⁰²⁷ See: Section 7.5.3.3, and 8.6.4.1.

²⁰²⁸ Section 7.5.3.

²⁰²⁹ Section 7.6.

should also be made. Such responsibilities may support a different perception of reasonable burdens of knowledge, investigation and proof. For example, in MÖD 2006:60 the enforcement authority had found indications that the actor did not have sufficient knowledge and control of certain stored materials. The materials consisted of matters other than under the conditions for the activity, and the actor did not seem to know anything about it. Clearly, it was the actor's responsibility to know of such failure in the control of the activity. This duty was clear, foreseeable, and deemed reasonable. But when the enforcement authority demanded the actor's remedying of this lack of control by investigating the stored materials, these burdens were held to be unreasonable on appeal. It was held that the enforcement authority should take the step by step approach and to first investigate the risk itself and then lay limited investigatory duties on the actor, as reasonably warranted by any discovered risks. This approach contradicts the upholding of actor responsibilities, as the pre-regulated degree of informative duties are in fact lowered in the enforcement situation. The problem has actually been caused by the actor's non-compliance with these duties. If enforcement entails the authority taking over these burdens, then there is little incentive for compliance. I would suggest that the context of clear pre-regulated duties for knowledge and control warrants a different view of how much investigation may be reasonably required of the actor.²⁰³⁰

9.5.3.2 Purposive and Contextual Test of Certainty

The fundamental actor responsibilities for self-control, knowledge and investigation, and the like, should influence the assessment of the addressee's legal certainty – foreseeability and clear and precise communication of his or her legal duties. Developments in English case law reveal a move towards a purposive and contextual test of legal certainty, and away from “formalism”.²⁰³¹ From the perspective of legal certainty, and of appropriate and effective enforcement of the addressee's duties, this seems an appropriate option. It entails reasonable assessment of the actual position of the actual addressee in the individual case – and whether it can reasonably be expected that they foresee, understand, and carry out their duties.

What would such an approach entail in practice? First of all, the pre-regulated duties to control and investigate the activity, as in the above exemplified MÖD 2006:60, may be considered as indicators of what the actor could reasonably be expected to know or find out. Secondly, the pre-enforcement communication may be considered in the assessment of the actor's position. At least clearly documented such communication may be

²⁰³⁰ See: Section 7.5.2, etc.

²⁰³¹ Stemming largely from the case of *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 Q.B. 196. See: Sections 8.4.3, and 8.6.5.

considered in the assessment of the actor's foreseeability and understanding of their duties.

Moreover, enforcement communication to a professional operator of a large industry may be formulated differently from that to a private individual. An operator of an industry is expected to have considerable technical knowledge and insight into the facilities. It might be expected that it understands technical terms, and functions standards, as well as complex maps and instructions.²⁰³² Private persons will have to have more concrete and tangible instruction on what they need to do. This then ties to the distinction of the environmental responsibilities and the administrative responsibilities regarding proper procedure and safeguards of legal certainty. Even though it is the environmental significance that should determine the extent of precautionary duties, the formulation of such duties may be different to different persons – in view of the preconditions for the communication. Enforcement against a private person might warrant further and different safeguards of legal certainty.²⁰³³ Little explicit statement of such considerations can be detected in environmental law practice. In MÖD 2004:67 the Court made some statements about the inappropriateness of shifting further information duties over to the actor. The normative regulatory duty of the authority, and its procedural responsibilities were thus – at least implicitly – stressed in cases involving a private person. I believe that such considerations may be warranted, and they may be supported by the argued purposive and contextual assessment of legal certainty in the individual case. It should, however, be remembered that the other side of the coin means that the professional actor should be expected to be more knowledgeable of his activities, of their environmental effects, and his precautionary duties. Enforcement against such actors may thus shift more burdens of information on to addressees and expect them to understand what they entail.

9.5.3.3 Orders to Make Suggestions

One specific matter that has been discussed is that of ordering an actor to investigate possible solutions to a discovered environmental problem – appropriate precautionary measures to remedy non-compliance. Such orders have not been accepted in Swedish enforcement law. Neither have I found such orders in the other legal systems studied. Nonetheless, I have argued that such orders should suit well the Swedish system of emphasised actor environmental responsibilities of enforced self-control.²⁰³⁴ This steering by the enforcement authorities accords well with the concept of shared environmental responsibilities and administrative procedural responsibilities,

²⁰³² See, for example the English case: *Buckinghamshire CC v. North West Estates Plc* [2003] J.P.L. 414.

²⁰³³ Discussed in Sections 7.5.3.5, and 8.6.5.4.

²⁰³⁴ See, mainly: Sections 8.6.4.2, and 8.6.4.4

which should not be shifted to the addressees of enforcement. With a simplified illustration of the suggested enforcement procedure it can be noted that the authority first acts on an indication of a relevant risk – a complaint, observations made during inspections, etc. It makes an introductory investigation to establish that there is sufficient indication of such risk. It then addresses the responsible actor with requirements for information needed to assess the problem – the risk and the cause of it. When this is starting to become clear, some investigation and assessment will have to be made to determine the best way to remedy the problem. This is where valid law draws the line. It is held that the authority cannot lay the responsibility for these investigations and assessments on the actor, and that it is the authority's task to decide what must be done – or rather: what the actor's legal duties are. I have found no relevance in this argument, as the normative decision of the legal duties is still in the hands of the authority. The added investigation that is demanded of the actor is the same thing that the actor's responsibilities for information already state. The duties for knowledge and investigation are inherently tied to self-control and to the dynamic and continuing duty to take necessary precautionary measures. The responsibility for information involves more than just producing facts and documents that the authority thinks they need. It must also have knowledge and insight, and be actively involved in solving the problems. Its investigation will include this perspective, and enforcements orders asking for such investigation do not provide them with other or further duties than before.

More importantly, the authority keeps the normative regulatory role, as it will still have the final say about what measures should be taken. The authority should then assess the actor's suggestions and order them to undertake one of them. The procedure can be paralleled to an authorisation procedure, where the actor presents the information and proposes how they are going to undertake necessary precaution. The authority then assesses and authorises the activity – it finds the suggestions lawful and appropriate. If not, it can make further investigations itself, or ask the applicant to do so, assess and decide on that information, and so forth. It is sometimes argued that actors cannot be made dependent on the future decision of an authority. They should not be forced to take action, the authorisation of which they are uncertain. However, this argument does not hold either, as the duty they are required to comply with is not uncertain. It is their duty to investigate that is enforced, not their duty to undertake certain steps or works.

Again, this reasoning shows the essence of distinguishing the different environmental and administrative duties involved. The authority's normative regulatory duty to tell actors clearly what their duties are is kept, as is its duty to secure legal pedigree for its decisions. The environmental duties for knowledge, investigation and self-control and for taking necessary precautionary measures are, however, primarily the actor's responsibility. With the suggested enforcement method of making the actor investigate and suggest

precautionary measures and solutions, this order is also retained. The authority's role for these matters is kept in supporting, but secondary to, the actor's responsibility. Used properly, this method represents a good way of safeguarding all the intentions of the procedure.

9.6 A Functional and Pragmatic View of the Context of Sanctions

9.6.1 Acknowledging the Range of Enforcement Cases

One consideration that is essential in the assessment of appropriate safeguards of legal certainty and procedural propriety is the context of sanctions. The public power to impose sanctions on the individual is basically the most intrusive exercise of power and infringement of the individual's freedom. More so the more severe the sanction is considered. Criminal procedure is featured by stricter demands for safeguards of the individual's legal certainty – legality, foreseeability, and fair trial rights; such as the presumption of innocence, the right to defence, the right to remain passive, and so on. To some extent these safeguards will also apply to the administrative procedure.²⁰³⁵ First of all, some administrative sanctions are seen as being analogous to criminal sanctions. These will typically have a repressive and punitive purpose and character – the Swedish environmental sanction fee, the Dutch bestuurlijke boete, the English monetary penalties (FMP and VMP). They are therefore surrounded by added procedural steps and safeguards.

This analogy with criminal procedure does not apply to most administrative coercion or sanctions, which have the purpose and character of steering the actor's behaviour to comply with law, and to better further its objectives – conditional fines, administrative coercion, stopping an activity, revoking a permit, and so forth. The context of sanctions will, however, still be decisive for the assessment of appropriate procedural safeguards and administrative responsibilities. The interpretation and application in the individual case of the principles of good administration and of the Rechtsstaat principles in general, reflect a sliding scale of administrative responsibility. This can be seen in the demands for investigation and proof. At one end there is an individual's application for a benefit, and at the other an enforcement of a severe sanction – such as the awarding of a significant monetary fine. In the latter the authority has considerable investigatory duties, and a heavy burden of proof. In the former, these burdens can largely be laid on the applicant. This perception is common to all the studied legal orders.

²⁰³⁵ See: Sections 7.7 and 8.6.6.

Despite the general application of such a sliding scale, the range of the scale is influenced by the legal context in which the administrative procedure is undertaken. Environmental law is generally characterised by the protection and furthering of important (“public”) environmental interests. Significant adjustments to the scale of legal certainty of the responsible individual can be noted - for instance, in the English environmental offences, illustrated in so-called “absolute liability”,²⁰³⁶ and where requirements to show culpability are lower. Moreover, in the Swedish system, we have the all-important shift of the burden of proof in administrative enforcement cases, as an expression of a precautionary approach.²⁰³⁷ As discussed above, this will thus lighten the burden of investigation and proof of the authority, so that it will only have to show sufficient indication of regulated risk. It can be difficult to draw certain conclusions from the individual cases on the weighing of evidence. Such matters are seldom explicitly compared with other situations, or even commented on in more general terms. It is nevertheless somewhat safe to say that the context of a significant sanction will – and should – demand more clear communication duties, and a higher standard of proof. However, in the environmental law context, the range of the scale should be different. It starts from another position, where actors are deemed to have considerable responsibilities to protect the interests of others, and have to show that they are doing so in order to have one’s individual interests protected by the legal system. In a way the procedure draws closer to that of applying for a benefit. Causing environmental risks is not free, and the exercise of freedom with such effects is conditional on basic responsibilities to protect the legitimate interests of others.

I have argued in this thesis that the commonly referred flexible standard of procedural care and application of certain Rechtsstaat principles could be better reflected in practice.²⁰³⁸ In the Swedish order there is a range of administrative enforcement action, in terms of severity or intrusiveness. Not all enforcement measures are coupled with a sanction, and these sanctions are not always punitive in character, or that severe (in terms of the amounts of fine). Revocation of permits is hardly ever used, though stop orders and prohibitions could be applied in ways having similar severe effects for the individual. However, I have not been able to draw from Swedish environmental practice any clear parallels to this flexibility. The express statements of consideration of a sanctions context will sometimes even use the sanctions argument so as to require extended procedural safeguards in all enforcement situations – because they may in the future be subject to an actual threat of sanction.²⁰³⁹ This goes too far. The authority must be clear in its communica-

²⁰³⁶ See: Section 4.5.8.3.

²⁰³⁷ See: Section 7.3.10.

²⁰³⁸ Section 8.6.6.

²⁰³⁹ See, for example: Decision of the Parliamentary Ombudsman of 10 March 1997 (dnr 1857-1996).

tion of the legal effects of their acts when directed at an individual, but a piece of non-binding advice should not have to be given with the same procedural safeguards as for a decision to impose a severe penalty. The procedure must make room for a more flexible and communicative direction of behaviour, otherwise all communication from the environmental authorities would be in the form of detail regulation and command and control. This is generally not found to be the most effective or appropriate way of steering.

In a way, the specific environmental law procedural demands, such as the shifted burden of proof, can be seen as substantive. It sets the standard of what the authority must investigate and prove. Similarly, an absolute criminal liability sets the standard of what the prosecutor must prove. It does not take away the burdens of investigation and proof. This brings us back to the starting point: environmental responsibilities are shared, while administrative procedural responsibilities lay mainly on the authority. The authority has the duty to investigate and prove, and more so the more intrusive a decision is prepared. It must still only prove a risk – up to the threshold of showing its competence to act. But the actor's duties of investigation and proof are thereafter triggered. Surely the context of an administrative sanction of some kind will demand clearer indication of the risk, and clearer communication of the duty (the non-compliance with which is coupled with a sanction), etc. Nevertheless, the context of a sanction should not overtake the substantive demands prescribed by the precautionary approach and the substantive actor responsibilities of the Environmental Code. Actors still have to investigate the environmental impact and risks of their actions, and show that they are complying with the law – even when an administrative sanction is involved. This is not a criminal procedure, and it should not be treated as one.

9.6.2 Meeting the Risk of Self-incriminating Effects

The information that an actor produces to the authority may be used as grounds for enforcement against him. This is a main purpose of the information duties. The actor thus becomes actively involved in the regulatory procedure. This works in the enforcement procedure, when the different environmental and administrative duties and requirements are carefully distinguished and the purposes and consequences thereof kept in mind. However, the context of sanctions will bring about a further problem, which is that of the risk of the individual being forced to incriminate him or herself, in a subsequent criminal procedure.²⁰⁴⁰ Enforcing the duty of actors to investigate their own environmental impacts may later on be held to have conflicted with the individual's right to fair trial. The protection against self-incrimination – or the right to remain passive – essentially connects to the fairness of criminal trial. When investigating the matter of these self-

²⁰⁴⁰ See: Section 7.7.6.

incriminating effects, the essential thing to establish is the relationship of the information duties and the criminal procedure. The scope of this procedure links to the prerequisite of “criminal charge”, which has been subject to a great deal of interpretation in practice.²⁰⁴¹ The basic interpretation is a temporal one. Before some qualified suspicion arises, the actor can be required to provide information that can be used in the enforcement of his or her compliance. After this point, the actor – the suspect – has a right to remain passive. But the drawing of this line of when a “criminal charge” has arisen is complicated by the interpretation of the prerequisite criminal charge. First of all, the definition of a procedure as “criminal” can be wider than the letter of the law reveals. Also administrative sanctions can be covered. It is furthermore up for interpretation as to when a suspicion is qualified enough to mean that a criminal enforcement procedure has started. Lastly, the freedom from self-incrimination may reach further back into the procedural time frame, depending on the way they are in fact subsequently used in the criminal procedure. When the evidence gathered with other purposes, in an authoritative administrative order, is then relied upon as criminal evidence, the subsequent effect is that the actor has been forced into self-incrimination.²⁰⁴²

It might be expected that the described perspective of incrimination is not the same perspective the administrative enforcement authority has in its exercise of functions under environmental law. It is mainly concerned with gaining sufficient information with which to steer the actor into compliance with the law – not to gather information to be able to convict and punish the actor in a future criminal trial. The consideration of the purpose of administrative investigation and enforcement of information duties is also found in the analysed discourse. Nevertheless, it seems difficult – or impossible – to predict and assess of the full impact of the administrative enforcement procedural steps on the protection of the individual’s right to remain passive in a later procedure (dealt with by other authorities). Having studied the issue in comparison with the Dutch and English orders, it seems that similar aspects of the matter have been discussed. In the English system the connection between criminal and administrative enforcement is even closer, as the administrative authorities also have criminal investigations and prosecution competences. In this system, however, it is left to the criminal trial judge to decide on the admissibility of evidence.²⁰⁴³ Judges are in a better position to assess the purpose and function of the evidence in question, and whether the person charged with a crime has been forced to incriminate himself. Evidence obtained in breach of the right to remain passive can thus be found inadmissible. Such a solution might well be argued to be the realistically

²⁰⁴¹ Sections: 7.7.4.1, and 7.7.6.4.

²⁰⁴² See: Sections 7.7.6.5–7.7.6.8

²⁰⁴³ See: *R v. Hertfordshire County Council Ex p. Green Environmental Industrial Ltd* [2000] Env. L.R. 426, and Section 7.7.6.4.4

most feasible answer in view of the complexities of the varying enforcement procedures with different purposes and the involvement of different authorities, perhaps over an extensive period of time. The environmental enforcement authority that collects information from an actor in a communicative procedure aimed at meeting possible environmental risks is hardly in a position to assess the potential use of such information in the future. The assessment of possible self-incriminating consequences should be lifted from these administrative authorities to the actual criminal procedure – that is, to a prosecutor or a trial judge. Otherwise, there may be a risk that the administrative authority is unnecessarily limited in its enforcement of information responsibilities. Alternatively, its enforcement may result in conflicts with the right to fair trial – and (formally) the officers of that trial can do little about it. They have to admit the evidence unfairly gathered.

Swedish courts have created a kind of safety precaution solution, meaning that the authority should not use conditional fines to coerce the production of information when it has reached the criminal charge point.²⁰⁴⁴ This seems unsatisfactory. First of all, there does not have to be a sanction tied to an administrative order to find it coercive. The addressee is still told they have a duty to comply. Secondly, this safety area only avoids the question of the reach of self-incrimination into the administrative enforcement procedure. The problem of determining the connection with a criminal procedure is still unresolved.

9.7 Better Regulation of Environmental Law

The environmental law systems of all the studied legal orders have in common the fact that they have over the last decades worked towards integration of environmental control. In the context of industrial installations, this is much tied to EU law requirements of integrated pollution prevention and control. But this is merely one aspect of the development of more comprehensive and holistic environmental management and control. In some ways, the Swedish Environmental Code has the widest scope. It applies to all actions and installations having an impact (or risk) of some significance to the purposes and aims of the Code. These purposes and aims refer to the protection of biodiversity and human health, and suchlike, but also more widely to sustainable development and generally formulated national environmental quality objectives. Subsequently, each and every person who does something that has some significant impact on these objectives is covered by general rules of the Environmental Code, including actor responsibilities for information.

²⁰⁴⁴ See: MÖD 2004:64 and Section 7.7.6.8.

Another aspect common to all the studied legal orders is that of deregulation and better regulation policies. There has, in the different legal orders, been different reform debates aimed at making environmental control more effective, resource-efficient and proportionate. In recent years, moreover, the better regulation movement has grown to be a dominant policy agenda, with its call for lessening the administrative burdens on business by 25%. These changes have meant that fewer environmental activities need an environmental permit, and if they do, the procedures of the permit regime are often slimmed down and coordinated. In the Swedish system the regulatory order has entailed a general adjustment of the regulatory system, pushing the regulatory demands further “down” in the system – activities earlier under permit obligation may just have to notify the activity to the enforcement authority, and some activities earlier under notification duty, are freed from such duty. It is, moreover, often the municipal authority rather than the County Administrative Board that is responsible for the enforcement – this means more enforcement tasks and duties for smaller local authorities.²⁰⁴⁵

What these changes mean for the topic of this thesis is that increasingly more environmental risks are regulated through administrative supervision and control only. Some consequences of this trend should be pointed out. First of all, the need for effective realisation of environmental objectives through administrative enforcement is accentuated. Effective control by the administrative enforcers is crucial to the protection of the environment and human health, and the achievement and maintenance of sustainable resource management and sustainable development. This shows the growing importance of the matters discussed, and of the role and preconditions for the authorities to carry out their work in general. I cannot escape pointing out that these enforcement authorities that carry such considerable responsibility for the realisation of environmental law and policy objectives are in general municipal boards, consisting of local politicians – often with very little resources (including legal expertise) and with wide responsibilities. If this institutional organisation is to be held on to, these enforcers need clear and accessible support and guidance if they are to undertake their tasks as well as they would generally wish.

A second consequence of the deregulation of permit obligations is that the duties of the individual actor will be pre-regulated – specified in advance – to a lesser degree than before. It may even be argued that there will be fewer duties for self-control and producing information for the regulatory procedure. In the permit procedure, both on application and reviewing the permit, the actor is expected to produce a considerable amount of information, to investigate and suggest precautionary measures, to assess environmental effects, and so on. Based upon the above-discussed sliding scale of proce-

²⁰⁴⁵ See: Sections 1.2.6 (Introduction), 3.3.2.5 (Sweden), 4.2.1.3, 4.3.1.3, 4.4.4, (the UK) 5.3.1.4, 5.3.1.4, (the Netherlands).

dural care, a great deal of the burdens of investigation and proof may be placed on the operator seeking the benefit of a permit. Moreover, the permit conditions will generally specify self-control, documentation, and reporting duties. General rules on such duties are often also more clear and precise for activities under the permit regime. In the Dutch and English systems, enforcement outside the permit procedure rests more on the authority's inspections and other investigation. This means that deregulation of permit obligations will also lead to general deregulation of information obligations. In the Swedish system there are general responsibilities for information, also beyond the permit regime. These general rules include the shifted burden of proof and powers for the administrative enforcement authorities to order actors to submit information and make investigations. Actors will thus have similar duties to those when they were regulated under the permit regime – at least in principle. I would nevertheless hold that the regulation through an order to investigate, for example, noted environmental risks will under general administrative law demand more procedural safeguards of the addressee's legal certainty. More investigation and proof will in general be demanded of the authority. The infringement of an order may seem unforeseeable to the actor, and there will be a greater need for specification of the duties in the order. These safeguards reduce the room for reliance on actor involvement in the regulatory procedure through their production of evidence and suggesting solutions, and so on.

One way of meeting this added need for considerations of legal certainty would be to regulate through more specified general rules. The general principles of knowledge and precaution, and more, will often be too widely formulated for actors to understand their concrete duties. It has to be translated into specific duties for individuals before they can be enforced. Under the Dutch order the deregulation of permit obligations has been paralleled by such general regulation – for different kinds of activities, and for different kinds of environmental issues.²⁰⁴⁶ Case law also holds that the general rules and permit regulation should be the main method of regulation. The general principle of duty of care should not, in the interests of legal certainty, be enforced directly.²⁰⁴⁷ To meet the general criticism against general rules for inflexibility in consideration of individual cases, such rules are supplemented by powers for the enforcement authorities to tailor the rules for an individual activity. I would argue that some general regulation of minimum precautionary measures supplemented by the power to regulate further or differently is warranted in the individual case, which would make enforcement easier and more effective for the authorities. It might also make voluntary compliance easier. The duties – at least some minimum requirements – would become more clear and foreseeable, while an individual step by step

²⁰⁴⁶ See: Sections 5.3.1.4, and 6.6.

²⁰⁴⁷ Section 5.3.3.

communicative regulatory procedure may be the best way to arrive at the best solution in the concrete and individual case. Nonetheless, one has to think of the added regulatory burdens of the often local authorities – that are sometimes very small authorities with less resources. I believe that environmental steering in general – and administrative enforcement in particular – will have to be made more practicable if the attainment of environmental goals is not to be placed in jeopardy. Therefore more specified general rules on environmental standards and responsibilities should be provided, including information duties or the reorganisation of the enforcement system so that larger entities of enforcement authorities will be responsible for the realisation of environmental law and policy – with the resources to do so.

9.8 The End of the Journey – Dialogues and Text

Those points of discussion will now be left to conclude this thesis. The described journey plan was indeed followed, and many interesting encounters and experiences were had on the way. I have analysed different dialogues in the administrative enforcement discourse. A concrete dialogue is that between the public authority and the actor. Behind this lies a more general dialogue between the administrative law and environmental law principles – or doctrines. These dialogues centre on the matter of common and shared responsibilities for the environment and public responsibility for safeguarding the Rechtsstaat. The analytical discussion of this thesis represents my contribution to the discourse on legal certainty and the enforcement of environmental responsibilities. Until now it has mainly been my own dialogue with the legal texts. With these concluding words, however, this private affair stops. My words become a text inviting the reader to an own encounter. So, even though this thesis has reached its end, I hope the dialogue continues.

Sammanfattning

Del I Avhandlingens ämne och form

Inledning

I denna inledande del placeras avhandlingen in i sin kontext. Vikten av genomdrivandesystem sätts in i en systematisk kontext av miljöstyrning och vikten av miljöförvaltningsrättslig forskning framhålls inom en miljöforskningskontext. Mötet mellan miljö rätt och offentlig rätt utvecklas här, vilket också innefattar europarättsliga aspekter.

Kapitel 1 Introduktion till avhandlingen – vad, varför och hur?

Avhandlingen utgår ifrån miljö rättens mål. Miljö rättens karaktär bestäms av dess syfte och funktion att uppnå miljömål. I dagens miljö rätt är det huvudsakliga målet hållbar utveckling. Miljö rätten har en starkt instrumentell och målen om hållbar naturresurshushållning har i princip tvingande karaktär. Därmed är effektiv styrning mot målet centralt. Rättsliga styrmedel karaktäriseras av det faktum att de kan genomdrivas av rättssystemet – genom offentlig maktutövning. Därigenom får de sin funktion och roll inom en större kontext av miljö styrning. Nationell och internationell rätt – företrädesvis EU-rätten – ställer också krav på effektivt genomdrivande av miljö rätt. Tillsynssystemet är en central del av genomdrivandet, och därmed en central del av styrningen mot miljömål. Men den rättsliga styrningen bestäms också av rättssystemets begränsningar – såsom rättsstatliga principer. Dessa begränsningar utgör också begränsningar av det offentligas miljö styrning. Detta kan innebära problem i det effektiva genomdrivandet av miljömål. En konflikt mellan effektivitet och rättssäkerhet kan anas.

Syftet med denna avhandling är att studera hur miljö rättsliga principer utmanar förvaltningsrättsliga principer och strukturer, och hur dessa förvaltningsrättsliga strukturer begränsar genomdrivandet av miljö rättsliga principer. Ett vidare syfte är att diskutera behövliga och lämpliga omformuleringar, eller omtolkningar av rättsliga strukturer som begränsar genomdrivandet av miljömålen. Avhandlingen syftar till att åter speglar därmed Bruntlandrapportens

uppmaning att människans lagar måste reformeras för att harmoniseras med naturens lagar.

Avhandlingsstudien är till stor del komparativ. Här jämförs tillsynssystemen i Sverige, Storbritannien (England och Wales) och Nederländerna. Metoden är som utgångspunkt funktionell.

Kapitel 2 Mötet mellan olika rättskulturer

I detta kapitel presenteras de mötande rättskulturer och potentiell friktion dem emellan. Den förvaltningsrättsliga kulturen utgår ifrån rättsstaten och rättssäkerhet, samt legalitets-, objektivitets-, och proportionalitetsprinciperna. Dessa grundläggande principer säkerställs genom regler och principer för förvaltningsförfarandet, t.ex. kommunikations- och officialprinciperna. Dessa förvaltningsrättsliga principer har också europarättslig anknytning. De speglas i begreppet ”god förvaltning” och anknyter till mänskliga rättigheter som till exempel rätten till rättvis rättegång.

Den miljörättsliga kulturen utgår från begreppet hållbar utveckling, och systemets instrumentella mål- och resultatnriktning. Det är naturen som sätter gränserna för människan, inte tvärtom. Miljörätten präglas starkt av naturens komplexitet och nödvändighet, och det faktum att så många olika legitima intressen och intressenter ska beaktas och avvägas. Det finns också vissa anspråk på en grundläggande rättighet till miljö. På grund av dessa speciella miljörättsliga drag, innehåller miljörätten grundläggande krav på förebyggande, försiktighet, och att förorenaren ska betala. Dessutom finns ett starkt principiellt aktörsansvar.

Dessa två, sinsemellan olika, rättsområden – eller kulturer – möts i tillsynsändet, när en förvaltningsmyndighet skall genomdriva miljörätten. I detta möte kan det uppstå problematiska konflikter, eller friktion. Det rör sig t.ex. om frågan om genomdrivande av försiktighetskrav. De miljörättsliga principerna om förebyggande och försiktighet medför krav på genomdrivande redan innan en skada konstaterats. Vidare läggs i grunden ansvaret för att säkerställa beslutsmaterial och risken för osäkerhet på aktören som bär ansvaret för riskerna. Detta kan komma i konflikt med förvaltningsrättsliga krav på rättssäkerhet, som innebär att myndigheterna ska säkerställa laglig grund för ingripanden. Vidare ska den enskildes förpliktelser enligt lag vara tydliga och precisa för denne. Inom ett område som präglas av ramlagstiftning har tillstånds- och tillsynsmyndigheter ett stort ansvar för att göra klart för den enskilde vilka förpliktelser de generella reglerna innebär. Dessa frågor kommer att diskuteras i del III.

Del II Tre olika rättsordningar och deras tillsynssystem

Inledning och kapitel 3–5

I del II beskrivs och jämförs tillsynssystemen i Sverige, Storbritannien (England och Wales) och Nederländerna. Även deras förvaltningsrättsliga och miljörättsliga kontext presenteras och diskuteras i jämförelse. Denna jämförelse ger en bred förståelse och insikt av tillsynssystemets struktur och funktioner, och mötet mellan den miljörättsliga och förvaltningsrättsliga kulturen i alla tre länderna. Alla länderrapporterna byggs upp på liknande sätt. Inledningsvis presenteras förvaltningen, dess regler och principer, samt dess konstitutionella bakgrund – inklusive regerings och domstolars kontroll av förvaltningen. Därefter undersöks det avgränsade miljörättsliga området, dess lagar och principer, och dess kontrollstrukturer, inklusive tillsynssystemet. Tillsynsmyndigheternas behörighet och tillsynsbefogenheter diskuteras, liksom deras plikt att utöva tillsyn. Därefter beskrivs de olika instrument som tillsynsmyndigheten har till sitt förfogande. Gränserna till andra tillståndsreglering och straffrättsligt genomdrivande diskuteras också.

Kapitel 6 Jämförande kommentarer

Det konstateras att de jämförda länderna har många likheter inom det undersökta området. De regleras också alla av den omfattande europarätten på området. Detta gör att de har mycket miljö rätt gemensamt, och de därmed följande kraven på effektivt genomdrivande. De regleras också av Europakonventionen om de mänskliga rättigheterna (EKMR), och influeras av utvecklingen av en europeisk förvaltningsrätt. Detta gör att det finns många paralleller i de studerade länderna – både miljörättsligt och förvaltningsrättsligt. Samtliga studerade länder präglas också av senaste årens regelförenklingpolitik, delvis med grund i EU:s policy om ”Better Regulation”. Detta har bl. a. lett till avregleringar, förenklingar och sammanslagningar av tillståndsregimer och deras processer.

Vad gäller offentligrättsliga principer kan sägas att Storbritannien har en jämförelsevis annorlunda tradition. Terminologin och strukturen är annorlunda. Här uttrycks förvaltningsrättsliga principer främst i grunderna för lagprövning – ”judicial review”. I slutändan finns dock många paralleller, eftersom alla systemen grundar sig på de besläktade doktrinerna om rättsstaten och ”rule of law”. Viss försiktighet anmodas dock.

De miljörättsliga regelsystemen har alla gått från sektorslagstiftning mot integrering, och den starka internationella miljörättsliga utvecklingen vid 1900-talets har satt sina spår i alla de jämförda länderna. Den svenska miljöbalken har här dock pekats ut som något annorlunda. Den har en mycket vid tillämpning och en långtgående målstyrande funktion. Miljöbalken stadgar

ett principiellt miljöansvar inte bara för kontrollmyndigheterna och utpekade skadliga verksamheter, utan för envar vars agerande har betydelse för miljöbalkens mål och syfte. Dessa kallas i denna avhandling för aktörer – eller miljöaktörer. Tillsynsmyndigheternas instrument för att genomdriva dessa krav är omfattande. Deras funktionella behörighet är dock begränsad i jämförelse med sina engelska och holländska motsvarigheter. I Sverige delas tillstånds- och tillsynsfunktionerna mellan olika myndigheter. I Storbritannien och Nederländerna ligger de på samma myndighet. I Storbritannien har dessutom tillsynsmyndigheterna rätt att driva brottsutredning och åtal, som de tar vara på. I det engelska systemet är det straffrättsliga genomdrivandet centralt. Det utgör även ett brott att bryta mot ett tillsynsföreläggande – att inte göra som tillsynsmyndigheten säger. Den svenska miljörätten är alltså vid, men genomdrivandet av den är uppdelad på flera myndigheter. Detta kan medföra sämre koordination av genomdrivandesystemen.

Tillsynsinstrumenten påminner annars om varandra i de olika länderna. Någon typ av föreläggande är den vanliga formen för auktoritativ tillsyn. De hänger också ihop med olika typer av sanktioner. I det engelska systemet – som sagt – hot om straff, som dessutom tillsynsmyndigheten själv för till åtal, och i Sverige och Nederländerna ofta vite eller motsvarande. I Storbritannien och Nederländerna är förelägganden alltid kopplade till hot om vite, straff, eller tvångsgenomförande. I Sverige kommer det ofta i ett senare skede. Generellt sett har tillsynen ett handlingsdirigerande syfte – till skillnad från straff. Det har dock införts punitiva förvaltningsrättsliga sanktioner i alla de studerade länderna.

Del III Effektiv och rättssäker tillsyn. Komparativ analys av tematiska mötespunkter

Inledning

I denna del av avhandlingen analyseras mötet mellan förvaltningsrätten och miljörätten närmare, med fokus på tillsynssituationen och aktörens ansvar för information – dvs. för kunskap, utredning och bevisning. Analysen sker ur två olika perspektiv. Först analyseras tillsynsmyndigheternas direkta genomdrivande av ansvaret för information. Därefter analyseras de indirekta kraven som myndigheten ställer genom att i tillsynen förlita sig på aktörens informationsansvar.

Kapitel 7 Genomdrivande av aktörens ansvar för information – kunskap, undersökning, bevisning

Detta kapitel handlar om fördelningen av ansvaret för information i miljötillsynen. Detta rör främst ansvar för beslutunderlag och bevisning i tillsynsförfarandet, och till viss del i påföljande domstolsprövning. Inledningsvis utreds och jämförs gällande rätt som sådant ansvar i alla de jämförda länderna. Det konstateras att Sverige och Nederländerna har liknande regler om myndighetens omfattande, men flexibla, ansvar för beslutsmaterial och bevisning. Det engelska systemet är något annorlunda och antyder lägre krav på myndigheten i detta avseende. När det gäller miljörättsliga regler framstår den svenska miljöbalkens generella och långtgående regleringar med krav på kunskap, egenkontroll, och framför allt den omkastade bevisbördan som egenartad.

Efter denna grundläggande diskussion undersöks aktörens ansvar för information i förhållande till kontroll myndigheten. Hur långtgående krav kan ställas på den enskilde? Det konstateras att tillståndsregimerna i alla länder reglerar omfattande ansvar för information. Detta är okontroversiellt och grundar sig i EU-rätt och den grundläggande regeln att den som ansöker hos det allmänna om en förmån av något slag också ska visa att förutsättningarna för att få denna förmån är uppfyllda. Tillståndsgivna verksamheter kan också ofta lyda under i förväg reglerade krav på egenkontroll, dokumentation och rapportering. Därtill har alla länderna olika medel för att hjälpa tillsynsmyndigheterna när de utför inspektioner, t.ex. tillgång till dokument och rätt att ställa frågor. Utöver dessa krav på aktörens informationsansvar, kan det också finnas tillsynsinstrument som innebär att aktören kan avkrävas den information och de undersökningar som tillsynsmyndigheten behöver för tillsynen. Det konstateras att dessa möjligheter är vidast och mest långtgående i det svenska systemet.

Undersökningen går vidare till att analysera grunderna och gränserna för dessa ingripande tillsynskrav. Kravens förutsebarhet och skälighet analyseras särskilt. Det argumenteras för att förutsebarheten av krav på aktörens information kan vara mer begränsad för icke tillståndsgivna verksamheter. Detta blir särskilt problematiskt i ett system som den svenska miljöbalken som till stor del utgör ramlagstiftning, och bärs upp av avvägningsregler och generellt formulerade principer. Dessa problem förväntas öka med den omfattande avregleringen av tillståndssystemen. Mer konkret reglering av förpliktelseerna i generella regler, och kommunikativ tillsynsprocess förespråkas som lösningar för att mildra problemen. Liknande diskussion återkommer i analysen av informationskravens skälighet. Här förespråkas dock även en tydligare hänsyn till aktörens grundläggande ansvar. Detta ska tas med i avvägningen, t.ex., när man avgör ifall kraven på en aktörs undermåliga dokumentation ska åtgärdas. Det faktum att aktören har underlåtit att utföra den dokumentation han ska, kan inte leda till att det anses oskäligt att lägga på honom ansvaret för att ta fram informationen som skulle ha angivits i

dokumentationen. Annars blir tillsynen kontraproduktiv, och incitamenten för att leva upp till sina aktörsförpliktelser svaga.

Tillsynens kontext av hot om sanktioner diskuteras också. Det konstateras att sådan kontext ställer högre krav på rättssäkerhetsgarantier. Särskilt gäller detta för punitiva sanktioner som straff och sanktionsavgifter.

En särskild fråga som diskuteras det faktum att den information som framtagits av aktören och rapporterats till tillsynsmyndigheterna kan komma att användas mot honom själv i straffrättsligt sammanhang. Detta kan komma i konflikt med EKMR Art. 6 och rätten till rättvis rättegång. Rättigheten gäller främst straffprocessen, men gränsen är svår att dra. När har brottsutredningen inletts? Dessutom finns det andra faktorer som kan påverka ifall informationsplikten i tillsynsprocessen ses som ett brott mot rätten att vara passiv och slippa inkriminera sig själv. Faktorer som typen av information och syftet med informationskraven vägs in. Dess frågor har diskuterats i Europadomstolen och i de nationella domstolarna i Sverige, Storbritannien och Nederländerna. Det konstateras att det kan vara mycket svårt för tillsynsmyndigheten att avgöra i förväg om informationen de kräver av aktörerna kan komma att inkriminera denne i framtiden. Det föreslås därför att säkerställandet av skyddet för rättvis rättegång sker i ett senare skede – nämligen i själva straffprocessen.

Kapitel 8 Målstyrning, aktörsansvar och precision i genomdrivande av tillsyn

I detta kapitel undersöks då det indirekta kravet på informationsansvar, genom att tillsynsmyndigheten förlitar sig på aktörens kunskap och utredning när det utövar tillsyn. Detta kan ske genom att föreläggandena inte anger hur ett problem ska åtgärdas, utan bara att det ska det, alternativt att aktören inte får bedriva verksamheten om inte vissa resultat uppnås. Detta handlar så klart om precisering av förelägganden kontra mål- och resultatstyrning och genomdrivande av aktörens ansvar.

Inledningsvis konstateras att de studerade rättsordningarna alla innehåller regeln om tydlig och konkret offentlig reglering. Detta handlar först och främst om tydliga regler i lagstiftning, men också om tydlighet i det offentliga myndighetsutövning. Det måste vara klart och tydligt för den enskilda vad denne måste göra för att följa lagen och undvika myndighetens ingripande. Detta kompliceras dock av de miljörättsliga kraven på aktörens säkerställande av kunskap, utredning, och bevisning, osv. Genomdrivande av aktörernas ansvar blir återigen kontraproduktivt – eller åtminstone inkonsekvent – om myndigheten tar över aktörens ansvar för denna aktiva informationsprocess.

Olika typer av förelägganden undersöks och jämförs för att analysera hur dessa motstående frågor samverkar. Generellt sett accepteras inte oprecise-

rade krav på försiktighetsåtgärder – inte in något av systemen. Däremot används föreläggande av förbud i fall av osäkerhet kring lämplig lösning (i Sverige), och förelägganden som bara preciserar problemet som ska lösas eller resultatet som ska uppnås. Detta kan väl sägas formellt sett tydligare i kommunikationen av förpliktelser. Men för den enskilde har det kanske mindre betydelse om föreläggandet anger problemet tydligt eller det resultat som ska uppnås. De får ju fortfarande inte veta var de ska göra. Mot bakgrund av miljörättsligt ansvar för egenkontroll och information så kan denna ordning verka motiverad. Ur rättssäkerhetssynpunkt – och ibland också ur effektivitetssynpunkt verkar det mer problematiskt.

För att bättre jämkna de motstående intressena av effektivt genomdrivande av miljörättsliga krav, och rättssäkerhet för den enskilda i tillsynsprocessen, så har jag föreslagit utveckling av den kommunikativa tillsynsprocessen, särskilt så att även förelägganden att komma in med förslag på lösningar och försiktighetsmått kan användas. Dessutom förespråkas, med inspiration från engelsk rättspraxis, en mer ändamålsbestämd och kontextuell bedömning av kraven på rättssäkerhet i det enskilda fallet. I en sådan bedömning kan man se till den enskilda adressatens faktiska förståelse av sina förpliktelser, istället för formalistiska krav på specifikation. En kommunikativ tillsynsprocess kan också bli viktig här eftersom tidigare kommunikation mellan myndigheten och den enskilda kan vägas in i bedömningen av vad den enskilde kan antas förstå om sina förpliktelser.

Kap 9 Avslutning

I detta sista kapitel lyfts några frågor från avhandlingen upp och analysresultaten förtydligas. Här lyfts fram att miljöansvaret är delat mellan det allmänna och den enskilde, men att myndighetens ansvar för upprätthållande av rättsstaten inte kan föras över på den enskilde. En central poäng är att det är viktigt att skilja dessa olika konstruktioner och deras syften åt. På så sätt kan man lättare skapa utrymme för både rättssäker och effektivt genomdrivande av miljörättsliga krav, utan att myndigheten tar över den enskilde aktörens ansvar för information och försiktighet. Avslutningsvis visas också på de potentiella svårigheterna som följer med den omfattande förskjutningen av miljökontrollen från tillståndsregimer till lokala tillsynsmyndigheter. Dessa myndigheter behöver tydligare föreskrifter och mer resurser för att kunna genomföra sina tillsynsuppgifter så effektivt som krävs.

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