

# Parliamentarians for Global Action

## Parliamentary Workshop on Clean Air and Clean Water

August 29-30, 2002  
Johannesburg, South Africa

### Effective Water Pollution Legislation – The Legislative Framework Each Country Needs to Effectively Control Water Pollution

*Presentation by*

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#### 1. The Legislator's Challenge

The legislator has to address challenges that go well beyond those that a judge must consider in determining a case or a lawyer in providing advice to a client. The legislators brief is not capable of being narrowly defined and everyone's opinion is both admissible and relevant.

Public policy choices have to be made, which inevitably involve making difficult trade offs. Such public policy choices need to be informed, and the open and transparent engagement of the community through a vigorous information campaign and debate is a vital component in both developing and implementing a legislative regime for the effective control of water pollution.

#### 2. Is there such a thing as 'model legislation'?

Legislators make laws to address issues of public concern within their own jurisdiction and answer to their own electorates. Model legislation comes from somewhere else and is not developed through engaging with the local community, nor through drawing upon the wisdom of locally elected officials. Further, it is not drafted in the context of local conditions. Model legislation is an interesting academic exercise.

The reality is that there is no 'quick fix' to developing a legislative framework to effectively control water pollution, and model legislation is not the answer.

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\* The author would like to thank Megan Dyson, Chair, IUCN Commission on Environmental Law, Water and Wetlands Forum, for reviewing this paper

<sup>1</sup> For more information on the IUCN Environmental Law Programme see: [www.iucn.org/themes/law](http://www.iucn.org/themes/law)

### **3. Universally recognised principles, sharing information and learning from others**

While model legislation is not the answer to developing a legislative framework to effectively control water pollution, there are certain universally recognised principles relating to water management that do have global application. These should, in an appropriate and locally relevant manner, be built into the domestic legislation of each country. This will require a recognition of each country's culture, traditions, and legal and constitutional frameworks and every country will do it slightly differently.

Equally, there are common issues that are being addressed throughout the world and there is much to be gained from a comparative analysis of legislation,<sup>2</sup> and the exchange of knowledge, experience and personnel. This should always occur in a manner that ensures the progressive and effective transfer of skills and technology, which is best achieved through forging long term relationships with the providers of assistance and support.<sup>3</sup>

### **4. The context of a legislative framework**

Legislators do not legislate in a vacuum. Legislation is prepared in response to an issue of public importance demanding a legislative response, such as the need to tackle water pollution for reasons of public health and environmental protection.

Legislation is only one part of a public policy response, which will also include voluntary measures, public information, and market based measures (which also often require legislative backing). Legislation cannot be looked at in isolation from the broad suite of policy responses.

Further, legislation cannot be looked at in isolation from a country's institutional capacity or the need to provide sufficient budgetary resources to enable the legislation to be effectively administered.

### **5. Common issues to be addressed to address water pollution**

In addressing the topic of the legislative framework that each country needs to effectively control water pollution one first needs to ascertain the common issues that every country needs to tackle in seeking to effectively control water pollution.

*Some* of the common issues include having to:

- Decide who will be engaged in the process of developing the legislation, for example the community, professional groups, industry.
- Determine how 'pollution' is to be legally defined.
- Determine the water quality standards that are being managed for, which will vary according to particular water uses, for example for drinking, swimming, fishing or irrigation, or perhaps all of them.

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<sup>2</sup> ECOLEX, the 'Gateway to Environmental Law', is a joint initiative of IUCN, UNEP and FAO that seeks to provide access to the comprehensive environmental law and policy holdings of each organization, including a comprehensive legislative data base. The site, that is still under development, can be found at: [www.ecolex.org](http://www.ecolex.org)

<sup>3</sup> This has been the approach of the IUCN ELP since its inception in 1958.

- Deal with both existing sources of pollution and potential new sources of pollution, and when dealing with existing sources to achieve improvement without losing jobs.
- Address both point source and diffuse source pollution, the former being a far easier problem to deal with.
- Decide upon the scale at which water pollution issues are to be addressed: at the national, basin, state/provincial, catchment or local level or all, or a mix, of them.
- Decide how power is to be shared in controlling water pollution, including the benefits of establishing of an independent pollution authority, and what matters should be the subject of delegation, co-decision making, consultation with the community and so on.
- Address both private business and public authorities, such that public authorities enjoy no net benefit over private business by virtue of public ownership.
- Determine who will be given the power to seek effective compliance with, and enforcement of, the legislation and what compliance and enforcement options are to be included.
- Decide whether the time is right to develop a system to allow for the trade of pollution rights and if so, how such a system should be developed and administered.
- Ascertain how the effective administration of the legislation is to be financed, for example will this come through general revenue, revenue generated through the application of the polluter pays principle, through levies imposed on water users, or a mix of all of them.

All of these issues also need to be addressed in the context of an existing legislative framework, one that establishes an independent and effective judiciary, the opportunity for judicial review of administrative decisions, an independent public prosecutors office and a system for environmental impact assessment.

## **6. The types of laws involved in establishing an effective legislative framework**

It does not take long to see that a framework for the effective control of water pollution is no easy matter and such a framework touches upon many areas of the law. For example, the legislative framework will be needed to address:

- Environment protection: to tackle existing (and future) point sources of pollution and to establish (or recommend) water quality standards/guidelines.
- Land use planning: to avoid the establishment of new (diffuse and point source) sources of pollution and to protect water catchments.
- Land/farm management/irrigation practices: to tackle diffuse sources of pollution and to protect water catchments.
- Vegetation management: to address diffuse sources of pollution and to protect water catchments, including the protection (or rehabilitation) of riparian zones.

- Catchment management: to ensure that the needs of the entire catchment are being addressed in a co-ordinated and effective manner (and catchment authorities can be used to progress an integrated approach to water, land and vegetation management issues).
- Water *quantity*: to ensure that water quality is not adversely impacted by inadequate flows to meet environmental and water quality needs.

Within this context, legislation must adequately address the need for improvement without closing down businesses and public utilities (other than in the most extreme cases), and hence it will need to address issues such as:

- Environmental improvement orders: to allow business and public authorities time to adjust to a new regime over a fair and reasonable time, including the possibility of cleaner production grants and ‘soft’ loans to facilitate this process.
- Polluter pays principle: to be implemented in a staged and progressive manner to allow business (and public authorities) time to adjust to a new regime over a fair and reasonable time.
- Performance bonds supported by guarantees: to guarantee performance of obligations.
- Environmental duties: to impose general duties of environmental care of all land users, especially those responsible for diffuse sources of pollution.

## **7. Supporting institutions**

In addressing all of these issues it is preferable to be able to deal with them in as co-ordinated and comprehensive manner as is possible and the institutional arrangements put into place to administer a legislative framework are critical in this regard (many of which will need to be created through legislation).

In this sense the following arrangements have been shown to be successful:

- Point source pollution: an independent regulatory authority with a strong inspectorate capacity. (Note: Experience shows that a strong regulatory authority with a clear legislative and political mandate is the most effective manner to deal with point sources of pollution).
- Water quality standards: an independent regulatory authority.
- Diffuse sources of pollution: catchment management authorities whose members are drawn from local communities and who have amongst them the range of necessary skills, with the capacity to raise and retain their own funds. Enforcement powers should be vested in the independent regulatory authority.
- Land use planning: planning authorities that are linked with both the pollution authority and the catchment authority.

## **8. Matching legislative reform to capacity**

The legislation that is developed must match the realistically attainable administrative capacity of the country or region.

For example, there is no point developing a complicated legislative framework for trade in water pollution rights if one does not yet have an effective licensing system in place. Point sources are best tackled first as they are easier to address than diffuse sources. Further, relatively rapid and noticeable improvements can be achieved in dealing with point sources.

One step at a time.

## **9. Concluding remarks**

Effective legislation to address an issue as complex as the control of water pollution takes time to develop, evolve and improve over time, in particular if diffuse and point sources are to be addressed.

There is no ‘quick fix’ and a 20 minute presentation is not going to give anyone sufficient guidance to go away and develop an effective legislative framework. However, universal principles and common issues can be identified.

Much has been learned in many parts of the world through trial and error over many decades in attempting to develop a framework for effectively controlling water pollution.<sup>4</sup> This experience also involves related issues, such as the parallel use of non legislative policy responses and developing the necessary institutional and budgetary capacity to administer such legislation.

All of this information and knowledge can and should be shared in a manner that transfers skills and technology. This is most effective when assistance comes from sources where relationships are built over time.

The universal principles having been laid out, the issues identified, and the knowledge and experience having been shared, there is no substitute for going through the difficult but necessary task of working with ones own community, and drawing upon ones own history and wisdom, to develop public support for a legislative framework that best suits a country’s own particular circumstances.

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<sup>4</sup> IUCN ELP is the world’s environmental law network. IUCN ELP’s global headquarters is in Bonn, Germany and its Commission membership includes leading environmental lawyers in 129 countries around the world. IUCN ELP can provide access to an extensive array of comparative legislative models. For more information go to: [www.iucn.org/themes/law](http://www.iucn.org/themes/law)