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## Really Responsive Regulation

Robert Baldwin and Julia Black<sup>1</sup>

### Introduction

An important test of a regulatory theory is whether it offers assistance in addressing the challenges that regulators face in practice. In the area of enforcement, those challenges are numerous and severe. Resources are often thinly spread and errant behaviour is difficult to detect. Regulatory objectives are not always clear and legal powers may be limited. Enforcement functions are often distributed across numbers of regulators who struggle to co-ordinate their activities. Further, it is often extremely hard to measure the success or failure of regulation. Even if such measurement is possible, it may be very difficult to improve the regulatory system by adjusting enforcement strategies and legal powers.

Let us consider, for instance, the challenges faced in enforcing fisheries laws in order to protect fish stocks. Sea fishing is peripatetic and the geographical areas over which a regulator has to monitor fishing activities are extensive. Regulatees are highly mobile and there are a large number of landing sites around the coast. Inspection at sea is very resource intensive, there are many ways to avoid detection<sup>2</sup> and funding levels allow only a very small proportion of vessels and landings to be inspected.<sup>3</sup> The nature of the industry is such that the number of undetected infringements is ‘impossible to determine’.<sup>4</sup> Problems of monitoring compliance and enforcement are exacerbated by the organisational context. Monitoring and enforcement involve a number of organisations whose jurisdictions and responsibilities overlap, and often the enforcers have no clear set of priorities and outcome objectives to work from.<sup>5</sup> As a result, the quota control system relies heavily on the self-reporting of catches and there is extensive under-reporting and mis-declaration of fish landed.<sup>6</sup>

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<sup>1</sup> Law Department, London School of Economics and Political Science. We are grateful to all those at the Department of Environment, Food and Rural Affairs (Defra) who cooperated with our research into their enforcement activities in 2005. A note on methodology is given below, n.15.

<sup>2</sup> See National Audit Office (NAO), *Fisheries Enforcement in England* HC 563 Session 2002-3 (April 2003) (hereafter ‘NAO Report’) pp.19-20.

<sup>3</sup> See *ibid*, pp.19-20.

<sup>4</sup> *Ibid*, pp.2,15.

<sup>5</sup> *Ibid*, p.39. The first recommendation of the subsequent report from the Prime Minister’s Strategy Unit, *Net Benefits* (March 2004) (hereafter ‘*Net Benefits*’) was that clear hierarchies of fisheries management objectives should be developed (*Net Benefits*, p. 11). Defra responded with a statement of overarching aim, supported by more detailed objectives – see Defra, *Securing the Benefits* (Defra, London, 2005), p. 3.

<sup>6</sup> See NAO Report, p.16.

Lack of clear enforcement objectives and the impossibility of discovering the extent of ‘off the radar’ non-compliance means that it is almost impossible to measure the effectiveness of the detection systems in place, or indeed of the compliance and enforcement processes. A report by the National Audit Office on fisheries enforcement in 2003<sup>7</sup> concluded that Defra and the relevant inspectorates were unable accurately to judge the need to develop and apply new regulatory strategies for detection, enforcement or assessment.<sup>8</sup> The Department, moreover, was found to operate inflexibly in its deployment of resources and staff, reducing its capacity to adjust its inspection activities.<sup>9</sup>

What do the current theories on regulatory enforcement have to offer regulators who are faced with these challenges? We know an increasing amount about how regulated firms themselves respond to regulation.<sup>10</sup> There are extensive studies on how, once inspectors have arrived on site, they try to negotiate compliance with regulatees, and how they decide what types of enforcement action to take.<sup>11</sup> There is also more prescriptive writing on what enforcers should do, ranging from the well known ‘regulatory pyramid’ and ‘tit for tat’ approach of Ayres and Braithwaite’s responsive regulation, through the target-analytic approach of responding to the organisation’s reasons for non-compliance,<sup>12</sup> to the relative new-comer, ‘risk based regulation’.<sup>13</sup> Finally, authors such as Sparrow have prescribed extensive systems of performance assessment within regulatory processes, as have central governments.

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<sup>7</sup> See NAO Report.

<sup>8</sup> Ibid p.24.

<sup>9</sup> Ibid p.4 and 35.

<sup>10</sup> C. Parker, *The Open Corporation: Effective Self Regulation and Democracy* (Cambridge: CUP, 2002); N. Gunningham, R. Kagan, & D. Thornton ‘Social License and Environmental Protection: Why Businesses Go Beyond Compliance’ (2004) 29 *Law and Social Inquiry* 307; N. Gunningham and R.A. Kagan (eds), *Special Issue: Regulation and Business Behaviour* (2005) 27(2) *Law and Policy*, D. Thornton, N. Gunningham, and R. Kagan, ‘General Deterrence and Corporate Environmental Behavior’ (2005) 27(2) *Law & Policy* 262; R. Fairman, and C. Yapp, ‘Enforced Self Regulation, Prescription and Conceptions of Compliance within Small Businesses: The Impact of Enforcement’ (2005) 27(4) *Law and Policy* 491.

<sup>11</sup> See eg K. Hawkins, *Law as Last Resort* (Oxford: OUP, 2001); K. Hawkins, *Environment and Enforcement* (Oxford: OUP, 1984); B. Hutter, *Compliance* (Oxford, Oxford University Press, 1997); J. Braithwaite and J. Walker, et al. “An Enforcement Taxonomy of Regulatory Agencies.” (1987) 9 *Law and Policy* 323-351.

<sup>12</sup> R. Kagan and J. Scholz (1984), ‘The “Criminology of the Corporation” and Regulatory Enforcement Strategies’ in K. Hawkins and J.M. Thomas (eds) *Enforcing Regulation* (Boston, Mass: Kluwer-Nijhoff, 1984); R. Baldwin, *Rules and Government* (Oxford: OUP, 1995), and further below n.\*.

<sup>13</sup> J. Black, ‘The Emergence of Risk Based Regulation and the New Public Risk Management in the UK’ [2005] *Public Law* 512; H. Rothstein, M. Huber and G. Gaskell, ‘A Theory of Risk Colonisation’ (2006) 35(1) *Economy and Society* 91. More generally on the implications of the ‘risk turn’ in administrative law see E. Fisher, ‘The Rise of the Risk Commonwealth and the Challenge for Administrative Law’ [2003] *Public Law* 455.

<sup>14</sup> See M.K. Sparrow, *The Regulatory Craft* (Washington D.C: Brookings, 2003) Chapter 19; UK Government policy since June 2001 has required departments to review the impact of major pieces of regulation within three years of implementation (see: OECD, *U.K Challenges at the Cutting Edge* ( OECD, Paris,2002) p.34). The Better Regulation Task Force (BRTF) recommended the routinisation of post implementation performance reviews in April 2000 (BRTF *Helping Small Firms Cope with Regulation*, London, 2000) and the Better Regulation Executive’s revised *Regulatory Impact Assessment Guidance* of 2007 (BRE, London 2007) calls for use of Post Implementation Reviews to establish whether implemented regulations are having the intended effect and whether they are implementing policy objectives efficiently.

But such approaches are unlikely to offer complete satisfaction to a regulator who is faced with the sort of challenges discussed above. They say much on how the definition of non-compliance is arrived at but less on how to design inspection strategies, or how to detect non-compliance. Neither responsive regulation nor the target-analytic approach, or even risk based regulation, say a great deal about how a regulator should deal with resource constraints, conflicting institutional pressures, unclear objectives, changes in the regulatory environment, or indeed how particular enforcement strategies might impact on other aspects of regulatory activity, including information gathering, and how regulators can or should assess the effectiveness of their particular strategies when any of these circumstances obtain.

This article seeks to address these issues. It focuses both on how regulators in practice deal with these issues, and seeks to build on existing influential theories to suggest how they should do so. It proposes a strategy that constitutes, to coin a phrase, *really* responsive regulation. In other words, a strategy which is even more responsive than ‘responsive regulation’ – the highly influential approach developed by Ian Ayres and John Braithwaite.<sup>15</sup> We argue that to be *really* responsive, regulators have to be responsive not only to the compliance performance of the regulatee, but in five further ways: to the firms’ own operating and cognitive frameworks (their ‘attitudinal settings’); to the broader institutional environment of the regulatory regime; to the different logics of regulatory tools and strategies; to the regime’s own performance; and finally to changes in each of these elements.

Such a really responsive approach, we contend further, must be applied right across the range of activities that make up the regulatory process. In presenting our argument, accordingly, we analyse the full range of tasks involved in regulatory enforcement processes (including detection and assessment) and use recent empirical work carried out for the UK Department for the Environment, Food and Rural Affairs (Defra) to illustrate the challenges involved in discharging these various tasks.<sup>16</sup> We suggest that regulation should be sensitive to the interactions and trade offs that are involved in meeting these often quite distinct challenges, and argue that it is only such sensitivity that makes regulation ‘really responsive’.

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<sup>15</sup> I. Ayres and J. Braithwaite, *Responsive Regulation* (Oxford: OUP, 1992).

<sup>16</sup> The research was conducted at Defra’s request between August – November 2005. It looked at enforcement in seven Defra areas: Environmental Impact Assessments (Uncultivated Land); Cattle Identification Scheme; Horticulture (classification of imported fruit and vegetables); Pesticides Safety; Waste Management (Fly-Tipping); Fisheries and Ozone. Its aim was to analyse the use of different enforcement tools and to suggest ways of improving enforcement effectiveness by moving towards best practice methods across Defra. Fifty structured and unstructured interviews were conducted with Defra staff across the above seven areas of activity - interviewees included policymakers as well as lawyers and field enforcers. The draft findings and proposals were subjected to feedback evaluation at Defra review meetings and through presentation at a Defra interdepartmental workshop.

Before looking in more detail at the ‘really responsive regulation’ approach, it is worth setting the scene by briefly reviewing the development of mainstream approaches to regulatory enforcement. The next section, accordingly, outlines the ways in which ‘responsive regulation’ moved the debate (and practical strategies) onwards from disputes about ‘compliance versus deterrence’ approaches. It considers the advent of ‘smart’ regulation, the currently fashionable ‘risk-based’ solution to regulatory challenges, and the contribution of the ‘problem solving’ method of organising regulatory activities. Such approaches to regulation bring fresh insights into the regulatory game but they also bring new challenges to the fore. ‘Smart’ and ‘risk-based’ strategies, for instance, raise difficulties of transparency, accountability, evaluation and modification that are yet to be fully explored.

The second section examines the challenges that remain, in spite of the advances made in these literatures. It delineates in more detail the key elements of responsiveness that we argue regulation has to exhibit in all aspects of regulatory activity. The third section then examines the particular context of inspection and enforcement, analysing the inspection and enforcement process as the interlinkage of five different tasks. Each of these tasks involves a particular set of challenges that is accompanied by its own group of potential solutions or approaches. These are discussed individually, and illustrated by recent empirical work in the UK environmental and fisheries sectors. We conclude by summarising the value that is added by looking at enforcement through a really responsive regulation lens and consider the potential concern that this may be a level of regulatory analysis that goes too far to be operationalised within realistic resource and time constraints.

## **1. The Development of Approaches to Enforcement**

### ***Responsive Regulation***

One of the great contributions of Ayres and Braithwaite’s 1992 book *Responsive Regulation* was its condemning as ‘sterile’ the long history of disputation between proponents of ‘deterrence’ and ‘compliance’ models of regulatory enforcement; “between those who think that corporations will comply with the law only when confronted with tough sanctions and those who believe that gentle persuasion works in securing business compliance with the law.”<sup>17</sup> It was time, they said, to move away from such “crude polarisation” and to strike “some sort of sophisticated balance between the two systems.”<sup>18</sup> The crucial question for Ayres and Braithwaite was: ‘When to punish; when to persuade?’ Their prescription was a ‘tit for tat’ or responsive approach in which regulators enforce in the first

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<sup>17</sup> Ibid p.20. See also K. Sparrow, *The Regulatory Craft* (Washington: Brookings, 2000) p.184.

<sup>18</sup> Ibid, p.21.

instance by compliance strategies, but apply more punitive deterrent responses when the regulated firm fails to behave as desired. Compliance, they suggested, was more likely when a regulatory agency displays an explicit enforcement pyramid – a range of enforcement sanctions extending from persuasion, at its base, through warning and civil penalties up to criminal penalties, licence suspensions and then licence revocations.<sup>19</sup> Regulatory approaches would begin at the bottom of the pyramid and escalate in response to compliance failures. There would be a presumption that regulation should always start at the base of the pyramid.

The pyramid of sanctions is aimed at the single regulated firm, but Ayres and Braithwaite also apply a parallel approach to entire industries. Thus they propose a ‘pyramid of regulatory strategies’<sup>20</sup> for regulating different areas of social or economic activity. Governments should seek, and offer, self-regulatory solutions to industries in the first instance but that, if appropriate goals are not met, the state should escalate its approach and move on through enforced self regulation to command regulation with discretionary punishment and finally to command regulation with non-discretionary punishment.

It has widely been acknowledged that the enforcement pyramid and the tit-for-tat approach have offered a considerable advance on blanket commitments to deterrence and compliance models. Responsive regulation remains hugely influential worldwide and is applied by a host of governments and regulators. It has been further elaborated both by John Braithwaite and by the recent empirical work on the Australian Tax Office’s Compliance Model led by Valerie Braithwaite.<sup>21</sup> Indeed, John Braithwaite has expanded the notion of ‘responsive regulation’ well beyond its original context of enforcement into an all-encompassing regulatory and democratic ideal, incorporating notions of deliberative democracy and restorative justice.<sup>22</sup> We will return to the more expansive formulations of ‘responsiveness’ below; we are concerned in this section with the original formulation of responsive regulation, as subsequently elaborated in the enforcement context. As elaborated, responsive regulation has three critical elements to its implementation: first, a systematic, fairly directed and fully explained disapproval, combined with, second, a respect for regulatees; and third, an escalation of intensity of regulatory response in the absence of a genuine effort by the regulatee to meet the required standards.<sup>23</sup> This latter element, and in

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<sup>19</sup> Ibid, p.35 . On different ways of acting responsively see V.L. Nielsen, ‘Are Regulators Responsive?’(2006)28 *Law and Policy* 295.

<sup>20</sup> Ibid pp.38-9.

<sup>21</sup> J. Braithwaite, *Responsive Regulation and Restorative Justice* (OUP, 2002); V. Braithwaite (ed), Special Issue on Responsive Regulation and Taxation (2007) 29(1) *Law and Policy*.

<sup>22</sup> Braithwaite op. cit (2002); J. Braithwaite, ‘Responsive Regulation and Developing Economies’ (2006) 34 (5) *World Development* 884.

<sup>23</sup> Braithwaite op. cit (2002).

particular the pyramidal regulatory strategy of enforcement, has however been the subject of a number of criticisms or reservations.<sup>24</sup>

These criticisms fall mainly into three groups: the policy or conceptual; the practical, and the principled. In policy terms, the first criticism of the pyramid approach is that in some circumstances step by step escalation up the pyramid may not be appropriate. For example, where potentially catastrophic risks are being controlled it may not be feasible to enforce by escalating up the layers of the pyramid and the appropriate reaction may be immediate resort to the higher levels.<sup>25</sup>

Secondly, the regulator is meant to move up and down the pyramid depending on whether the regulatee cooperates or not. Escalation and descalation is thus possible throughout the course of the relationship with a firm, and indeed possibly within the same regulatory encounter. But moving down the pyramid, may not always be easy, as Ayres and Braithwaite recognise, because use of more punitive sanctions can prejudice the relationships between regulators and regulates that are the foundations for the less punitive strategies.<sup>26</sup> Moreover, the constant threat of more punitive sanctions at the top can make 'voluntary' compliance at the bottom of the pyramid impossible.

Thirdly, it may be wasteful to operate an escalating tit for tat strategy across the board. Responsive regulation presupposes that regulatees do in fact respond to the pressures imposed by regulators through the sanctioning pyramid. However corporate behaviour is often driven not by regulatory pressure but the culture prevailing in the sector or by the far more pressing forces of competition. Some authors have specified this more closely in terms of the motivations or character of non-compliance.<sup>27</sup> These approaches (which we term 'target-analytic') suggest that in some situations it

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<sup>24</sup> For critiques of responsive regulation see e.g. N. Gunningham and P. Grabosky, *Smart Regulation* (Oxford: Clarendon Press, 1998); J. Mendeloff, 'Overcoming Barriers to Better Regulation' (1993) 18 *Law and Social Inquiry* 711-29; R. Johnstone, 'Putting the Regulated Back into Regulation' (1999) 26 *J. of Law and Society* 378-390; and the book reviews of *Responsive Regulation* at: (1993) 106 *Harvard Law Review* 1685-1690 (Editorial); (1993) 98 *American Journal of Sociology* 1187-89 (Anne Khademian); (1993) 87 *American Political Science Review* 782-3 (John Scholz); (1993) 22 *Contemporary Sociology* 338-9 (Joel Rogers).

<sup>25</sup> Though see the argument that, where possible, persuasion should be the strategy of first choice because preserving the perception of fairness is important to nurturing voluntary compliance – discussed by K Murphy, 'Moving Towards a More Effective Model of Regulatory Enforcement in the Australian Tax Office' (2004) *British Tax Review* 603-19.

<sup>26</sup> See Ayres and Braithwaite, op cit Chapter 2; F. Haines, *Corporate Regulation: Beyond Punish or Persuade* (Oxford, 1997) p.219; Johnstone, *loc. cit.*

<sup>27</sup> For example, Kagan and Scholz point to three types of firm – R. Kagan and J. Scholz, 'The Criminology of the Corporation' in K. Hawkins and J. Thomas (eds.) *Enforcing Regulation* (Boston, Kluwer, 1984). Empirical work has questioned the validity of the distinctiveness of these reasons for non-compliance, however: V. Braithwaite, J. Braithwaite, D. Gibson and T. Makkai, 'Regulatory Styles, Motivational Postures and Nursing Home Compliance' (1994) 16 *Law and Policy* 363; see also V. Braithwaite (ed), *Taxing Democracy: Understanding Tax Avoidance and Evasion* (Aldershot: Ashgate, 2003). For other classifications see eg R. Baldwin, 'Why Rules Don't Work' (1990) 53 *MLR* 321. The UK tax regulator, HM Customs and Excise, has come up with a further classification, identifying seven types of responses on a compliance continuum, and the appropriate regulatory strategy in each case: HM Customs and Excise Annual Report 2003-4, HC 119 (London: HMSO, 2003), p.123.

may be more efficient to analyse types of regulated firms and to tailor and target types of regulatory response accordingly. If, for example, research reveals that a particular problem is predominately being caused by firms that are ill-disposed to respond to advice; education and persuasion, the optimal regulatory response will not be to start at the base of the enforcement pyramid – it will demand early intervention at a higher level. Whenever a group of regulatees is irrational or unresponsive to tit for tat approaches, the latter will tend to prove wasteful of resources. Similarly, an analysis of risk levels may militate in favour of early resort to higher levels of intervention (even where risks are non-catastrophic). The thrust of this argument is that, at least where the costs of analysis are low, it will be more efficient to ‘target’ responses than to proceed generally on a responsive regulation basis.

The pyramid approach and target-analytic approach can be integrated, but only with some modification of the former. Indeed in a move which breaks fundamentally with the game-theory roots of the ‘tit for tat’ strategy and its underlying assumption of a rational actor, Braithwaite has subsequently recognised different types of motivational postures suggested different strategies are appropriate for different types of firm. The starting point should still be negotiation. However, escalation should depend on an assessment of the firm’s motivational stance and regulatory capacity. ‘Virtuous’ firms should receive negotiating, restorative justice strategies; ‘rational’ firms should be met with deterrence strategies, and incompetent and irrational actors should be simply incapacitated, eg have their licences revoked.<sup>28</sup>

Fourthly, responsive regulation approaches look most convincing when a binary regulator-regulatee relationship is assumed.<sup>29</sup> Such a scenario envisages the transmission of clear messages from regulator to regulatee. As Parker has suggested, it involves the creation ‘enforcement communities’ in which regulator and regulatee understand the strategy that each is adopting and can predict each other’s responses.<sup>30</sup> Such understanding may not develop, however, even in a binary relationship. The relationship between the regulatee and the rest of the regulatory regime may not consist only of a relationship with one regulator in any particular area of activity. Regulatory regimes can be highly complex, and inspection and enforcement activities can be spread across different regulators with respect to similar activities or regulations. For example, our 2005 study of Defra’s inspection and enforcement revealed that there were numerous areas in which enforcement responsibilities are spread across different regulators, including fly-tipping (Defra, Local Authorities, police); cattle identification

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<sup>28</sup> On combining targeting and responsive approaches see Braithwaite, *op.cit* (2002), pp.36-40, reiterated in J. Braithwaite, ‘Rewards and Regulation’ (2002) *Jnl Law and Society* 12 at 21-22 and J. Braithwaite, ‘Responsive Regulation and Developing Economies’ (2006) 34(5) *World Development* 885 at 887-8.

<sup>29</sup> Responsive regulation, in Ayres and Braithwaite’s original formulation, does also envisage the involvement of consumers in a tri-partite arrangement; however the assumption is that the relationship is otherwise between a firm and a regulator and does not envisage multiple regulators.

<sup>30</sup> C. Parker, ‘Compliance professionalism and regulatory community: The Australian trade practices regime’ (1999) 26(2) *Journal of Law & Society* 215-239.

(State Veterinary Service (SVS), Rural Payments Agency, Local Authorities); Transmissible Spongiform Encephalopathy Regulations (SVS, Local Authorities, Defra, Food Standards Agency). As a result, responsive regulation may prove weak because the messages flowing between regulators and regulatees are confused or subject to interference. This may happen because regulatees are uncertain about who is demanding what and which regulator needs to be listened to regarding a particular issue. Such regulatory ‘white noise’ may undermine the responsive regulation strategy because lack of clear messaging will detract from the impact of any responsive approach to sanctioning.

Turning to the practical limitations of the pyramid approach, an issue in some industries is that there might be insufficient repeat interactions between regulator and regulated to allow a pyramidal strategy to be operated.<sup>31</sup> Where such interactions do occur, escalating through the layers of the pyramid may simply not happen because enforcement is not simply a two-actor game in which the only factor that shapes the enforcer’s response is the co-operative or unco-operativeness of the regulatee. Indeed, as Mendeloff has argued, whether a responsive approach is optimal will depend on a number of other factors such as agency resource levels, the size of the regulated population, the kinds of standards imposed (and how these are received), the observability of non-compliance, the costs of compliance, the financial assistance available for compliance and the penalty structure.<sup>32</sup> Enforcers may prove excessively tied to compliance approaches for a number of reasons, including their own organisational resources, culture and practices and the constraints of the broader institutional environment. The agency may lack the tools or resources to progress to more punitive strategies; it may fear the political consequences of progression and may not have the judicial<sup>33</sup>, public or political support for escalation; it may be reluctant to trigger an adverse business reaction to deterrence strategies; it may find it difficult to assess the need for escalation because it lacks the necessary information on the exact nature of a regulated firm’s response to existing controls; and it may be disinclined to escalate unless it has sufficient evidence to make a case for the highest level of response (e.g. to prosecute or disqualify).<sup>34</sup> Alternatively, those at the top of the regulatory organisation may have made a strategic decision to ‘come down hard’ on particular types of offence or offender for a range of reasons – media or political pressure, for example, or as a more general shift to a more deterrence’ or punitive style across the board

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<sup>31</sup> See N. Gunningham and R Johnstone, *Regulating Workplace Safety* Oxford, OUP, 1999, pp. 123-129.

<sup>32</sup> See Mendeloff, *op.cit.*, p. 717.

<sup>33</sup> On under-deterrence from low fines see e.g. the complaints of the Environment Agency in *Annual Report 2004*, and the comments in the Hampton and Macrory Reports: P. Hampton, *Reducing Administrative Burdens* (London, HM Treasury, 2005) (hereafter Hampton Report); and R. Macrory, *Regulatory Justice: Sanctioning in a post-Hampton World* (Cabinet Office, May 2006) (hereafter Macrory Report); and NAO Report, paras. 2.34-2.36.

<sup>34</sup> The NAO Report, para. 2.27 stated that fisheries infringements would be dealt with by means of written warnings in some cases but only if ‘the same evidence would be likely to stand scrutiny successfully if it were presented to a court’.

or with respect to particular regulatees,<sup>35</sup> or to compensate for weaknesses in other inspection and enforcement strategies adopted by the regulator. Such enforcement strategies are being adopted by UK regulators, for example the Financial Services Authority, to complement their risk based approaches to inspection and supervision. In this situation, regulatory policy overrides the individual nature of the regulator-regulatee relationship. It does not matter how cooperative the regulatee is, the regulatory official is meant to adopt a more punitive stance in order to pursue wider organisational objectives.

There may also be legal problems in applying a responsive approach.<sup>36</sup> In some areas, legislatures may have decreed that defaulters shall be met with, say, deterrence strategies and this may tie the hands of the enforcing agency.<sup>37</sup> Responsive regulation, moreover, calls for the availability of a wide range of credible sanctions, but legislators may have failed to provide regulators with the sanctions and investigative tools that allow a progression up the pyramid. The recent Macrory review of penalties, for example, highlighted many areas where regulators possessed no big stick that allowed them to ‘speak softly’ whilst having a credible threat in the background.<sup>38</sup> Although regulators commonly possess prosecution powers, the fines imposed by the courts are often so low that they fail to provide deterrence to the more calculating offenders, particularly small, itinerant operators who have few reputational concerns.<sup>39</sup> Alternatively, the stick may be so big (involving, for instance, the revocation of a major utility’s licence, or the de-recognition of a political party) that it simply can never be used. The potential sanction may be so severe that even threats to use it are not credible.

As for ‘principled’ concerns, responsive regulatory strategies have also been criticised on the grounds of fairness, proportionality and consistency. Although responsive strategies can uphold principles of substantive rationality, they inevitably come up against criticisms of lack of formalism and as undermining both the rule of law and broader constitutional values.<sup>40</sup> Yeung, for example, argues that the ‘relentless quest for effective compliance’ that pervades Ayres and Braithwaite’s model prioritises the functional concerns of ensuring effective regulation over constitutional values of proportionality and consistency. Regulatory responses are dictated by the cooperation or non-cooperation of the regulatee, not the seriousness of the infraction. Infractions causing widespread harm will not be treated severely so long as the regulatee cooperates with the regulator, whereas minor infractions will be treated

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<sup>35</sup> Eg J. Black, ‘Managing Regulatory Risks and Defining the Parameters of Blame: the Case of the Australian Prudential Regulation Authority’ (2006) 28(1) *Law and Policy* 1; R. Baldwin, ‘The New Punitive Regulation’ [2006] Public Law 351.

<sup>36</sup> On responsive regulation and legality see J. Freigang, ‘Is Responsive Regulation Compatible With the Rule of Law?’ (2002) 8 *European Public Law* 463-72.

<sup>37</sup> For example the US Federal Deposit Insurance Corporation Improvement Act contains a provision for prompt corrective action. This stipulates the different types of action the Federal Deposit Insurance Corporation should take when capital levels in a deposit taking institution reach particular levels.

<sup>38</sup> See Ayres and Braithwaite, *op.cit.*, Chapter 2.

<sup>39</sup> Macrory Report; see also Hampton Report.

<sup>40</sup> See eg K. Wehran, ‘De-Legalizing Administrative Law’ (1996) *University of Illinois LR* 423.

severely if the regulatee does not cooperate. The enforcement response is thus not proportional to the harm cause, and this is said to raise issues of consistency of treatment across different regulatees.<sup>41</sup> Such issues can be addressed to an extent by the generation of rules and guidelines to confine, structure and check responsive strategies, but there are dangers that such structuring may straitjacket responsive regulation within costly bureaucratic controls and that the structuring guidelines used may give effect to important policies that are likely to be under-exposed to democratic scrutiny.<sup>42</sup> Further, such ‘collaborative compliance’ regimes, characterised by close relationships between regulator and regulatee, are prone to ‘regulatory capture’.<sup>43</sup> Ayres and Braithwaite’s answer here is to advocate a system of tripartism – in which Public Interest Groups (PIGs) are legally empowered parties within the regulatory process that can act as informed representatives of regulatory beneficiaries and operate as counterbalances to industrial and agency pressures.<sup>44</sup> Critics have, however, questioned how such a system can be made to work within responsive regulation and have cautioned that empowered PIGs may become ‘shadow regulators’;<sup>45</sup> that disputes about the representativeness of empowered PIGs can be expected; that gridlocks may result; and that regulatory processes will not be constructively underpinned by trust and cooperation where there is (as in the USA) a backdrop of adversarial legalism.<sup>46</sup>

### ***Responding to the Limitations of Responsive Regulation – Smart Regulation***

Responsive regulation does not provide a complete answer to the problems of designing tools for regulation or of applying tools in different combinations, nor was it intended to. As Gunningham, Grabosky and Sinclair noted in their ‘smart’ regulatory pyramid,<sup>47</sup> there may be arguments for not confining the regulatory response to escalating punitive responses but for thinking laterally and breaking away from the punitive pyramid – for instance by placing more emphasis on *ex ante* controls such as screening, considering whether a restructuring of the industry will produce desired results better than regulation or whether resort to non-state controls will work better than state sanctioning or whether it is necessary to look beyond individual non-compliers to systemic difficulties in the sector.<sup>48</sup>

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<sup>41</sup> K. Yeung, *Securing Compliance: A Principled Approach* (Oxford: Hart Publishing, 2004) pp.168-170.

<sup>42</sup> See Black, *op. cit.* (1997)

<sup>43</sup> Yeung, *op. cit.*, pp.170-174; D. Dana, ‘The Emerging Regulatory Contract Paradigm in Environmental Regulation’ (2000) *University of Illinois LR* 35; M. Seidenfeld, ‘Empowering Stakeholders: Limits on Collaboration as a Basis for Flexible Regulation’ (2000) 72 *William and Mary LR* 411.

<sup>44</sup> See Ayres and Braithwaite *op.cit* Chapter 3.

<sup>45</sup> See Mendeloff, *loc. cit.* p.719.

<sup>46</sup> See Scholz, *loc. cit.* 783; Mendeloff, *loc.cit.*720,729.

<sup>47</sup> See N. Gunningham and P. Grabosky, *Smart Regulation* (Oxford: Clarendon Press, 1998), chapter 6; see also Ayres and Braithwaite, *loc. cit.*, pp.38-9.

<sup>48</sup> See Johnstone, *loc. cit.* 383.

The smart regulatory pyramid is also three-sided in making the point that different sorts of controls can be imposed by the state but also by quasi-regulators (such as trade associations and professions) and by corporations. Gunningham and Sinclair argue: “our pyramid conceives of the possibility of regulation using a number of different instruments implemented by a number of parties. It conceives of escalation to higher levels of coerciveness not only within a single instrument but also across several instruments.”<sup>49</sup>

The posited advantages of smart regulation’s three-sided pyramid are that it paves the way to a coordinated approach to regulation in which it is possible to escalate responses to non-compliance by moving not only up a single face of the pyramid but also from one face of the pyramid to another (e.g. from a state control to a corporate control or industry association instrument). This gives flexibility of response and allows sanctioning gaps to be filled – so that if escalation up the state system is not possible (e.g. because a legal penalty is not provided or is inadequate) resort can be made to another form of influence.<sup>50</sup> Seeing regulation in terms of these three dimensions allows creative mixes, or networks, of regulatory enforcement instruments and of influencing actors or institutions to be adopted. It also encompasses the use of control instruments that, in certain contexts, may be easier to apply, less costly and more influential than state controls.

Smart regulation is, accordingly more holistic than responsive regulation in its basic, enforcement, form.<sup>51</sup> It nevertheless involves an escalation process and, as a result, runs up against many of the general difficulties that responsive regulation encounters and which were noted above. In addition, of course, the creation of regulatory networks and the processes of coordinating responses across three different systems, or faces of the pyramid, involves its own problems (an important contribution of ‘smart regulation’ is its discussion of inherent complementarities and incompatibilities between different regulatory instruments).<sup>52</sup> As the advocates of this approach acknowledge,<sup>53</sup> such coordination is not always easy and gives rise to special difficulties of information management, resource and time constraints and political differences between different institutional actors. Evaluating the case for an

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<sup>49</sup> Ibid pp.399-400. Braithwaite has expanded again on his own original model in a similar vein to argue that a responsive approach to developing and using regulatory tools which conceives non-state actors as important regulators in their own right can enhance the regulatory capacity of the state - see Braithwaite, loc.cit (2006). On strategies for enhancing capacity by enrolling other actors see also J. Braithwaite and P. Drahos, *Global Business Regulation* (Oxford: OUP, 2001) and J. Black, ‘Enrolling Actors in Regulatory Processes: Examples from UK Financial Services Regulation’ [2003] Public Law 62-90.

<sup>50</sup> Ibid, p.403.

<sup>51</sup> The architects of responsive regulation might argue, however, that there is no inconsistency between the responsive and the smart approaches. John Braithwaite, indeed (in ‘Responsive Regulation and Developing Economies’ (2006)34 *World Development* 884,888) has emphasised that responsive regulation conceives of NGOs and businesses as important regulators in their own right so that ‘...the weaknesses of a state regulator may be compensated by the strengths of NGOs or business regulators’(p.892).

<sup>52</sup> Gunningham and Grabosky, op.cit chapter 6 (by Gunningham and Sinclair).

<sup>53</sup> Ibid pp.402-4.

escalatory response presents challenges within the responsive regulation pyramid but such evaluations will be all the more difficult when complex mixes of strategy and institutions are involved. Concerns about consistency, fairness and accountability may, moreover, be even more acute than was the case with responsive regulation.<sup>54</sup>

### ***Risk Based Regulation***

As a leading influence at the central governmental level, responsive regulation has perhaps given way (at least in the UK) to the currently fashionable ‘risk- based’ regulation. In the U.K in March 2005 the Hampton Review<sup>55</sup> recommended that all regulatory agencies should adopt a risk- based approach to enforcement and a host of agencies are actively developing such systems.<sup>56</sup> The principal sense in which the term ‘risk based’ regulation is used post Hampton is to refer to a targeting of inspection and enforcement resources that is based on an assessment of the risks that a regulated person or firm poses to the regulator’s objectives. The key components of the approach are evaluations of the risk of non-compliance and calculations regarding the impact that the non-compliance will have on the regulatory body’s ability to achieve its objectives. Risk- based regulation thus offers an evidence-based means of targeting the use of resources. It differs from ‘pyramidic’ approaches by emphasising analysis and targeting rather than a process of responsive escalation. As such, risk- based approaches are associated with a number of particular strengths. They provide a systematic framework that allows regulators to relate their enforcement activities to the achievement of objectives. They enable resources to be targeted in a manner that prioritises highest risks, and they provide a basis for evaluating new regulatory challenges and new risks.

The debate on risk based regulation is focused primarily on inspection. It is meant to apply to both proactive and reactive enforcement strategies. The enforcement activities of some regulators, notably utilities regulators, are principally reactive: triggered by complaints or reported incidents. The advantage of enforcing reactively is that private citizens often bear the burden of detection work, and this reduces public budgetary needs. Another is that the regulator is seen to be responsive to public concerns. Core disadvantages are that the drivers of action may be short term random and irrational considerations; attention is not necessarily paid to the most important risks; and preventative control is not established. Many regulators operate a proactive inspection strategy. The idea of risk based regulation is to target both proactive and reactive strategies in accordance with the risks a firm poses to

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<sup>54</sup> See Braithwaite, *loc. cit.*

<sup>55</sup> Hampton Report.

<sup>56</sup> J. Black, ‘The Emergence of Risk Based Regulation and the New Public Risk Management in the UK’ (2005) Public Law 512-548; on the development of similar system by the Australian Tax Office see J. Braithwaite, ‘Meta-Risk Management and Responsive Regulation for Tax System Integrity’ (2003) 25 (1) *Law and Policy* 1.

the regulators' objectives. As such it stands in contrast to routine, random or regional approaches to inspections. Thus in the area of VAT, inspectors used routinely to visit premises, regardless of whether there had been any incidence of non-compliance in the past, or regardless of size and so on. Under the new risk based system, firms are risk-rated in accordance with their propensity for, and impact of, non-compliance.<sup>57</sup>

Risk-based approaches, however, give rise to a number of particular challenges and difficulties.<sup>58</sup> Risk based regulation means focusing resources on regulatory priorities; the flip side is that it means not doing things that were done before. In the first instance, therefore, risk based systems require that senior regulatory managers are clear about which risks will *not* be prioritised. These decisions may well have been made by the regulator previously: resource and other limitations on regulatory capacity mean that regulators have always had to prioritise. Such decisions have previously been implicit and non-transparent. Risk based systems require them to be made explicit. As a result, managers must be able and prepared to deal with the political and practical consequences of establishing particular levels of risk tolerance. They must be willing to justify such levels of tolerance both politically and legally. The targeting approach of risk-based systems may thus detract from the reassurance that the public derives from across the board mechanisms – from having a regulatory ‘bobby on the beat.’ Risk based systems also raise issues of consistency of treatment of regulated firms, and equality of protection of consumers and the public. For these and other reasons, politicians and the public may not support the regulatory body’s decisions regarding the risks that it will prioritise for attention and those that it will not.

Risk based systems, moreover, tend to focus on known and familiar risks. They can fail to pick up new developing risks and will tend to be backward looking and ‘locked in’ to an established analytic framework. Another problem may be that risk-based systems will tend to neglect lower levels of risk, which if numerous and spread broadly, may involve considerable cumulative dangers. Poorly designed risk-based approaches, indeed, are likely to lead to persistent non-enforcement regarding certain types of firm and systemic risks. If such systems are not supplemented by other programmes, such as those of random inspection (as Hampton advocated) they can under-deter the lower level risk creators, the ‘forgotten offenders’ who escape prioritisation. The overall effect of regulation is then not to reduce risk, but to substitute widely spread risks for lower numbers of larger risks.

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<sup>57</sup> See HM Customs and Excise Annual Report 2003-4, HC 119 (London: HMSO, 2003), pp. 123-134 for the initial outline of this strategy, part of the broader VAT Compliance Strategy.

<sup>58</sup> See e.g Black, *op. cit* (2005) and (2006).

A more general problem with risk-based regulation is that it tends to focus on the individual firm, not on the more strategic issue of how to raise compliance within the regulatory community as a whole. Risk-based regulation, moreover, may even prove unduly narrow in its approach to even individual firms. It may tend to tailor not merely the targeting but also the severity of its sanctioning approach according to the level of risk presented by the non-complier.<sup>59</sup> Such a strategy may, however, under emphasise the need to understand why such a non-complier is not behaving as required and to identify the best regulatory response to that non-compliance.

In addition, risk-based regimes build their analyses by assessing on accumulated supplies of information. They may, accordingly, impose significant burdens on businesses (especially if poorly managed) and this may cut across government desires to reduce burdens and form-filling. They also require significant resources on the part of regulators to be able to analyse and respond to risks, and resources may not shift within regulatory organisations in a way which responds to changes in risk.<sup>60</sup> Nor can it be assumed that risk-based regulation always constitutes an efficient use of resources. If a regulatory body prioritises its deployment of resources by targeting these at highest risks this may prove costly where the expense of reducing those risks is high because enforcement or compliance cost are extensive. The efficient way to use a given level of resources to reduce overall risks (for instance to the environment) is to target not the highest risks or risk creators but those activities or risk creators that offer the prospects of the highest risk reductions for the given expenditure of resources. A strategy of targeting highest risks and ‘most severe’ problems would often fail a cost-benefit comparison with other strategies.

Finally, as with pyramidal approaches, risk-based systems may give rise to considerable issues of accountability. Even those regulatory agencies that recognise the virtues of openness, transparency and accountability may tend to assume that their processes for establishing and applying risk measures and criteria, and for selecting actionable risks, are uncontentious and technical. In response, it can be argued that a major effect of risk-based regulation is to transfer the real locus of policymaking into the recesses of these very processes. The danger is that risk-based regulation will tend to bury policymaking issues deep within the administrative process, making scrutiny and accountability extremely difficult.<sup>61</sup>

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<sup>59</sup> Black, loc. cit. (2006).

<sup>60</sup> For example, NAO, *The Financial Services Authority: A Review under s.12 of the Financial Services and Markets Act 2000* (London, April 2007), paras 1.10-1.15.

<sup>61</sup> See Black, loc.cit.

Can it be argued, however, that Malcolm Sparrow's 'regulatory craft' approach deals with the above difficulties? This strategy places one version of risk-based regulation – namely problem solving - at the centre of regulatory strategy. It separates out the 'stages of problem solving'<sup>62</sup> and stresses the need to define problems precisely, to monitor and measure performance and to adjust strategy on the basis of performance assessments. It also accepts the "dynamic nature of the risk control game."<sup>63</sup> What it does not do is paint a picture of the strategic choices that confront regulators in attempting to carry out different tasks or 'stages' of the problem solving process. Sparrow tells us to target key problems and solve these by developing solutions or interventions and 'implementing the plan' – what we are not told is whether the solution to a given problem lies through 'responsive' 'deterrent' or some other approach.<sup>64</sup> We have no menu of options nor are we offered an explanation of the potential interactions between different regulatory logics and different strategies for coming to grips with the stages of the problem solving process – matters that are more fully dealt with by proponents of smart regulation. The 'problem-centred' approach, moreover, assumes, perhaps too readily, that regulation can be parcelled into problems and projects to be addressed by project teams.<sup>65</sup> This may well be the case in some scenarios – where, for instance, a particular pollution problem occurs for a narrow and identifiable set of reasons. In other situations, however, the regulator may be faced with a host of different kinds of errant behaviour that cumulatively cause a mischief. To focus on the mischief by defining it as 'the problem' may not help us a great deal in seeking to devise strategies for responding to it. What may be more useful is to identify the challenges that have to be faced, the available options (in terms of tools and strategies) and the kind of process that will foster working towards an optimal application of tools and strategies over time.

To summarise, the responsive, smart, risk-based and 'regulatory craft' approaches all contribute very significantly to regulatory understandings, but even leaving aside the difficulties discussed above, they can be said to leave a residual need for further engagement with the considerable body of challenges that regulators face in their actions of detecting, constructing and responding to non-compliance.

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<sup>62</sup> Sparrow, *op.cit.*, Chapter 10.

<sup>63</sup> *Ibid.*, p.274.

<sup>64</sup> See Gunningham and Grabosky, *op.cit.*, Chapter 6.

<sup>65</sup> Sparrow (p.232) concedes that the problem solving approach "is predicted on the way hypothesis that a significant proportional of day to day accidents, incidents, violations and crimes fall into patterns that can be discerned."

## **2. Remaining Challenges and Really Responsive Regulation**

The notion of ‘responsiveness’ has been used in debates on law and regulation in a number of ways.<sup>66</sup> Here we draw on the criticisms of the enforcement strategies noted above, as well as a range of existing literature in regulatory and organisational theory ( and notably on Selznick’s formulation of responsiveness<sup>67</sup>) to argue that to be ‘really responsive’, regulators have to respond not merely to firms’ compliance responses but also to their *attitudinal settings*; to the *broader institutional environment* of the regulatory regime; to the *different logics of regulatory tools and strategies*; to the *regime’s own performance*; and finally to *changes* in each of these elements. Our argument is developed in the enforcement context but it is applicable to all aspects of regulatory activity – this follows from our view that the really responsive regulator should be wedded neither to any particular strategy of enforcement nor to enforcement as the control method of first choice.

At this point it is worth briefly elaborating on each of the elements just referred to.

### ***Responsiveness to Regulatees’ Attitudinal Settings***

In a really responsive regulatory regime, responsiveness means responding to the operating and cognitive framework of the particular firm or, put in other terms, its own ‘attitudinal setting’. This goes beyond the question of how the firm, or different individuals within the firm, interact on a personal level and whether relationships are cooperative or antagonistic to look at the broader context that shapes the firm’s response to the regulatory regime. Recent work on compliance shows the importance of motivational postures, the social signals that individuals send to the regulator and to themselves to communicate the degree they accept the regulatory agenda and the way in which the regulator functions and carries out its duties on a daily basis. This work identifies five types of motivational posture: commitment to or accommodation of the regulatory agenda; capitulation to the regulatory authority;

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<sup>66</sup> See John Braithwaite’s own expansion of the concept so that responsive regulation has now broken free of its enforcement roots to encompass far broader notions of deliberative democracy and restorative justice, and to provide a tools-based framework for enhancing the regulatory capacity of the state or providing an alternative to it - in Braithwaite, op.cit (2006) and see also P. Selznick, *The Moral Commonwealth* (Berkeley: UCLA Press, 1992), pp. 463-75; P. Nonet and P. Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Harper / Colophon, 1978). Teubner’s notion of ‘reflexiveness’ initially drew on Selznick’s responsiveness, but developed in a theoretically distinct direction: G. Teubner, ‘After Legal Instrumentalism: Strategic Models of Post-Regulatory Law’ in G. Teubner (ed), *Dilemmas of Law in the Welfare State* (Berlin, 1986); G. Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law & Soc Rev* 239; id., ‘Juridification - Concepts, Aspects, Limits, Solutions’ in G. Teubner (ed), *Juridification of the Social Spheres* (Berlin, 1987). Responsiveness has also been elaborated by others, see eg V.L. Nielsen, ‘Are Regulators Responsive?’ (2006) 28(3) *Law and Policy* 395.

<sup>67</sup> Selznick has been a long proponent of ‘responsive’ law, and in turn, regulation – see Selznick at note 71 above.

resistance, game playing and disengagement.<sup>68</sup> In its policy prescription, which is further refinement of the original pyramid, this work retains a focus on the nature of the firm-regulator relationship, and looks to that relationship to change motivational postures, for example through improving the procedural fairness in the administration of the regime, or examining how threats or rewards affect motivational postures.<sup>69</sup> It is suggested that we need to go beyond the confines of this relationship to examine broader factors. Work in the institutional theory of organisations which focuses on how organisations respond to their environment emphasise that responses are a complex combination of rational and institutionalised responses, in which strategic action is structured by a combination of internal and external institutional pressures, including pursuit of profitability or reputation, market position, congruence of external regulatory demands and internal goals, the means by which regulatory norms are imposed, the perceived fairness of the regulatory regime and the nature of the external environment.<sup>70</sup>

Really responsive regulation thus demands that regulators take account of the cultures and understandings that operate within regulated organisations. A really responsive regulation approach, moreover, draws attention to the kinds of problem that arise when there are tensions between attitudinal settings. It also highlights the effects of such tensions across the different tasks that are involved in the regulatory enforcement process – a matter to be returned to in Section 3 below.

### ***Responsiveness to Institutional Environments***

The second element of really responsive regulation is that it recognises and responds to the constraints and opportunities that are presented by the institutional environments within which the relevant regulators act. In short, this is a plea for institutional theories to be taken more seriously by regulatory scholars. There are different versions of institutionalism, which are distinguished by the model of stance they take on the extent to which structure or agency determines behaviour.<sup>71</sup> All agree, however,

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<sup>68</sup> A similar categorisation has been developed in institutional theory: Oliver identifies five response strategies: acquiescence, compromise, manipulation, avoidance or defiance: C. Oliver, 'Strategic Responses to Institutional Processes' (1991) 16(1) *Academy of Management Review* 145; or see eg HM Customs and Excise categorisation, op.cit..

<sup>69</sup> V. Braithwaite loc.cit. (2007). On the importance of perceptions of fairness of the regulatory regime for compliance see L. Feld and B. Frey, 'Tax Compliance as the Result of a Psychological Tax Contract: The Role of Incentives and Responsive Regulation' (2007) 29(1) *Law and Policy* 102; E. Ahmed and V. Braithwaite, 'Higher Education Loans and Tax Evasion: A Response to Perceived Unfairness' (2007) 29(1) *Law and Policy* 121; V. Braithwaite, K. Murphy and M. Reinhart, 'Taxation Threat, Motivational Postures, and Responsive Regulation' (2007) 29(1) *Law and Policy* 137; T. Tyler, *Why People Obey the Law: Procedural Justice, Legitimacy and Compliance* (Yale University Press, 1990).

<sup>70</sup> For a summary from an institutionalist perspective see Oliver, loc cit; W.R. Scott, *Institutions and Organisations* (Sage, 2001). See also C. Parker, *The Open Corporation* (Cambridge: CUP, 2002).

<sup>71</sup> For summaries see T. Koebler, "The New Institutionalism in Political Science and Sociology" (1995) 27 *Comparative Politics* 231-243; P. Hall and R. Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44(4) *Political*

that institutional environments are constituted by the organisational / regulatory, normative, cognitive and resource-distribution structures in which the regulator is situated.<sup>72</sup> The actions and decisions of organisations and individuals (both regulators and regulatees) is thus structured by the norms regulating their conduct, by the senses of appropriateness of actions, of understandings of how the environment operates, and by the distribution of resources between themselves and others with whom they interact. Historical institutionalism further emphasises the role of the political and legal infrastructure in which the regulator (state or non-state) is situated in shaping actions and decisions: the patterns of formal and informal control over the regulator, of veto points in decision making, its position in the infrastructure of a broader regulatory regime (eg a state or non-state based transnational regime, or EU regime, or local governmental regime), and the distribution of resources, including strategic resources, within that regime. This notion of institutional environment is akin to Haines's idea of 'regulatory character',<sup>73</sup> but the delineation of the exact nature and role of the institutional environment in shaping individual and organisational decisions has also long been the concern of institutionalists in sociology, political science and international relations.<sup>74</sup> Really responsive regulation emphasises the relevance of the institutional context not only of the regulatee, but of the regulator, in shaping the regulators' enforcement activities.

### ***Responsiveness to the Logics of Different Regulatory Tools and Strategies***

The third element in really responsive regulation is responsiveness to the logics of different regulatory strategies and tools.<sup>75</sup> Different regulatory strategies can have different logics. They embody, or at the least place emphasis on, different understandings of the nature of behaviour or of an institutional environment, and in turn have different preconditions for effectiveness (which are that the institutional environment or behaviour conforms to those foundational understandings)<sup>76</sup>. The concept of 'regulatory logic', it should be noted, differs from the idea of regulatory objectives (such as cleaner environments or safer workplaces). Such objectives, may be sought to be achieved through different logics (e.g. of punishment or restoration or rehabilitation or through 'professional' or 'commercial'

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*Studies* 936-957; J. Black, 'New Institutionalism and Naturalism in Socio-Legal Analysis: Institutional Approaches to Regulatory Decision Making' (1997) 19 *Law and Policy* 51-93.

<sup>72</sup> W.R. Scott, *Institutions and Organization*, (Thousand Oaks, Calif: Sage, 1995); W.W. Powell and P.J. DiMaggio (eds), *The New Institutionalism in Organizational Analysis*, Chicago: Chicago University Press.

<sup>73</sup> F. Haines *Globalization and Regulatory Character* (Ashgate, 2005).

<sup>74</sup> See eg P. Evans, P. Rueschmeyer and T. Scokpol, *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985); G. Ikenberry, 'Conclusion: An Institutional Approach to Foreign Economic Policy' in G. Ikenberry, D.A. Lake and M. Mastanduno (eds), *The State and American Foreign Economic Policy* (Ithaca: Cornell University Press, 1988); P. Hall and R. Taylor, 'Political Science and the Three New Institutionalisms' (1996) 44(4) *Political Studies* 936-957; J. Goldstein and R.O. Keohane (eds), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change*, (Ithaca: Cornell University Press, 1995).

<sup>75</sup> On mixing regulatory tools see Gunningham and Grabovsky, op. cit; Ayres and Braithwaite, op. cit.; Baldwin, op. cit (1995), J. Black, *Rules and Regulators* (Oxford: OUP, 1997).

<sup>76</sup> See J. Black, 'Decentred Regulation: Understanding the Role of Regulation and Self Regulation in a "Post-Regulatory" World' (2001) 54 *Current Legal Problems* 103-147

logics). Such logics involve distinctive relationships and modes of conversing with regulated parties – a punitive message, for instance, will be framed and received differently from a rehabilitative message. Coherence of logic matters because confusion detracts from effective regulation.<sup>77</sup> Really responsive regulation, moreover, seeks to identify the regulatory logics engaged in different regulatory tasks. Regulators cannot combine, say, punitive, rehabilitative and restorative regulatory logics across different enforcement tasks (such as detection and response development, discussed below) without this giving rise to potential tensions – which usually involve institutional or communications difficulties. Institutional problems arise when different regulatory bodies play different and non-harmonious roles within a regime. Communications problems are caused when different logics are based on different assumptions, value systems, cultures and founding ideas so that messaging across logics involves distortions and failures of contact. Responsive regulation requires escalation up a punitive scale that crosses logics; smart regulation theory encounters such issues in a more complex framework (and to a degree addresses complementarities and inconsistencies of approach) and risk based regulation focuses on the identification of priorities and targets rather than the potential difficulties of combining regulatory logics. In drawing closer attention to the nature of different regulatory technologies and their inherent logics, really responsive regulation seeks to provide a way of coming to grips with these tensions within a conceptual framework that identifies potential difficulties and provides a foundation for their resolution.

### ***Responsiveness to the Regime's own Performance and Effects***

Fourthly, really responsive regulation has to be responsive to the regime's own performance. We are not alone in emphasising the need for performance evaluation and modification. One important element of Selznick's conceptualisation of responsive law (and by extension, regulation) is that law becomes an instrument of inquiry into both its implementation and the premises on which the law, is based.<sup>78</sup> Sparrow and Braithwaite have separately developed detailed policy prescriptions for the design of regulatory performance measures.<sup>79</sup>

In the context of enforcement, such performance sensitivity requires that the regulator is capable of measuring whether the enforcement tools and strategies in current use are proving successful in achieving desired objectives. This will demand not merely an assessment of the performance of the

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<sup>77</sup> Waller also refers to this, describing it as 'institutional integrity': V. Waller, 'The Challenge of Institutional Integrity in Responsive Regulation: Field Inspections by the Australian Tax Office' (2007) 1 *Law and Policy* 67.

<sup>78</sup> Selznick, loc. cit. p.472.

<sup>79</sup> Sparrow, loc. cit.

existing regime but also an understanding of the activities that detract from the achievement of objectives but are beyond the scope of the current regulatory regime or which are ‘off the screen’ in the sense that they are going undetected – what Sparrow would refer to as ‘invisible’ offences.’<sup>80</sup> If this first challenge is not met, the regulator will not be in a position to judge whether changes in tools or strategies are called for or to estimate what kinds of changes are needed. This evaluation will demand an analysis of the fit between the relevant rules or requirements and the regulatory body’s objectives.

Performance sensitivity, moreover, rests on the regime’s ability both to *assess* its performance in the light of its objectives and to *modify* its tools and strategies accordingly.<sup>81</sup> Such modification, it is important to note, might involve radical shifts of strategy – such as an emphasis on the reinvigoration or reorganising of an industry rather than a continued stress on enforcing the current regime of rules.

Developing robust systems of performance assessment is, however, a notoriously difficult task. Each of the four main approaches to performance assessment, input, process, output and outcome assessments, has its own logic, is useful for different purposes, and, in turn, is of relevance to different parts of the regulatory organisation and its evaluators.<sup>82</sup> Input based assessment of performance is common: the measurement of numbers of inspectors and inspections, resources devoted to control and other inputs. Process or compliance based assessment is also common: measuring adherence to procedural requirements and other laws, policies or guidelines. What is less common is either output based assessment: measuring the extent to which the goals of the specific programme are achieved, or longer term outcome based assessments: evaluating the impact of the regulatory system against the broad objectives of the agency (rather than the specific programme). The difficulties of assessment are compounded in polycentric regulatory regimes, and rely critically on cooperation if the accountability and learning functions of performance evaluation are to be met.<sup>83</sup>

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<sup>80</sup> See Sparrow, *op.cit.*, pp.192, 272-3.

<sup>81</sup> As we discuss below, these modifications may require legal or policy changes which can only be made by others at the national or supranational (eg EU) level.

<sup>82</sup> Performance evaluation is a key part of the better regulation agenda: see eg NAO, *Measuring the Performance of Government Departments* (London, 2001); OECD, *Results Based Management in the Development Co-operation Agencies: A View of Experience*, (OECD, 1999) OECD, Working Party on Regulatory Management and Reform, *Regulatory Performance: Ex Post Evaluation of Regulatory Tools and Institutions*, GOV/PGC/REG (2006)6 (OECD, 2004). On the difficulties of assessing performance see eg P. Hopkinson, P. James, A. Sammut, ‘Environmental performance evaluation in the water industry of England and Wales’ (2000) 43(6) *Journal of Environmental Planning and Management* 873-896; on responses to performance evaluation see eg S. Modell, ‘Performance Measurement and Institutional Processes: A Study of Managerial Responses to Public Sector Reform’ (2001) 12(12) *Management Accounting Research* 437; G. Bevan and C. Hood, ‘What’s Measured is What Matters: Targets and Gaming in the English Healthcare System’ (2006) 84(3) *Public Administration* 517.

<sup>83</sup> F-B van der Meer and J. Edelenbos, ‘Evaluation in Multi-Actor Policy Processes: Accountability, Learning and Cooperation’ (2006) 12(2) *Evaluation* 201.

Really responsive regulation pinpoints the need to assess performance not only on a continuing basis, but also in a manner that takes on board those shifts in objectives and regulatory environments that have been referred to above. Really responsive regulation does not eradicate the difficulties of performance assessment but, by placing assessment at the core of regulatory activity, it may facilitate its execution – insofar as it encourages the creation of ongoing systems and processes that will produce relevant data in a timely and organised manner.

### ***Responsiveness to Change***

Finally, in order to be really responsive, regulatory strategies have to adapt to movements in regulatory priorities, circumstances and objectives. These changes may be driven by factors internal to the regulator or imposed on the regulator from outside. Thus, shifts may be due to policy adjustments by the regulator or because of developments in such matters as attitudes and preferences, industrial practices and technologies, types of regulated actors, numbers of concerns regulated or governmental policies and legislation or other changes in the institutional environment. The set of regulatory tools and strategies that is optimal will vary according to differences in the regulatory environment. If, for instance, governments make large scale taxation, policy or legal changes, or if they allow new markets to develop, this is likely to affect the kind of regulatory and enforcement regime that best achieves desired objectives as given area. If, for example, the government introduces an emissions trading scheme to control a toxic water pollutant that is used in a certain production process, the Environment Agency might be well-advised to reconsider its use of command –based controls over that substance.

The challenge for regulators, in such a context, is to operate systems that are sensitive to such changes and can adapt accordingly. The difficulty with pyramidal and risk based systems is that they incorporate no core mechanism that assesses the need for systemic and strategic change – and evaluates this on the basis of evidence. Proponents of responsive regulation might, it should be noted, point here to the ‘pyramid of regulatory strategies.’<sup>84</sup> This pyramid, however, involves the state in signalling to industries that it will escalate strategies from self-regulation towards externally imposed command regimes. What it does not offer is an explanation of how the need for such escalation is to be assessed and how escalation is to be managed in a world of change. Similarly, advocates of ‘smart regulation’ would remind us that unsatisfactory regulatory outcomes can be dealt with in their system by the process of ‘sequencing’ regulatory instruments.<sup>85</sup> The idea behind sequencing is that “certain

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<sup>84</sup> Ayres and Braithwaite, *op.cit.*, pp.38-40.

<sup>85</sup> Gunningham and Gabosky, *op.cit.*, pp.444-7.

instruments would be held in reserve, only to be applied as and when other instruments demonstrably fail to meet pre-determined performance benchmarks. Logically, such sequencing would follow a progression of increasing levels of intervention.”<sup>86</sup> As with responsive regulation, however, smart regulation leaves work to be done to explain what is involved in evaluating success or failure or the rationales for adopting one rather than another method of sequencing. In the case of risk based regulation, any capacity of the regime to respond to changes in regulatory objectives or environments is dependent on the capacity of the system to collect information on the need for such changes and to act on such information through revisions in risk calculations and weightings. A problem with the risk based approach, however, is that, as noted, it will tend to focus on existing high level risks rather than smaller, cumulative, or newly emergent risks. It will tend to be blind to risks that are not picked up in the existing analysis and has no core method of identifying new regulatory challenges and adjusting to these.

Commentators such as John Braithwaite are, of course, not unaware that the processes of regulatory realignment involve challenges or that contentious issues attend the control of regulatory reshaping. In a recent article Braithwaite has pointed out that within networked regimes (in which regulatory functions and responsibilities are spread across numbers of organisations of different types) there are dangers of oligarchic power and issues of access to policy frameworks.<sup>87</sup> He suggests that the republican ideal is that contests between interests should act to prevent domination and that this joins with the responsive approach to offer a ‘combined ideal... that pyramidal escalation to contest domination drives contestation down to the deliberative base of the pyramid so that regulation is conversational’<sup>88</sup> It might be unduly optimistic, however, to assume that such ideals will commonly be realised so that regulatory conversations steer and shape regulatory systems in optimal ways. There are dangers, as indicated, that, within networked regimes, undue influence may be exercised by certain interests, that the parties in such conversations may lack good information on regulatory performance and that desirable regulatory changes may not take place because of deadlocks and disagreements. A really responsive regulation approach suggests that positive steps have to be taken to rise to the challenges first, of encouraging performance sensitivity through assessment procedures and, second, of fostering the capacity of regimes to change regulatory direction so as to adapt to changes in circumstances, priorities and objectives, including the cultivation of changes in organisational culture and intra-organisational dynamics that may be needed to respond to these changes.<sup>89</sup>

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<sup>86</sup> Ibid, p. 444.

<sup>87</sup> Braithwaite, op. cit. (2006). See also L. O’Toole and K. Meier, ‘Desperately Seeking Networks: Cooptation and the Dark Side of Public Management in Networks’ (2004) 64(6) Public Administration Review 681.

<sup>88</sup> Braithwaite, op. cit (2006), p. 893.

<sup>89</sup> See eg Black op. cit., (2005); J. Job, A. Stout and R. Smith, ‘Culture Change in Three Taxation Administrations: From Command and Control to Responsive Regulation (2007) 29(1) Law and Policy 84.

The need to address these challenges is again arguably the more urgent when, as is common, regulatory systems involve numbers of regulatory bodies operating different types of controls – i.e. when regulatory regimes are networked rather than simple. If networked regulatory regimes are to be shaped by complex contests and conversations, it is essential that such processes operate against a background of cooperation and good information concerning the performance of the extant regime. Assessing performance across networked regimes is, of course, considerably more difficult than measuring the effects of a simple command system but that difficulty makes the need to rise to the challenge the more urgent. The greater the potential for confusion in a regulatory system, the stronger is the case for assessing whether current methods and mixes are working well or badly.

Similar arguments can be made for meeting the challenge of ensuring that systems can be adjusted and modified on the basis of assessments of performance. There are real dangers that networked, smart, regulatory regimes lock their involved actors into agreed positions and approaches so that salutary reforms cannot be brought into effect. In an ideal world, conversations between networked regulatory actors might be expected to produce desirable regulatory adjustments. In a less than ideal world, such conversations may lead to confusions, entrenched positions, inability to respond to regulatory failures and blame shifting. What may be needed are strategies for encouraging appropriate programmes of modification.

What ‘really responsive regulation’ sets out to do is to offer a framework for regulation which is responsive to firms’ attitudinal settings, recognises the significance of the institutional environment (or ‘regulatory character’), which develops an awareness of the differential nature of the logics of different regulatory tools and strategies, which is performance sensitive, and which responds to change. All are fairly formidable tasks. The next section draws on empirical work we conducted with the UK Department for Environment, Food and Rural Affairs (Defra) and work done by the UK National Audit Office on Defra’s regulation of sea fishing. It explores how a really responsive regulation approach could be applied in regulatory enforcement and does so by delineating the particular elements of (or tasks involved in) inspection, compliance and enforcement activities; by noting the challenges involved in each of these; and by outlining what a really responsive regulatory response would bring to the analysis of enforcement.

### 3. Regulatory Enforcement: A Framework of Tasks

In introducing our argument we stated that a ‘really responsive’ regulation approach needs to be applied across all of the different tasks that are involved in regulatory activity. In the case of enforcement, this requires that the enforcement function is broken down into its different elements. We propose that there are five such elements or tasks.<sup>90</sup> These involve **detecting** undesirable or non-compliant behaviour, developing tools and strategies for **responding** to that behaviour, **enforcing** those tools and strategies on the ground, **assessing** their success or failure and **modifying** approaches accordingly.<sup>91</sup>

These tasks should not be seen as necessarily moving in a neat linear progression; in reality they are all interlinked and performance in relation to one of them may impact on the discharge of another, either positively or negatively. Thus, for example, tools or strategies which are used for detecting non-compliant behaviour can serve as positive bases for assessments of performance or even for prompting compliance (eg speed cameras or random inspections). In contrast, certain enforcement styles may have negative effects on the processes of detection or assessment (as where a prosecution strategy alienates regulatees, cuts off information flows to the regulator and impedes the processes of detection and performance measurement). Distinguishing these five tasks provides a framework for identifying those challenges that are encountered in carrying out a number of very different functions. It directly addresses the need to deal with change through performance assessment and strategic modification. It allows us to examine the different approaches that can be adopted in meeting these challenges and it also illuminates the nature of interactions between responses to the different challenges. It can be applied with a focus on addressing statutory or policy objectives in general terms or in dealing with disaggregations of these into more narrowly described issues or problems.

This framework can also be represented, as in Table 1, as key questions that really responsive regulators will consider in dealing with those concerns and tasks.

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<sup>90</sup> Other aspects of regulation can, similarly, be seen as comprising numbers of different tasks – to which a really responsive approach can be applied. Space here does not allow us to argue for particular breakdowns of such aspects and tasks – our core message is that really responsive regulation involves such a disaggregation, here illustrated in relation to enforcement. For other breakdowns of the regulatory/enforcement (problem solving process see Sparrow [op.cit](#) pp.141-2 (the OSHA framework: 1. Nominate potential problem 2. Define the problem 3. Determine how to measure impact 4. Develop solutions or interventions 5. Implement plan with periodic monitoring, review and adjustment. 6. Close Project.

<sup>91</sup> For a more detailed discussion of the ‘DREAM’ framework see R. Baldwin and J. Black, *A Review of Enforcement Measures* (Defra, London, November 2005)

**Table 1. A Really Responsive Enforcement Framework: Key Questions**

	<b>Detection</b>	<b>Response</b>	<b>Enforcement</b>	<b>Assessment</b>	<b>Modification</b>
<b>Compliance Response</b>	1.Are objectives clear? 2.Do regulatees supply accurate data on their activities? 3. Do detection processes reveal the extent of undesirable as well as non-compliant activity?	1.Does the regulator have the tools to deal with the full variety of compliance responses?	1. Are objectives clear? 2.Do enforcement strategies deal with 'off screen' activities? 3.Are strategies optimally targeted?	1.Are objectives clear? 2.Can compliance records be measured and related to outcome objectives?	1.Can changes be made when achieving objectives will require new tools/strategies?
<b>Attitudinal Setting</b>	1. Are there ideas/cultures/traditions - within the regulated population or the regulatory body - that impact on effective detection?	1. Do ideas/cultures traditions affect the potential use of certain tools?	1. Do ideas/ cultures/ traditions affect the potential use of certain strategies?	1.Is assessment undermined by ideas/ cultures/ traditions (eg that may corrupt data supply/ quality)?	1. Are cultures consistent with a capacity and inclination to modify when necessary? 2.Is there awareness of the need to change tools/strategies in the policymaking culture?

<b>Institutional Environment</b>	1.How do institutional relationships/ divisions of powers/ roles impact on detection?  2. Does governmental /EU policy/ law facilitate effective detection?	1. Is there adequate resourcing of tools.  2. Are the tools in use consistent with UK/EU policy and law?	1.Do the different institutions coordinate on strategies for enforcement?  2. Are respective institutional roles clear?	1. Are the measurement systems and values of different organisations consistent?	1. How do allocations of institutional roles affect capacity to adjust tools and strategies? 2.Does the Government allow/facilitate modification? 3. When modifications are carried out are institutional interactions taken into account?
<b>Logics of Tools and Strategies</b>	1. Do different tools/strategies operate harmoniously to facilitate detection?	1. Are tools consistent or at tension?	1. Are strategies consistent or at tension? 2. Are positive combinations of strategy exploited? 3. Are known weaknesses of strategies dealt with?	1.Do the various assessment procedures operate consistently?	1. When modifications are carried out are interactions of logics taken into account?
<b>Regime Performance</b>	1. Are objectives clear? 2. Is the regulator	1. Does the system allow the performance	1. Are objectives clear? 2. Does the	1.Are objectives clear?	1. Are modifications based on evidence from assessments? 2. Is the right emphasis

	confident about the accuracy of the detection system?	of particular tools to be measured?	system allow the performance of particular strategies to be measured? 3.Can needs to adjust strategy be assessed?	2. Do assessment methods link closely to objectives?	put on enforcement rather than structural redesigns?
<b>Change</b>	1. Are objectives clear?  2. Can the detection regime cope with changes in objectives/operational arrangements/resourcing/regulate response?	1. Can new tools be resourced/ legislated for?	1. Can strategies be adjusted to cope with new risks and risk creators?	1. Can assessment methods be adjusted to cope with new risks risk creators/ objectives etc.?	1. Can modifications be introduced quickly enough to cope with changes in risk/ objectives etc.?

We turn now to look in more detail at how the really responsive regulation framework might be applied in practice. In offering this account we hope to show how a really responsive regulation approach provides a more holistic approach, and as such takes preceding approaches forward.

### **3.1 *Detection: the Identification of Non-compliant and Undesirable Behaviour***

Uncovering undesirable behaviour through detection is a first step in regulatory enforcement. Detection challenges are, however, often severe. Our research into enforcement in a number of divisions of the U.K Department of Environment Food and Rural Affairs (Defra) drew attention to the following potential problems. Enforcers often face extreme difficulties in detecting errant behaviour when the regulated community is extensive (as where certain environmental controls cover the whole population) and where breaching rules is cheap and easily carried out in a clandestine manner. Resourcing realities often mean that enforcers have to rely on tip offs from the public or hot-lines and whistleblowing processes. As a result, the regulators will receive a good deal of unreliable information and will commonly be ill-placed to calculate the real level of ‘off the screen’ activity that detracts from the achievement of objectives.

In fisheries regulation, as noted above, detection of non-compliance is particularly difficult for a number of reasons.<sup>92</sup> The geographical areas to be covered are extremely extensive and regulatees are mobile; enforcement involves numbers of bodies with complex overlappings of jurisdictions and

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<sup>92</sup> See NAO Report, pp.19-20. It is not unique in this respect; many other areas of regulatory activity pose significant detection problems, notably tax evasion, financial crime, misselling of consumer products (notably credence goods), many areas of professional conduct (eg legal or medical malpractice), and many areas of environmental or health and safety regulation, particularly but not uniquely where there are difficulties in showing causation.

responsibilities; there are a large number of landing sites in England; inspection at sea is very resource intensive; and there are very many ways to avoid detection. There are also numerous places to conceal illegal catches of which inspectors are unaware; and resources only allow a very small proportion of vessels and landings to be inspected.<sup>93</sup> The quota control system, as a result, involves heavy reliance on the self-reporting of catches and there is very extensive under-reporting and mis-declaration of fish landed. (The majority of infringements detected concern the falsifying of such information).<sup>94</sup> Two central problems aggravated difficulties when the NAO conducted its review. The number of undetected infringements was ‘impossible to determine’<sup>95</sup> because of the nature of the industry and, in addition, the enforcers had no clear set of priorities and outcome objectives to work from.<sup>96</sup>

A lack of clear objectives can make it extremely difficult to state what ‘compliance’ involves, in fisheries as in other areas, and the problem of constructing an agreed understanding can be bedevilled by legal uncertainties. The latter sometimes stem from drafting weakness but, divergences of understanding between the judiciary and the regulators can also prove a problem-notably regarding the purposes and objectives of the regulation at issue. In cases where there are unresolved disagreements on the meaning of compliance, this renders detection activity extremely fraught.

Resourcing constitutes a perennial constraint on detection. In many controlled areas the calculation of levels of compliance and the incidence of ‘off the screen’ activity would demand the operation of registration schemes or the carrying out of surveys but funds may not permit such activities. In other domains such surveys are conducted and, in many sectors, programmes of random inspection are used to obtain relevant data. In yet other areas, detection can only be carried out after the event and this impedes precautionary enforcement.

In responding to these challenges regulators must first develop clear conceptions of their aims and an appropriate disaggregation of those objectives into subsidiary aims so that, achievable targets can be set and problems identified in a manageable way.<sup>97</sup> This construction of aims and disaggregation of objectives will necessarily be shaped by its own internal and external institutional environment, and as such may be one which is challenged by politicians, regulatees and / or the broader public (as the

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<sup>93</sup> See NAO Report, pp.19-20.

<sup>94</sup> See NAO Report, p.16.

<sup>95</sup> NAO Report, pp.2,15.

<sup>96</sup> NAO Report, p. 39. The first recommendation of the *Net Benefits* report was that clear hierarchies of fisheries management objectives should be developed ( *Net Benefits* ,p. 11). Defra responded with a statement of overarching aim, supported by more detailed objectives – see *Securing the Benefits*, p. 3.

<sup>97</sup> Sparrow, pp.146-9.

discussion on risk based regulation above illustrates). Nonetheless, if this is not done, the regulators will not know what sort of errant behaviour they need to detect. Regulatory objectives, moreover, may change over time and, in addition, the threats to achieving objectives may shift continuously. A regulator, of say, fisheries will thus have to deal with changes in priorities regarding the protection of different species of fish (or regarding protecting fish versus protecting employment), it will also face emerging risks from innovative fishing technologies and new fishing enterprises.

Secondly, in such a state of flux it is essential to be able to identify levels and patterns of compliance. But change poses challenges. New methods of avoiding the rules or concealing non-compliance may be devised constantly. Enterprises may be creatively complying with or breaking the rules in innovative ways. A given set of rules or a licensing regime may be impacting on enterprises less than it did formerly. A regulator, accordingly, needs to be able to detect not merely the levels of non-compliance with requirements but also the extent of any 'off the screen' or 'invisible' black market activity that affects the achieving of the agency's legitimate objectives. Thirdly, regulators have to assess the extent to which compliance with the relevant legal requirements will not be enough to achieve agency objectives. In a world of change, with new problems and strategies for escaping the rules, it is essential to know, in a continuing manner, the gap between rules and objectives.

These are issues that are often left out of account in approaches to enforcement. Pyramidic systems tend to focus attention on the need to ensure compliance rather than to develop intelligence on the extent to which compliance falls short of objectives.<sup>98</sup> Risk based systems look more directly towards objectives but as discussed above they have their own risks, in particular of focusing on a given set of risks and a given approach to addressing them, and of under-emphasising the need to detect new and 'off the screen' activities of a non-compliant or undesirable nature.<sup>99</sup>

In contrast, the really responsive regulatory body would seek to detect such matters and develop ways to assess how reliable its detection processes are. It is, after all, only through performance sensitivity - by knowing the reliability of its detection (and, indeed, other procedures) - that it can form a view on such matters as levels of compliance and the balance between activities that are covered by regulation and those that escape the system. Such detection and assessment processes are essential, moreover, if the regulatory regime is to be adjusted so as to extend its coverage to previously uncontrolled behaviour.

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<sup>98</sup> But see smart regulation's taking on the need to go 'beyond compliance' in Gunningham *et. al. op. cit.* p. 153 and N. Gunningham, 'Beyond Compliance' in B. Boer et al (eds) *Environmental Outlook : Law and Policy* (Sydney, ACEL Fedn. Press, 1994)

<sup>99</sup> See Sparrow *op.cit* pp.273-5.

Dealing with change is thus a key issue for the really responsive regulator. In a fluid world it is necessary not only to develop but to adjust detection techniques to meet new challenges. Enforcement, moreover, is not a mechanical process in which the fact of compliance, is a given, easily identifiable matter. As many have observed, compliance is often ‘constructed’ through processes of negotiations between different actors in the regulatory arena.<sup>100</sup> Detection strategies, accordingly, have to respond to shifts in concepts and constructions of compliance and have to relate such shifts to the achieving of regulatory objectives, changes in constructions of objectives, and changes in the translation of objectives into targets and problems. Adjustments of regulatory logic, in turn, have to be made.

The really responsive regulatory body will not only lay the foundations for its detection and other work by establishing clarity on objectives, it will be clear regarding the regulatory logic that it will apply. This will not necessarily involve a single logic – be that purely punitive, restorative or restitutive, for example. What really responsive regulation should involve is coherence so that the regulator is clear about the role of different individual logics in relation to the task of detection, and in addition with respect to the tasks of response development, enforcement, assessment and modification. Regulators should have a view, for example, on the sorts of risks and risk creators that will demand first instance use of rehabilitative logics for the purposes of detection, response development, and so on.

The really responsive regulator will also take on board the issue of attitudinal settings and how this affects the carrying out of detection or other tasks. Of particular concern may be instances where there are conflicts or tensions between the attitudes of the regulators and those of the regulatees. In the fisheries sector the NAO unearthed examples of conflict in such attitudes. Thus, the NAO review noted that:

‘Regulations may lead fishermen to act in ways which they regard as unnatural, for example, having to throw fish back into the sea to preserve their quota by only landing the best quality fish or to avoid exceeding quota.’<sup>101</sup>

This finding evidenced a tension between the cultures of fishermen and of the command- based Defra regime. It pointed to a clash between the assumptions and ideas that respectively animated the regulatees and the regulators. The NAO finding, moreover, showed how such tensions could prejudice communications. Here the ‘unnaturalness’ of throwing dead fish back into the sea was likely to undermine self-regulation through voluntary compliance; to lead fishermen to

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<sup>100</sup> See e.g. K. Hawkins Law as Last Resort (Oxford, OUP, 2002) Chapter 8.

<sup>101</sup> NAO Report ,p.19.

land such fish ‘off-screen ’; and to fail to declare such catches. This practice of non-declaration was liable, in turn, to impact on the command regime by undermining not only the communication and detection of non-compliance with quotas but also the enforcement of those quotas and the broader Defra system for assessing and modifying the detection and enforcement systems.

Institutional environments also have to be taken on board. In relation to many regulated activities, enforcement is carried out, as noted, by a network of different bodies – agencies, local authorities and others. These will often enforce the same legislation in different ways and will possess different systems for gathering information on regulatory activities and compliance. Such institutional fragmentation stands in the way of the easy evaluation of detection procedures and has to be responded to with efforts to coordinate, harmonise or rationalise.

Broader institutional settings may also impact on the effective detection of non-compliance and the estimation of ‘off the screen’ activity. In the U.K the Government’s general stance on reducing informational burdens on business does not encourage the surveying of industrial activity and in a number of important fields, the regulated industry proves highly defensive in the face of regulation. Enterprises themselves tend to be important reserves of information on compliance and, as a result, their non-cooperation is likely to impede detection work and the use of quasi-regulatory sources of data (such as trade associations). One strategy that can be used to respond to such opposition is, however, to invoke the aid of business associations in attempting to deal with those maverick, unlicensed and unregulated operators that are seen by the regulators as sources of off the screen undesirable behaviour and by the organised industry as providers of competition that is unfair due to avoidance of compliance costs. A further strategy that can be employed where there are serious problems with maverick offenders is to offer incentives to encourage subjection to the regulatory system (e.g. by making access to markets dependent on this) or by encouraging general ‘buy-in’ to regulation across the industry.

Such difficulties of detection are considerable, but have to be faced up to if regulatory enforcement is to further the achievement of objectives. If non-compliant and errant behaviour is not detected, it cannot be dealt with by a tit for tat or any other strategy. If levels of compliance and undesirable behaviour are not known it will be impossible to work towards optimal regulation to meet changes and new challenges or to evaluate performance and estimate whether resources spent on regulation are worthwhile. A really responsive regulation approach highlights detection challenges and links these to other tasks but also demands that we deal with issues of attitudinal setting, institutional environment, the logics of tools, performance sensitivity and the perennial difficulty of changing circumstances.

### 3.2 Response: Developing Rules and Tools

A second core task of regulatory enforcement is the development of those rules and tools that are fit for purpose in both detecting non-compliance or undesirable behaviour and in producing compliance with relevant requirements. Within the responsive regulation approach the central focus is the use of a hierarchy of enforcement tools as applied through a process of potential escalation. It is easy to assume that a full array of tools is always available and that the given toolkit or set of rules is appropriate on a continuing basis. In practice, however, few regulators possess the luxury of a full toolkit. In our research for Defra we identified over forty enforcement tools which are deployed by regulators in the UK, the US and Australia across a number of domains. They can be grouped into seven main types (irrespective of their legal form): tools relating to the *continuation of business / operations* (eg licence amendments / revocations; disqualifications; imposition of restrictions on activities; seizure of equipment / assets and so on); *monetary or financial tools* (eg fines, disgorgement of profits orders); *restorative tools* (remediation orders; restorative conferences); *undertaking and compliance management tools* (eg voluntary or enforceable undertakings, compliance assistance, compliance audits); *performance disclosure* (eg individual naming and shaming, league tables). These are obviously in addition to the pre-enforcement tools: warnings, notices etc, that may be issued as a prelude to more formal action being taken, and the role of investigations and other detection activities in prompting compliance.

If a regulator lacks a tool this may be no peripheral matter. The absence of a relevant tool may bring serious consequences for enforcers. For example, in addressing fly tipping, officials lobbied hard for new tools (on the spot administrative penalties) to help address the problem.<sup>102</sup> Other potentially valuable tools that enforcement officials seek, raised in our 2005 research, included registration processes, charging mechanisms, and banning orders. In the fisheries field, the NAO found that a number of powers and tools that were employed in other countries were not yet used in England.<sup>103</sup> These potential tools included: imposing restrictions on the places where fish can be sold; placing observers on vessels; adopting Individual Transferable Quotas for fishermen; increasing the involvement of the industry in enforcement; and funding more inspections through the sale of 'beyond quota' fish. Defra has now taken some steps to improve its toolkit. It has deployed new satellite technologies; introduced a Designated Port Scheme;<sup>104</sup> set up joint operations with other fishing authorities; extended inspections in international waters; and conducted more surprise inspections. At the time of the NAO Report, Defra was also considering introducing an approved

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<sup>102</sup> Defra, *Fly-tipping Strategy* (London, Defra, 2004)

<sup>103</sup> NAO Report, p.4.

<sup>104</sup> Which requires larger vessels to land catches at specific ports.

agent restriction on the sale of fish and a system of administrative penalties allowing temporary suspensions of fishing licences.<sup>105</sup>

Ensuring that enforcement tools are ‘really responsive’ is a significant task. Our 2005 research highlighted a number of challenges. In the first instance, enforcers have to be performance sensitive – they must possess systems of performance assessment that tell them whether they need to adjust or expand their tool kits – this is a matter returned to below. In addition, even those who are aware of their needs for new enforcement tools and who are open to designing and using new tools<sup>106</sup> have to have the capacity to adjust tools in order to improve performance or adjust to changing circumstances and challenges. Enforcers are, however, often constrained in their development of new tools by a number of factors – including institutional environments. Legislation may often be needed in order to introduce new powers and it is common for officials to consider that new legislation (even secondary legislation) is an unrealistic political prospect. Existing bodies of legislation (particularly European Directives) are often seen as constraints on the use of new tools and uncertainties in legislative requirements tend to blight creative approaches to new tools. Government policies and institutional factors are also often seen as an impediment to new tool use – especially when these involve dispersions of regulatory responsibility across a number of bodies or where attention is directed at enforcing existing tools to the detriment of forward looks at new powers. Resource constraints, as ever, constitute a hurdle - especially where these stand in the way of the surveying or inspection exercises that are needed in order to reveal the true incidence of non-compliance or unwanted activity and hence the need for new tools and strategies. Really responsive regulators will, in addition, examine the way that different attitudinal settings and tool logics will affect both the way that particular controls operate and the manner in which tools can be combined. As was seen in discussing detection work, a tool that operates with a self-regulatory logic (such as a system of catch declaration) will tend to operate inefficiently if it is at odds with the regulatees’ attitudinal settings – as where a fish quota and catch declaration system involves the ‘unnaturalness’ of offloading freshly caught (and dead) fish into the sea.

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<sup>105</sup> See NAO Report p. 5. Defra’s 2004 *Review of Marine Fisheries* report (hereafter ‘*Review of Marine Fisheries*’ ) (p.13) outlined how, following the NAO report, satellite surveillance was extended as was the designated port system . Other changes in the Defra programme of enforcement reforms included more extensive designation of markets, registrations of buyers and sellers of first sale fish, improvements in boxing arrangements, wider use of single species licensing and more use of administrative measures. See also the Prime Minister’s Strategy Unit, *Net Benefits* (March 2004) and the Marine Bill Consultation document (March 2006). In June 2006 the Defra Minister Ben Bradshaw announced that new enforcement powers for Sea Fisheries Committees would be introduced in the Marine Bill. Proposals consulted on included a new administrative penalties scheme.

<sup>106</sup> The evidence in Defra was that many enforcers are indeed open to designing and using new tools.

### 3.3 Enforcement: Strategies for Applying Tools

Enforcement is a matter of deploying a strategy or mixture of strategies for securing desired results on the ground. The NAO found that Defra fisheries regulators prioritised inspections according to broad – based risk analyses which tended to target particular fisheries and types of activity rather than individual vessels.<sup>107</sup> Thus, surveillance operations and inspections tended to focus on areas of high risk where quotas were most restrictive, stocks were of high value, fishing activity was intense, fish were known to be collecting or fisheries were seasonal. Inspections also tended to be concentrated on points where the regulatory returns to interventions would have been greatest – for example on those ports where landings were, given the circumstances, most likely. Major difficulties encountered in using such risk – based approaches lay in coming to terms with new risk creators and new risks to fish stocks. The extent of ‘off screen’ activities also tended to undermine the reliability of the data underpinning the risk analyses.

A message offered by really responsive regulation is that it is essential to examine how the logics of different regulatory tools and strategies interact. Such interactions may be positive or negative. Where there are conflicts these can impede the achieving of objectives. For example, in uncultivated land regulation, the Defra task of stopping unauthorised cultivation of this land was hindered because acrimonious litigation arising from the prosecution of vague laws removed the cooperation of the National Farmers Union, and farmers generally, so that advisory and educational work was difficult to carry out successfully.<sup>108</sup> Conflicting logics can impede not only the application of a tool or strategy but its development. In the area of cattle identification, the logic of the European Directive regime drastically constrained the introduction of the enforcement methods that Defra staff wanted to develop, because of the European focus on command and control inspection and prosecution meant that alternative enforcement strategies and tools were given low policy priority.

On the positive front, the proponents of ‘smart regulation’ suggest, with respect to *ex ante* regulatory strategies, that there may be a good deal to be achieved by combining different logics, tools and strategies. Regulatory enforcement tools and strategies are often applied so as to achieve a number of purposes (e.g. detection and information gathering as well as compliance seeking), and are based on different logics. Attention should accordingly be paid to positive interactions and combinations of tools, strategies and logics as these are encountered in dealing with specific

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<sup>107</sup> See NAO Report, p. 20.

<sup>108</sup> See R. Baldwin and J Black, *A Review of Enforcement Measures* ( Defra , November 2005)

regulatory tasks – how, for instance, risk based regulation’s difficulties in detecting new risks and risk creators can be addressed by resort to a degree of random, regional and routine enforcement. The inherent bias in risk based systems towards controlling ‘high probability, high impact’ firms can be balanced by the use of alternative enforcement strategies. It will often be useful, for instance, to deploy a risk based approach together with one that is compliance based or educative, or deterrence based, responsive, or target analytic.

Really responsive regulation can, similarly, suggest ways in which the messages of responsive regulation can be supplemented. Responsive regulation ranks enforcement tools in terms of punitive severity (the enforcement pyramid can, indeed, be seen as a severity pyramid). A problem in practice, however, is that tools may rank differently according to context and regulation. To some firms, naming and shaming may be seen as non-punitive, to others it may be viewed as far more punitive than a fine. In some contexts, moreover, it may be necessary to escape from the severity pyramid in favour of radically different control strategies. The ‘smart regulation’ approach does not overcome such difficulties by making the pyramid three dimensional – escalation still operates on a single punitive axis. The really responsive regulation perspective, though, does offer more assistance by dealing head on with the issue of logics. It also takes on board the ‘attitudinal setting’<sup>109</sup> of the firm. This will impact on the way the firm perceives and reacts to different control tools (say, naming and shaming) and adverting to issues of attitudinal setting adds a dimension to analyses of logics and the interactions of these. Really responsive regulation thus provides a basis for assessing how best to apply a pyramidal approach to enforcement, for judging how responsive and other approaches can be combined, and for evaluating whether it is necessary to change logics – to move, for instance, from punitive to other modes of influence such as positive incentives or market-based mechanisms. Here there is a further contrast between ‘responsive’ and ‘really responsive’ regulation – the former tends to focus on the best ways to enforce a given set of regulatory rules or policy whereas the latter emphasises performance sensitivity and provides a basis for judging the case for instituting a sea-change in that policy.

Really responsive regulation also takes on board institutional environments. Regulatory systems, as noted, more often than not involve numbers of organisations and this is, again, illustrated by the fisheries field as described in the NAO’s 2003 Report.<sup>110</sup> At that time the European Union’s Common Fisheries Policy set the legal framework for regulation but the major enforcement function was carried out by Defra’s Sea Fisheries Inspectorate in co-ordination with the twelve local authority Sea Fisheries Committees. The Department, however, also used the services of the Royal

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<sup>109</sup> For further discussion of ‘attitudinal setting’ see below, Section 4.

Navy Fishery Protection Squadron and it employed the private firm Directflight Limited to conduct surveillance operations in co-ordination with the patrols of the Royal Navy.

Such institutional complexities often impact on the application of different tools and strategies. In fisheries this was found to be the case when the NAO investigated. That body reported confusion about the roles of the Committees and the Inspectorate; some duplications of inspections; inflexibilities in the deployment of resources across functions and institutions; and some complaints of over administration.<sup>111</sup> In the fisheries field, however, the reporting process prompted some responsiveness to such issues - at least in the form of institutional rationalisations that have been carried out since the NAO analysis was published.<sup>112</sup> Really responsive regulation, though, would demand more than mere rationalisation (which can often recreate old problems within new institutional packages). It would point to the need to analyse how variations in institutional characteristics and institutional interactivity affects, in quite particular ways, the carrying out of the various tasks that make up the process of regulatory enforcement.

### 3.4 *Assessment*

A fourth task within regulatory enforcement is the development of performance sensitivity through processes that evaluate not only how well the current system is being enforced but which also calculate how much undesirable activity is escaping the impact of the current network of controls. This task involves assessing the strength of the case for developing new tools, or adopting new enforcement strategies or moving towards a new design of regulatory regime. Performance assessment is thus centrally important for the progressive development of regulatory policies and is integral to good regulatory management – especially across complex networks of state and other controls. It is also essential to accountability and transparency insofar as assessments provide measures of progress in meeting objectives and their publication enhances openness.

The practical challenges are significant, however. Our 2005 research into Defra enforcement highlights a number of points. First, accurate assessments of overall effectiveness cannot be made (even within a single – operator, single tool regime) unless the regulator is able to calculate not only levels of non-

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<sup>110</sup> NAO Report, p p. 34-5

<sup>111</sup> *Ibid* p. 35.

<sup>112</sup> Defra established a new Marine Fisheries Agency in October 2005 to separate policy development from the delivery of enforcement and it also set up a new Marine Fisheries Directorate. In 2006 a Regional Fisheries Manager for SW England was created as a pilot for further co-ordinating reforms. On the drive for such changes see e.g. Prime Minister's Strategy Unit, *Net Benefits* (March 2004) ; Defra, *Securing the Benefits* ( July 2005); *Securing the Benefits – A Stocktake* (July 2006).

compliance but levels of ‘off screen’ non-compliance - errant behaviour which is beyond the reach of the regulatory regime yet is relevant to the achievement of objectives. Second, clarity of legal and policy objectives is a precondition of effective assessment. Third, risk based systems can provide a ready means of effecting year on year comparisons of performance – risk scores can be compared quite easily. Such systems, however, will not measure the effects of regulation on parties outside the system, and are quite easily manipulated by officials. Fourth, the natural inclination to focus on enforcement inputs (which offer cheaper, quicker and more reliable statistics to be gathered) has to be balanced with efforts to measure outcomes on the ground. Fifth, in some regulated areas it is possible to identify ‘short cut’ measures of effectiveness – thus in relation to pesticides it may be feasible to analyse residues in water and use this as an indicator. Finally, where responsibilities for enforcement are unclear, or spread across numbers of institutions, this may impede the accurate assessment of effectiveness – because of coordination difficulties, institutional politics or divergencies in data collection and processing methods. Rationalisation of regulatory responsibilities may accordingly offer ways to improve assessments, but only where, as noted, old co-ordination problems are not simply contained in a new organisational wrapper,<sup>113</sup> or rationalisation does not produce its own.

Fisheries provide further evidence of the challenges of assessment. In fisheries regulation a key outcome measure is state of stocks, but this is affected by many factors other than enforcement.<sup>114</sup> Levels of compliance are also difficult to measure. As indicated, a considerable amount of non-compliant activity goes on beyond the inspection regime and the NAO reported that it was impossible, in the then current system, to determine the number of undetected infringements.<sup>115</sup> These infringements related to both compliance with technical regulations and with the recording of landings. It was not physically possible to inspect enough vessels to ensure that landings were accurately recorded.<sup>116</sup> Such difficulties drove the regulators towards secondary measures of effectiveness (e.g. probabilities of inspection)<sup>117</sup> and to data on input activities (such as sea inspections, port visits and prosecutions). As a result, Defra was ill-placed to measure the effectiveness of its detection system, its enforcement system or its processes of assessment. Nor was it able accurately to judge the need to develop and apply new tools for detection, enforcement or assessment.

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<sup>113</sup> See eg Black, op. cit., (2006).

<sup>114</sup> E.g. global environmental changes - see *Review of Marine Fisheries*, p.113.

<sup>115</sup> See NAO Report, pp.2, 15-18.

<sup>116</sup> See NAO Report, p. 3.

<sup>117</sup> Said by Defra to be ‘probably the best readily obtainable measure of effectiveness’ – *Review of Marine Fisheries*, p. 113.

The lack of clear outcome objectives and benchmarks further undermined the assessment process in this area<sup>118</sup> and a separate difficulty reported by the NAO was that EU Member States placed different interpretations on what constituted a serious infringement.<sup>119</sup> Even within English enforcement, infringements in different inspection districts were not recorded in a consistent manner. The NAO concluded that Defra was not able to monitor whether each district was dealing with infringements appropriately or to construct a picture of the nature or frequency of infringements so as to inform enforcement activity.<sup>120</sup>

A really responsive regulation approach helps to identify those key issues that have to be addressed if assessment processes are to prove valuable. Attitudinal settings have to be considered – as has been noted, if regulatees’ mind-sets are at tension with recording systems (e.g. for fish landings) the assessment procedure will be undermined. Institutional environments have to be taken on board so that there is co-ordination of data collection systems across different fisheries regulators and regulatees with their various budgetary and governance frameworks. The logics of different tools and strategies will also have to be considered since these impact on assessment processes. Where, for instance, command and control methods are mixed with self-regulatory or advisory systems, there may be tensions that, as noted, will prejudice information flows and data collection schemes.<sup>121</sup> Performance sensitivity is, again, necessary since assessments have to be reflexive in the sense that regulators must be able to measure their performance but also be able to evaluate the strengths or weaknesses of their measuring systems.

To take an example: one proposal might be to protect fish stocks by awarding Individual Transferable Quotas to fishermen ( which in effect give individuals tradable property rights to sell specific quantities of fish).<sup>122</sup> The really responsive regulation framework would emphasise that such a system would change the regulatory roles of fishermen and Defra staff – with the market in quotas operating alongside the ‘command’ regime and taking over some of the functions of the regulator (e.g. allocating catch allowances). This would involve new mixes of attitudes, institutional responsibilities and roles, so a really responsive regulation approach would involve examining how such a change would impact on the Defra-driven regime across the five regulatory enforcement tasks. Possible findings might be that detection (and enforcement) would be enhanced because fishermen would have new inclinations to self-regulate and would be more inclined to inform on

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<sup>118</sup> See NAO Report, p. 16, Net Benefits, p.11..

<sup>119</sup> See NAO Report, p.16.

<sup>120</sup> See NAO Report, p. 24.

<sup>121</sup> R. Baldwin, ‘Is Better Regulation Smarter Regulation?’ [2005] Public Law 485.

<sup>122</sup> A system found in New Zealand and Iceland – see NAO Report, p. 22.

known offenders.<sup>123</sup> Such inclinations might impact positively beyond the trading system and on the wider command regime. New response tools might be needed in order to identify good self-regulators within the trading system and any potential quota allocation difficulties that might flow from the market in permits and which might cut across the command system. New powers might be needed to check on the validity of permits and the consistency of market trading practices with the achieving of target objectives. As a result, resources might have to be reallocated from the command system and towards permit validation – which would demand adjustment of strategies within the command system itself. Interactions between the trading system and existing enforcement strategies might be analysed so as to avoid tensions. Thus, the current risk-based regime might need to be adjusted so that the self-regulatory effects of the trading system are not undermined by decisions to prosecute (or even to inspect) that are driven by risk analyses. As for assessment processes, one challenge to be faced might be that the meaning of compliance within the trading system does not correspond to that employed within the command regime. Such a divergence would tend to undermine the measurement of overall system performance and steps might be needed to align data collection regimes. On modification, a really responsive regulation approach would prompt the question: How does operating a combined ‘command’ and ‘trading’ system affect the overall capacity of the regulatory regime to adjust to change by moving to a revised approach? (Is there a danger that a trading system locks the regulator into a particular pattern or level of stock allocation? Will the trading system comply with anticipated movements in the EU Common Fisheries Policy?)

### ***3.5 Modification: The Adjustment of Tools and Strategies***

The fifth core task within regulatory enforcement is again ongoing and involves modifying the regulatory approach in a manner that is informed by prior assessments of performance. Modification links to the other elements of the really responsive regulation framework. It takes on board the adjustments of responses – the tools and rules that are used for both detection and compliance seeking purposes and it also encompasses the modification of enforcement strategies themselves. As already suggested, modification also demands a willingness to think ‘outside the envelope’ and to consider whether, instead of adjusting the tools and enforcement strategies within the current regulatory strategy, it is necessary to effect a ‘third order’ or ‘paradigm shifting’ change<sup>124</sup> by adopting a new regulatory (as

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<sup>123</sup> A reported finding in New Zealand and Iceland – see NAO Report, p.4.

<sup>124</sup> On the distinction between ‘first order changes’ of regulation (e.g. tunings is the given regulatory control as exemplified by a change in the X is a price control formula) versus ‘second order changes’ such as switches of instrument (e.g. from RPI-X to rate quantum price controls) versus ‘third order changes’ or ‘paradigm shifts; (e.g. abandoning command and control standards in favour of emissions trading) see J. Black, ‘What is Regulatory Innovation?’ in J. Black, M. Lodge and M. Thatcher, *Regulatory Innovation* (Cheltenham: Edward Elgar, 2005).

opposed to enforcement) strategy (or mix of strategies) – for example, by moving from a state-imposed command and control centred regime to a completely different regulatory style such as one giving centrality to a scheme of industry-administered guidance and training.

Modification is an essential task since there is only limited value in assessing performance if the regime is not to be adjusted so as to improve performance. Moreover, as the NAO report into fisheries also found, weaknesses in assessment systems can undermine capacities to modify processes.<sup>125</sup> In that sector Defra was found by the NAO to operate inflexibly in its deployment of resources and people, which reduced its capacity to adjust its inspection strategies.<sup>126</sup> A special problem was lack of staff mobility which reduced operational responsiveness.<sup>127</sup> What was clear to the reviewers of the NAO was that a large number of strategic options were open to Defra but that these had not been fully assessed, explored or put into effect.<sup>128</sup>

In many regulatory enforcement bodies there may be a case for raising awareness of the need to adjust regulatory methods. The evidence from our 2005 Defra research suggests that current training deficiencies may be as much the product of resource constraints as of any other factors. Policymaking cultures may also contribute to excessive conservatism in regulation insofar as they prioritise moving forward to new policy challenges rather than assessing and modifying existing regimes. In contrast, however, there seem extensive indications that field inspectors and their managers possess a considerable (but unmet) appetite for revising and rethinking their enforcement approaches. A new emphasis on the modification task and adopting a really responsive regulation framework is likely to demand a shift of policymaking emphasis and a cultural change so that regulation is seen less as a ‘one shot’ operation, with the policy agenda moving on after the initial process of design to address other, often unrelated issues, and more as a constant process of evaluation and adjustment.<sup>129</sup> This is not, however, to deny that in some respects Defra has proved willing to introduce some new tools and strategies in the fisheries sector. It considered agents licensing and administrative penalties in 2002-3<sup>130</sup> and, following the NAO review, it, *inter alia*, developed its use of satellite surveillance and introduced a Designated Ports Scheme.<sup>131</sup> As also noted, however, assessment weaknesses will always undermine the modification processes and Defra was also found by the NAO to operate inflexible systems

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<sup>125</sup> For discussion of changes post the NAO report see Review of Marine Fisheries.

<sup>126</sup> See NAO Report, p. 4.

<sup>127</sup> See NAO Report, p. 35.

<sup>128</sup> But for subsequent action see *Marine Fisheries; Net Benefits*, and *Securing the Benefits Review*.

<sup>129</sup> See R. Baldwin ‘Is Better Regulation Smarter Regulation?’ [2005] Public Law 485, 508-9; Sparrow, above note 14, chapters 19,20; and the discussion of triple- loop learning in J. Healy and J.Braithwaite, ‘Designing safer health care through responsive regulation’ (2006) 10 Medical Journal of Australia S56-S59. See also Christine Parker’s discussion of ‘triple-loop’ evaluation of self-regulation in Parker, above note 10 pp. 277-84.

<sup>130</sup> NAO Report, p.5.

<sup>131</sup> See also *Review of Marine Fisheries*, para.2.20.

(particularly regarding human resources) that made modifications difficult. Again, what really responsive regulation would demand would be continuous attention to modification needs and to the development of such informational and assessment systems as would establish the performance sensitivity that is necessary to establish a sound basis for modification decisions.

Capacities to cope with change are critical. Such changes may be driven by external institutions and factors or may be internally generated. In fisheries, external drivers might include amendments in the EU Common Fisheries Policy, new governmental decisions on resourcing, or special crises in fish stocks due to environmental changes. Internally, Defra may decide that there is a need to change policies and objectives for its own political reasons. What the really responsive regulatory body will be able to do is to assess the need for a given change, to see the implications across the five regulatory enforcement tasks, and to be able to modify the regime in order to implement needed changes.<sup>132</sup> To take a specific example, the really responsive regulation approach would deal with fluctuations in fish stocks by producing answers to such questions as : Do detection systems allow Defra to pinpoint the issues of compliance that relate to those particular stocks that are under current threat? Are new tools needed to detect and enforce in relation to threatened stocks?<sup>133</sup> (Are new policies regarding such stocks required?). Does the present set of enforcement strategies need to be adjusted in order to prioritise currently threatened stocks? Can the assessment system indicate with precision how well the detection, response development, enforcement, assessment and modification systems are coping with this newly-defined risk to stocks? Is the regulator able to modify its processes in order to deal with the new risks to its achieving its objectives?

## ***Conclusions***

Looking at how a really responsive regulation approach might be applied to fisheries or other areas of Defra regulation serves to illustrate the potential contribution of such a perspective. First, it is clear how disaggregating an aspect of the regulatory function (enforcement) into all of its different components shows regulatory enforcement to involve more than deciding whether to apply a risk-based or responsive regulation approach, or calculating how rapidly to escalate up an enforcement pyramid. Prior issues are detection (including the establishing of objectives) and response development. Fisheries is not unique in raising very serious problems of detection and response development, and the really responsive regulation approach emphasises how problems on one front (for

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<sup>132</sup> For Defra efforts to analyse needs for change following the NAO review see *Review of Marine Fisheries*.

<sup>133</sup> The NAO noted the view of fishing concerns that Defra's data on fish stocks were generally a year out of date and adrift of fishing experience at sea – NAO Report, p.19.

instance detection<sup>134</sup>) can impact quite dramatically on the other tasks ( such as response development and assessment) that comprise regulatory enforcement.

Adopting a really responsive viewpoint also stresses the importance of dealing with attitudinal settings and institutional environment, not least the organisational infrastructure of the regulatory regime. In many regulated areas the multiplicity of regulatory responsibilities stands in the way of effective assessment and modification process. A good deal may be achievable in such areas by clarifying institutional frameworks and lines of regulatory responsibility – if necessary across state, quasi-regulatory and corporate boundaries. To argue this is not to reject the message of smart regulation – that mixes of instruments and institutions may provide best regulatory systems – it is to propose that unproductive fragmentations should be avoided.

The really responsive regulation perspective also shows how important it is to take on board the ways in which the logics of different regulatory mechanisms not only interact but tend to do so in distinct ways according to the particular regulatory enforcement task being undertaken.<sup>135</sup> Really responsive regulation requires regulation to be amenable to the use of ranges of tools for different purposes and according to different regulatory logics (e.g. to punish or for restorative or rehabilitative reasons). It thus avoids the ‘single axis’ difficulty and draws attention to the challenge of operating through coherent regulatory logics – ways of combining controls that are located within culturally or organisationally variant modes of relationship.

As for performance sensitivity, the really responsive regulation approach demands that we ask whether there is such sensitivity across the five enforcement tasks of: detection; response development, enforcement; assessment and modification. In the case of fisheries, this framework exposed a number of limitations and challenges – not least due to the absence of clear output objectives for the regime<sup>136</sup> and the resultant lack of a framework for performance measurement. (Assessments of enforcement and response tools were similarly undermined by lack of knowledge concerning the effectiveness of the detection system.<sup>137</sup>) A really responsive regulation approach

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<sup>134</sup> Issues of detection may be especially acute in fisheries but we contend that these are challenges likely to be encountered to a greater or lesser degree in most regulated domains.

<sup>135</sup> For example, the impact of rule design on behaviour and on enforcement strategies: see Baldwin, op. cit. (1995); D. McBarnet and C. Whelan, ‘The Elusive Spirit of the Law: Formalism and the Spirit of Legal Control’ (1991) 54 *Modern Law Review* 848; M.W. Nelson, ‘Behavioural Evidence on the Effects of Principles- and Rules-Based Standards’ (2003) 17 (1) *American Accounting Association* 91.

<sup>136</sup> Notably measures that show how measured activities are impacting on overall output or outcome objectives - see NAO Report, p. 39.

<sup>137</sup> The NAO’s 2003 report on fisheries drew attention to Defra’s problems in measuring performance regarding detection and enforcement. Similarly the European Commission carried out a review of Member State control and

stresses the role of performance sensitivity in preventing the regulator from being locked into any given enforcement strategy or into an emphasis on enforcement rather than the redesign of the industry or the broad control regime. Such an approach brings the need to cope with change to the fore.

Really responsive regulation is thus an holistic approach which, in the enforcement context, attends both enforcement in individual instances and the nature of the overall enforcement and regulatory strategy. It involves constantly challenging the shape of the current regime and thinking ‘outside the envelope’ of the existing enforcement approach. It offers high levels of transparency insofar as it provides a framework for assessing different enforcement tools and strategies as well as interactions between these. That framework also provides a means of contributing to coherency of ‘regulatory logic’ so that strategies for dealing with certain tasks do not cut across or contradict those used in relation to others. The really responsive regulation approach, moreover, emphasises the need to deal with networks and ‘decentred’ regulatory regimes in which regulatory functions are carried out by a wide range of institutional types and instruments. In doing so, however, it poses the difficult question of how really responsive regulation can be developed in such polycentric regulatory regimes, including those where the roles of policy making, information gathering and enforcement are distributed between a number of different organisations, particularly where they cross different jurisdictional boundaries.

Really responsive regulation thus provides not so much a set of ready answers to difficult regulatory issues as a reframing of the regulatory endeavour. The approach it offers reveals a set of challenges that may appear daunting. This raises the question whether this is an approach that demands a level of analysis too far – whether it can be operationalised in the usual regulatory context.

The price of failing to adopt a really responsive approach, however, may be huge. If regulatory enforcers do not deal with the issues of detection, response development, enforcement, and assessment they will operate blindly and in a manner that is locked into a static conception of the regulatory challenges that they face. If they fail to address needs for modification they will fail to make the adjustments that they must effect if they are to overcome the new hurdles that they will inevitably confront.

A worry about really responsive regulation may be that it is too eclectic. With regard to enforcement, for instance, it tells us that there are seven or so potential approaches to choose from and that each has

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monitoring regimes in the fisheries sector in 2001. See also European Commission, *Final Report on the Monitoring of the Implementation of the Common Fisheries Policy* COM (2001) 526.

strengths and weaknesses - really responsive regulation does not, however, offer its own line and indicate whether risk-based systems are to be preferred to responsive or random or other systems.

The answer to this point is twofold. First, it is the case that the respective strengths and weaknesses of the major approaches to enforcement will vary according to context – it is horses (and mixes of equines) for courses. What really responsive regulation does do is to go beyond the general prescriptions of ‘craft’ approaches (e.g. “develop an intervention plan”) so as to offer a framework for evaluating the role of different such approaches and different combinations of approach or regulatory logic. Thus, by applying a really responsive regulation perspective to the five core tasks of enforcement it is possible to identify such matters as: the weaknesses of risk-based regulation regarding the tasks of detection, response development and modification; the strengths of random approaches for detection and the weakness of responsive regulation in relation to responses and tools. This framework approach is not so much an exercise in random eclecticism as a means of coordinating a number of the crucial messages from the most influential current theories of regulatory enforcement. It provides a systematic basis for developing optimal responses to the various key tasks involved in regulating.

The second respect in which really responsive regulation offers an advance is by providing a framework that, as noted, goes beyond refining ways to apply the given regulatory strategy that is encountered in a particular domain. It demands ongoing consideration of the case for reassessing and redesigning the overall regulatory strategy – for examining, for instance, whether to abandon command and control methods in favour of taxation or trading regimes.

Regulation is really responsive when it knows its regulatees and its institutional environments, when it is capable of deploying different and new regulatory logics coherently, when it is performance sensitive and when it grasps what its shifting challenges are. As regulators across the world have to operate within more complex networks of control and have to face up to increasing rates of change, the case for really responsive regulation can only be expected to grow.