

PREFACE

This Report in accordance with the relevant Terms of Reference seeks to identify and generally consider legislative instruments and related mechanisms (inclusive of non-environmental regulations and/or voluntary procedures and practices) that may facilitate or hinder the implementation of a national EMS policy.

Particular focus is on:

- Main environmental licensing and related regulations and guidelines;
- Financial, corporate and related provisions (inclusive of Government's proposed Green Procurement Regulations);
- Trade (with a limited consideration of regional and extra-regional agreements/issues);
- Standards and their implementation.

Approaches in other countries which could inform the development of legislative instruments and mechanisms for Jamaica are considered.

Countries from which these approaches have been drawn include, Indonesia, India, Trinidad & Tobago, the European Union, USA, Canada and New Zealand.

Various recommendations have been made. In particular there are proposals for legislative changes.

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EXECUTIVE SUMMARY

From this particular legal perspective, the development of a national EMS policy for Jamaica clearly warrants embracing boldly new approaches in the law as well as approaching in new ways old intractable problems.

In this Report an attempt has been made to examine several legislative instruments, mechanisms and tools to ferret “hooks” for utilization as well as inform possible approaches in an area of the law hardly overflowing with legislative and related precedents.

In some instances, the relevant provisions or particulars have been set out in some detail for ease of reference. Some have prompted proposals for changes. In the case of others, their ramifications for Environmental Management Systems (EMSs) have been (only) considered and noted.

Note is taken at the outset, that an Environmental Management System (EMS) is a structured and integrated system by which environmental objectives are established and performance measured and continuously improved within an organization. It assists an organization, inter alia, to carry out its legal responsibilities as regards the environment as well as to perform beyond the minimum dictates of the law.

The traditional reactive attitude towards environmental legislation is undergoing a metamorphosis. Such legislation was often viewed as essentially intrusive and a cost source. There is now a shift to a more pro-active approach towards compliance with and beyond legislative requirements.

Jamaican law, while maintaining and even strengthening the efficacy of its “stick” sanctions and enforcement capabilities is being challenged more and more to provide not only “carrots” but innovative legislative and other “mechanisms” to facilitate and encourage a proactive attitude towards instituting EMSs. There is already in Jamaica a programme for encouraging use of the international ISO 14001 standards for EMSs.

As regards legislation, a recommended first step towards promoting EMS use is to ensure the efficacy of what already exists. Among the general weaknesses that need to be addressed as regards the efficacy and implementation of Jamaican environmental legislation are the following:

1. Inadequate stipulated penalties for breaches
2. Overly lenient sentences for breaches
3. Insufficient sensitivity by law enforcers as to the importance of prosecuting environmental offences
4. Failure to timely promulgate regulations after passage of (primary) legislation
5. Failure to timely enact legislation to incorporate International Environmental Conventions to which Jamaica becomes a party
6. Failure to focus directly on individual rights of the private citizen in respect of the environment and to empower the private citizen accordingly

Continuing, in the wider vein, it is necessary to create a broad legislative setting for promoting EMS in Jamaica. It is being proposed that steps be taken to have in place a national green plan.

By a national green plan is meant a comprehensive, integrated large-scale, long term, flexible environmental blue print for sustainable management geared at solving Jamaica's environmental problems.

Such a plan seeks to tackle the complexity and breadth of the environmental problem head on and is developed by government with wide national participation and input from various levels and sectors thereby embodying national consensus and vision.

While, the absence of such a plan need not detain the EMS endeavours, such a plan should be put on a parallel fast-track and in time become the ultimate reference point for EMSs in Jamaica. Such a plan could be also expressed substantially by way of appropriate over-arching legislation as is the case with New Zealand's **Resource Management Act**.

The Jamaican Constitution as regards the fundamental rights of citizens vis-à-vis the environment also needs to be considered as part of establishing broader setting conducive to promoting EMS use. Various broad proposals have been put forward including the following:-

1. That generally, use be made of agreement between the regulator and regulated, incentives, Codes of Conduct and/or Guidelines in promoting EMS implementation.
2. That legislation specify deadlines for passage of particular regulations.
3. That consideration be given to having the Jamaican citizen (and environmental non-governmental organizations (NGOs) more empowered to bring court actions.
4. That the Polluter Pay Principle and User Pay Principle be applied as far as possible in establishing scales of fees in respect of the various environment related licences and permits with implementation of an EMS and good environmental performance being mitigating factors in the consideration as regards how much is payable.
5. That fines for breaches of various environmental legislation be increased.
6. That Prosecution Guidelines and Sentencing Guidelines be developed in respect of environmental law violations
7. That provision be made for sentencing an offender to implementing EMS.
8. That provision be made for fixing designated officers of a company with criminal liability in particular circumstances for environmental law violations
9. That Parish Councils be empowered to play a greater role in environmental impact assessment, monitoring, reporting and generally in the promotion of environment-friendly behaviour at the community level.
10. That Jamaica adopt and adapt for usage, the Indonesian Programme for Pollution Control, Evaluation and Rating (PROPER) which utilizes a simple colour rating scheme for reporting to the public on environmental performance of enterprises.
11. That legislation be enacted to empower the Auditor-General to carry out environmental auditing and reporting functions as regards governmental/public bodies and agencies.
12. That the Stock Exchange Rules and the issuance of a Prospectus should require for particular companies disclosure of environmental performance.

13. That the Draft Government Procurement Regulation be substantially revisited.
14. That Jamaica pursue developing with other states appropriate cooperative agreements for promoting EMS use.

A primary recommendation is for the promulgation of an Environmental Management (Incentives and Disincentives) Act.

Such legislation would provide for various incentives and disincentives in respect of EMSs specifically and more generally as regards environmental management. Provision would thereby be made for the establishment of pilot projects as regards EMS use for particular enterprises or sectors with attendant incentives and disincentives. Tax Concessions by way of relief from income tax, customs duty, and other taxes would also be provided for under such legislation.

So too would be the levying of additional taxes on particular environment-unfriendly machinery, products and systems. Provision could also be made for the imposition of a waste disposal fee in respect of particular imported items. Such legislation would broadly empower the relevant Minister to make regulations towards promotion of EMS use. The details of these and other recommendations are set out in context throughout the text and are extracted and put together in Chapter 8.

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4. BACKGROUND

4.1 EMS and the Law

EMS

An Environmental Management System (EMS) is a structured and integrated system by which environmental objectives are established and performance measured and continuously improved within an organization. It encompasses an organization's structure, policies, responsibilities, resources, processes, practices and procedures for managing continual improvement in the organization's environmental performance.

Fundamentally, an EMS integrates environmental objectives into the strategic and operational decision-making and is applicable to, inter alia, businesses, central and local government and communities.

Being subject to the "rule of law" compliance with applicable environmental and other laws is inevitably part of an organization's responsibilities. An EMS helps to manage compliance.

Old Order

Under the old paradigm, carrying out these responsibilities vis-a-vis the imperatives of the law manifested a reactive attitude on the part of the organization towards compliance with environmental laws and regulations.

The spectre of sanctions for breach and concomitant financial costs provided the main impetus for compliance in the old dispensation.

New Thrust

Under the new movement, compliance with the law is part of an integrated environmental management thrust towards making the business/organization sustainable.

Accordingly, legal, production and market objectives are integrated towards ensuring compliance with environmental regulations as well as effectively dealing with waste, risk and reputation management, providing for cost reductions, communication, education and product acceptance towards competitive advantage and ultimately sustainable development.

Voluntary

Voluntary Compliance¹ and proactivism beyond compliance are:

¹ At the most basic interpretative level, "voluntary compliance" suggests the meaning of freely choosing to comply. In reality, it appears that "voluntary compliance" vis-à-vis the law entails choosing to bring oneself within some option that the law provides e.g. a particular facility, framework or delineated conduct and to comply, benefit or suffer accordingly. However, it is to be emphasized that it is the facility, framework or conduct which is optional, not compliance with the law which remains mandatory. The term "voluntary compliance" has apparently gained widespread currency in environmental discourse. It is often used in connection with EMSs and related legal instruments. However, the correctness of the term is not without doubt. The same is true of a number of its derivatives or relatives such as "Voluntary Regulation", "Voluntary Law" and the like. Taken at face value, the expression "voluntary compliance" appears to be inaccurate and oxymoronic. To the extent that it contemplates

Compliance - Integral to this shift. Thus, the law while maintaining and even strengthening the efficacy of its “stick” sanctions and enforcement capabilities is being challenged more and more to provide not only “carrots” but innovative legislative and other “mechanisms” to facilitate and encourage a proactive attitude towards instituting EMSs.

Performance - One recurring feature of the law as regards the encouragement of Focus EMS use is the focus on performance.

In the performance-focused system, measures are utilized as targets, for comparative and benchmarking purposes and to facilitate experiential learning in the continuous improvement process.

Rewards and penalties are linked to different performance levels and capabilities as incentives and disincentives operate within a setting of accountability and responsibility. However, critical to the performance-focused system is the capacity to measure and assess environmental performance in the areas concerned. Significant resources are needed. This clearly constitutes for Jamaica a major consideration and challenge.

ISO 14000 - ISO 14000 is a series of international voluntary standards and guidelines developed by the International Organization for Standardization (ISO) and adopted in 1996 for the process of managing the environmental aspects of an organization.

It covers not only EMSs but also the auditing of such systems, performance evaluation, eco-labelling, life-cycle assessment and environmental aspects in product standards. Within the series is the core document ISO 14001 which provides an international standard and specification for an EMS.

ISO 14001 - ISO 14001 requires a coherent framework for setting and reviewing environmental policy and objectives, for assigning responsibility to achieve these objectives, and for regularly measuring progress towards them.

The standard enables an organization to formulate an environmental policy and objectives which takes into account legal requirements and information about significant environmental impacts. ISO 14001 requires companies to have appropriate management structures, employee training, and a system for responding to and correcting problems as they occur or are discovered. Regular internal review audits are an essential part of the process.

As regards verification, a company adhering to ISO 14001 standards, has the choice of “self-declaration” (which costs less but also has less credibility) or “registration” (which depends on a thorough audit by independent auditors). ISO 14001 standards are system-based and do not set environmental performance goals, such as specific emission standards. Such specific standards are for national laws and regulations. It is also to be noted that ISO 14001 does not measure regulatory compliance.

conduct that meets the “external standards” of the law it is oxymoronic because obligations imposed by law are mandatory and not optional.

It is the essence of the rule of law that subjects are bound to comply with the law. Nevertheless, these various “voluntary” terms are used in the Report more in recognition in some cases of their seemingly “term of art” status and in other cases, the fact that various instruments and mechanisms are so termed rather than as endorsement in every instance of their correctness as a matter of law (or semantics). The terms’ usefulness as marketing tools are much less doubted as they, inter alia, connote happily for the subject that he is free to do what he wishes and when he complies, he is really doing so voluntarily.

Regulatory environmental performance standards provide the background against which an EMS must operate and the ultimate yardsticks to be taken into account. Where these standards exist, ISO 14001 may help companies to assess, track and manage their compliance at the level of those standards.

ISO 14001 registration does not strictly speaking require or ensure actual regulatory compliance but rather a “commitment to comply with relevant environmental legislation and regulations.”² An ISO 14001 EMS being optional, may not even be chosen for implementation. It follows from all of this that ISO 14001 can supplement but not replace regulations.

Broadly, it facilitates and encourages compliance with the law. Adverse environmental impacts are reduced through good, attentive and responsive management. Breaches of the environmental regulations are minimized as awareness and planning for at least compliance and detection and remedying of breaches are increased.

Due Diligence - The question of whether a Defendant has exercised the requisite diligence – due diligence – in a given environmental matter before the courts is often one of significant import.

Practically, “due diligence” provides an important nexus between EMS and the law. From a functional legal standpoint, an EMS is de facto an organized system for carrying out due diligence.

In the Canadian case of **R v. Imperial Oil Ltd.**,³ a very significant and damning finding of the court was that there was a general pattern of carelessness on the part of the Defendant about environmental matters, including a total lack of planning for the possibility of an accident.

In another Canadian case, the landmark decision of **R v. Bata Industries**,⁴ Judge Ormston proposed various tests of due diligence for company directors, which satisfying them would in effect entail implementation of an appropriate EMS.

Questions posed by Judge Ormston included the following:

- Did the Board of Directors establish a pollution “system” as required?
- Was there supervision or inspection?
- Was there improvement in business methods?
- Did each Director ensure that the Corporate Officers [had] been instructed to set up a system sufficient within the terms and practices of [the] industry of ensuring compliance with environmental laws... that the officers report[ed] back periodically to the Board on the operation of the system, and ... that [they were] instructed to report any substantial non-compliance to the Board in a timely manner?

An EMS facilitates affirmative answers to these questions and the carrying out of due diligence.

² ISO 14001, s.4(2)(c).

³ (16 September 1990), Ont., C.A.

⁴ (1992) 7 C.E.L.R. (N.S.) 245 at 287

The usefulness of having an EMS in place in establishing due diligence is highlighted in the case **R v. Courtaulds Fibres Canada**⁵ where gradual implementation of an EMS was accepted as due diligence, even though the company concerned continued to have numerous spills.

ISO 14001 as a major benchmark for due diligence, is more far reaching detailed and demanding than what any court would normally require to establish due diligence. It remains however a helpful useful ally of the law and facility for the courts.

In the case **R v. Prospec Chemicals Ltd.**⁶ a court in January 1996 in Alberta, Canada in response to a joint submission by the prosecutor and defendant company for an Order requiring the defendant company to register itself in compliance with ISO 14001 by June 1998 duly accepted the recommendation and ordered accordingly.

ISO 14001 was thus made mandatory for the company. The company was faced with a monetary penalty if it did not register by the court-imposed deadline.

The Court Order added power to ISO 14001 which it would otherwise lack. ISO 14001 in turn gave particular efficacy to the court order in the given circumstances of the case. To comply with ISO 14001, the company had to update its EMS to a level of thoroughness and sophistication that neither regulators nor judges could specify or evaluate because they lacked the necessary technical knowledge. The company itself was in the best position to identify the environmental impacts of its activities and to design an EMS to bring such impacts into regulatory compliance.

Importantly, the case illustrates one way in which ISO 14001 can supplement the regulatory process and indeed the mutually re-enforcing nexus linking the law, EMSs, the ISO 14001 EMS specifically and due diligence.

4.2 Legislative Instruments and Related Mechanisms

Main Source of Jamaican Environmental Law

Jamaican environmental law is largely to be found in legislative instruments as distinguished from case law developed through decided cases and declared in court.⁷ The legislative instruments comprise:-

- (a) Acts of Parliament (Primary Legislation) (e.g. **The Natural Resource Conservation Authority Act, 1991**)

⁵ (19 June 1992), (Ont. Ct. (Prov. Div)); 9 C.E.L.R. (N.S.) 304

⁶ (1996), 19 C.E.L.R. (N.S.) 178 (Alb. Ct.)

⁷ Redressing wrongs of an environmental nature has a long history in the law developed and declared in decided court cases and long pre-dates modern day environment-awareness which has now deliberately spawned various pieces of environment legislation. Such wrongs have been addressed under the law relating to:-

- Nuisance, which protects against interference with the use and enjoyment of land;
- Trespass, which provides protection from unpermitted physical intrusions;
- Negligence, which protects against physical or property damage resulting from breach of ones' duty of care; and
- The Rylands v Fletcher doctrine which protects strictly against abnormally dangerous activities carried out in particular locations or circumstances.

- (b) Subordinate or Delegated legislation (Secondary Legislation) which encompasses Regulations, Orders and the like made pursuant to powers granted under the parent Act. (e.g. The **Natural Resources Conservation (Permits and Licences) Regulations, 1996** made pursuant to the **NRCA Act, 1991**).

The Principal environmental legislative instruments are those dealing with natural resource conservation, physical planning and building control, environmental health, waste management and pollution control, watersheds, beaches, forestry, fisheries, surface and underground water, clean air, national heritage sites, wildlife protection, natural parks, mining, petroleum and quarries control and the control, disposal and use of pesticides.

By and large, these instruments seek to implement and enforce various permitting and regulatory schemes by which the government acts on behalf of the public as a whole through its various organizations and agencies. However, largely missing from all of this is a failure to focus directly on the individual rights of the private citizen in respect of the environment and to empower the private citizen accordingly.⁸

Command and Control

Existing environmental legislation entails command and control stipulations. Broadly, these stipulations require compliance with self-reporting, monitoring and notification requirements; discharge limits; process and activity controls; and product/commodity standards and controls.

Non-Environmental Legislation Relevant to EMS Agreement

Also to be noted here is that Legislation other than those directly dealing with environmental issues can be of much utility in encouraging the use of EMSs in Jamaica and are also hereinafter considered.

“Related Mechanisms”

A most basic mechanism for promoting EMS as between regulator and regulated is that of **Agreement**.

Agreement, ipso facto, has no necessary connection to legislative instruments. However, it may be creatively utilized in conjunction with these instruments to encourage compliance and Voluntary Compliance beyond the minimum standards or dictates of the instruments concerned.

Incentive Schemes may be developed within this **hybrid of legislation and agreement** as have been done in a number of other countries (e.g. The Netherlands, Indonesia, India and the USA). Various nomenclatures have been utilized in different countries to indicate and/or market varying “voluntary alternatives” or supplements to “command and control” legislation.

⁸ A private citizen now normally has to rely on remedies available under traditional civil wrongs such as Nuisance, Trespass and Negligence (with their constricting technical rules) as well as struggle with technical procedural rules having to do with eg. standing, (i.e. the right to be heard) to press a claim in an environment-related matter where he believes he has been wronged.

In Jamaica, there appears to be at present no precedent of environmental legislative provisions deliberately geared towards proactive promotion of voluntary compliance. Legislation dealing with other (non-environmental) matters also appear to be generally bereft of such provisions.

Somewhat of an exception to this is **The Labour Relations and Industrial Disputes Act, 1974 - (L.R.I.D.A.) Section 3(1)**, pursuant to which a **Labour Relations Code** was developed and promulgated as in the words of the Act such a Code “would be helpful for the purpose of promoting good labour relations...” (per **Section 3(1), L.R..I.D.A.**)

The code is subject to revision from time to time (per **Section 3(3)**). “A failure on the part of any person to observe any provision...” of the code does “...not of itself render...” such a person “...liable to any proceedings”. However, provisions of the Code relevant to the adjudication of an issue are to be taken into account in deciding the issue.

Analogous provisions obtain in respect of **The Road Traffic Act, 1938** and **The Road Code** made pursuant to **Section 95** of that Act.

In like vein, **Codes of Conduct** and/or “**Guidelines**” as regards desirable environment - friendly behaviour on the part of organizations can provide useful mechanisms facilitative of promoting EMS use. Although Guidelines or Codes of Conduct are not legally enforceable control instruments, they nonetheless play an important role in establishing the form of behaviour required.

Also, similar to what obtains in respect of **The Labour Relations Code** and **The Road Code**, the extent of adherence to established guidelines is a very relevant consideration for the courts as regards liability and/or sentencing.

Various Guidelines have been developed by the NRCA and others are at different stages of development. A number of these already provide direct guidance for various activities of particular sectors of industry such as the Food and Agro-Industries and Chemicals sectors. Increased activity in this direction strengthens the thrust towards promoting EMS use.

Recommendation(s):

1. That consideration be given to having the Jamaican citizen and environmental non-governmental organizations (NGOs) more empowered to bring court actions in respect of particular environmental breaches.
2. That the consequential legislative amendments should, inter alia, seek to address some of the technical legal impediments to bringing such actions.
3. That generally, use should be made of Agreements between regulator and regulated, incentives, Codes of conduct and/or Guidelines in encouraging EMS implementation.

4.3 Jamaican Environmental Legislative Instruments - An Overview

Historically, legislative instruments in Jamaica having some relevance to environmental matters have been resource-oriented and lacking in environmental and institutional focus. Environment-related provisions are in bits and pieces and scattered over an assortment of several disparate enactments. With the exception of **The Natural Resources**

Conservation Authority Act (The NRCA Act) promulgated in 1991 and subsequent limited legislative interventions, the bulk of existing instruments manifest environmentally inappropriate norms inherited from the United Kingdom in the pre-independence period.

Such legislation was never geared towards addressing the environmental problems which afflict the country at the present time. In general, these instruments simply do not contemplate current environmental lesions and prescriptions.

The NRCA Act in 1991 signalled at the time a new dawn in enlightened environmental legislative activity. However, with the new activity in a competitive world of rapidly growing environmental sensitivity and changing approaches to environmental management issues, questions inevitably arise not only as to the efficacy of the legislative efforts thus far but also as to the way forward.

Legislative Instruments and mechanisms concerning the environment in Jamaica manifest a command and control approach. While the merit of encouraging voluntary compliance has been clearly recognized, such voluntary compliance practices and mechanisms as exist appear to have often come about because of an inability to effectively apply the command and control approach.

Insufficient resources to adequately enforce provisions of the law or monitor compliance with terms of issued permits and licences or where there are gaps in the law resulting in particular undesirable environment-unfriendly conduct being beyond the tentacles of the law or where there is the well founded apprehension as to the time that would be lost in pursuing litigation through the very slow court litigation process all provide instances singularly and cumulatively which at times have prompted greater reliance on voluntary compliance.

However, it appears there is need for a more positive and pro-active approach to voluntary compliance. Environmental management systems for instance, need to be adopted for their intrinsic value.

This represents for Jamaica a major challenge as regards ensuring that there is in place the right mix of legislative instruments and related mechanisms encompassing both 'stick' and 'carrot'.

Here, it has to be borne in mind inter alia, human and material resource constraints, the business culture that obtains and the general level of public environmental awareness that currently exists as well as the level that may be engendered or reasonably anticipated in the not too distant future.

4.4 General Problems and Issues Concerning Effectiveness and Implementation of Jamaican Environmental Legislative Instruments

It is of vital importance that problems which undermine the efficacy of existing legislation be addressed as part of the quest towards promoting EMS use.

Problem of Inadequate Penalties for Breach of Environmental Laws

Much of the laws, often because they are old and anachronistic have penalties which are very low and do not provide any deterrent to offenders.

Problem of Overly Lenient Sentences for Breaches of Environmental Laws

There appears to be a tendency not to treat environmental law breaches with the seriousness they deserve. Accordingly, too often convicted offenders get away with light sentences vis-a-vis the available sentencing options.

Problem of Not Timely Developing and Passing Regulations to Ensure Efficacy of Legislation

There is often an unacceptable time lag between the passage of the primary legislation and such legislation being buttressed and rendered effective by referred to but not passed regulations, required Ministerial Orders and the like. This shortcoming often provides an early port of call and refuge for a prospective litigant dissatisfied with an order issued against him by a government agency.

In a particular case, the Court found that the NRCA had no power to make the given order against particular development taking place in Negril because the requisite Regulations had not yet been promulgated.

It also appears that litigants are not only using tardiness in promulgating required regulations as a shield in reaction to Governmental Orders made against them but are being more pro-active where they perceive their interests are being prejudiced by perceived tardiness.

On April 1, 2000, DYC Fishing Limited filed suit in the Supreme Court against the Ministry of Agriculture over its alleged failure to implement the requirements of the relatively recently enacted **The Aquaculture, Inland and Marine Products and By-Products (Inspection, Licensing and Export) Act, 1999**.

The application before the Court brazenly seeks an Order compelling the Minister of Agriculture, to, inter alia, ensure the promulgation of regulations under **The Aquaculture, Inland and Marine Products and By-Products (Inspection, Licensing and Export) Act, 1999**⁹; develop and implement policies and programmes to safeguard public health of consumers of aquaculture, marine products and by-products; and grant licences and operating certificates in respect of exportation of aquaculture, inland and marine products and by-products under the Act.

A declaration is also being sought from the Court that the Minister has no power under the Act to issue fishing or other quotas for the harvesting of fish or other marine or aquatic products.

The drivers for the suit appear to be that “without these conditions resumption of exports to Europe is hopeless” and that prices for the aquatic products in Europe are much better than in the USA, the current main export market.

Problem of Not Passing Legislation to Implement International Convention

There is at times an unacceptable time lag between Jamaica becoming a party to an International Convention concerning the Environment (or other subject-matter) and the enactment of the necessary legislation to incorporate the Convention’s provisions into Jamaican law.

⁹ Considered post.

This sometimes leads to situations where Governmental agencies empowered and constrained by particular legislative instruments may find themselves over reaching their jurisdiction in an attempt to implement requirements of a convention to which Jamaica is a party.

When this happens, and generally when a governmental agency acts outside its jurisdiction and its actions and orders are challenged in court, such actions and orders will be struck down by the courts.

Other legally well founded governmental actions may be unnecessarily doubted. Ultimately, the effectiveness of the Instruments may be undermined. In 1999, conch exporters who were not satisfied with quota and licence restrictions placed on their ability to fish for and export conch successfully challenged the restrictions in court.

Conch/CITES Case

In the case, (**Seafood and Ting International & DYC Fishing Limited v NRCA**), the Jamaican Court of Appeal lamented that there was no legislation in place to implement the **Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)** to which Jamaica is a party and which concerns, inter alia, the export of (the endangered) conch or allocation of quotas for such export. In 1983 conch referred to biologically as *Strombus Gigas*, were placed on Appendix II to the Convention as it was felt that it would become extinct if it was not effectively regulated.

Parties to the Convention are not allowed to export conch without the prior grant and presentation of an export permit which is not to be granted unless a Scientific Authority of the exporting state advises that the export will not be detrimental to the survival of the conch and a management Authority of the said state of export certifies that conch is not caught in contravention of local laws for its protection. The plan and procedure implemented by the Fisheries Division provided for the restriction of entry of persons to the conch exports industry and the admission of no new players in the sector.

The Court found that there is no law in Jamaica which provides that an exporter of conch requires a quota from the Fisheries Division of the Ministry of Agriculture or Minister before an exporter can obtain a permit from the NRCA to export the product. The Court held that neither the NRCA nor the Minister of Agriculture has any legal power and authority to determine who can or cannot export conch from Jamaica and what quantities exporters can ship. As Justice Downer put it in the Court of Appeal.

“The fact is that the government has deputed the appellant (NRCA) to issue permits of exportation of conch as part of its administrative duties without providing the necessary legislative framework to incorporate the Convention.”

Mr. Justice Downer observed that the Conch Exporters concerned recognized that there must be a national quota system in the regulation of the export trade in conch which is the largest in the world. Without such a system the trade would perish.

“...That the export trade in conch is a matter of international concern and ought to be regulated in the interests of the environment is evident.

That legislation is necessary to implement the provision of the Treaty is a constitutional imperative is well known. Yet this Court was compelled to decide the important issues in

this case on Common law principles because of the failure of the Executive to seek to incorporate the treaty provisions by legislation.”

The lesson is clear and the imperative well known indeed but not put in practice often enough. Jamaica needs to move speedily to pass enabling legislation to give effect to the Environment related international conventions to which it is or becomes a party. The epilogue to the conch case is that there is now enacted **The Endangered Species (Protection Conservation and Regulation of Trade) Act, 2000** which incorporates the CITES Convention into Jamaican Law.

Recommendation(s):

1. Review and update penalties for breach of environmental laws.
2. Consult with and sensitize judiciary as to the full implications and/or gravity of particular environmental breaches.
3. Have environmental law breaches and their implications feature prominently in the training of Police Officers.
4. Expand capacity and develop and adhere to appropriate action time tables towards speedy implementation of requisite Regulations.
5. Have legislation specify deadline for passage of particular regulations.
6. Enact timely legislation necessary to incorporate international convention to which Jamaica becomes a party.

5. TOWARDS A BROADER LEGISLATIVE POLICY SETTING FOR PROMOTING EMS IN JAMAICA

5.1 Green Plan Considerations

There is need for a national green plan to inform the development of appropriate legal instruments and related mechanisms. Here, it is being contended that such a plan helps in providing not only an understanding of where the country is and intends to be but will assist in providing a setting which aids the utilization of EMSs.

While, the absence of such a plan need not detain the EMS endeavours, such a plan should be put on a parallel fast-track and in time become the ultimate reference point for EMSs in Jamaica.

Meaning of National Green Plan

By a National Green Plan is meant a comprehensive, integrated large-scale, long term, flexible environmental blue-print for sustainable management geared at solving a nation's environmental problems.

Such a Plan seeks to tackle the complexity and breadth of the environmental problem head on and is developed by government with wide national participation and input from various levels and sectors thereby embodying national consensus and vision.¹⁰ The green-plan concept is an emerging one with the Netherlands, Canada and New Zealand providing outstanding examples.

The Netherlands

One feature of The Netherlands' green plan, or National Environmental Policy Plan (NEPP) is the way in which each industrial sector has been encouraged to organize into associations and to work out for itself, in cooperation with the government, its plans for achieving the environmental quality goals established in the NEPP.

A twenty-five year time frame is set for environmental recovery. The principle is "*each generation cleans up*". Notably, the responsibility for managing local environmental problems, in fact for implementing much of the NEPP is delegated to local authorities with standards being set at the regional and national levels in recognition that many environmental issues cross the boundaries of town and region.

Fundamental principles towards sustainability incorporated in the NEPP are:

1. The stand-still principle (environmental quality may not deteriorate)
2. Abatement at the source (remove causes rather than ameliorate effects)
3. The polluter pay principle (the user of a resource pays for the negative effect of that use)
4. Prevention of unnecessary pollution

¹⁰ A Jamaica National Environmental Action Plan (JANEAP) has been utilized and revised periodically and there have been other national planning efforts. But, as indicated, much more is envisaged here.

5. The application of the best practicable means (following the development of abatement technology)
6. Carefully controlled waste disposal
7. Application of a two-track policy of more stringent source-oriented
8. Measures based on effect-oriented quality standards
9. Internalization of environmental concerns (motivating people to responsible behaviour)

New Zealand

New Zealand's green plan is essentially reflected in its **Resource Management Act**.

It is based on the concept of "sustainable management" which provides the lynchpin and structuring principle for the country's environmental laws and policies. Resource management is based on districts defined by watersheds, rather than arbitrary political boundaries. Similar to the Netherlands, New Zealand is shifting away from regulating how resources are to be used, towards regulation of the effects that resource use will be allowed to have on the environment.

Section 5(2) of the Act provides:-

Sustainable Management

"In this Act "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while:

- (a) *Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and*
- (b) *Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and*
- (c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment."*

Decisions made and actions taken under the Act, are required to meet these principles of sustainable management. The Act however recognizes that the concept of sustainability is a dynamic one and will change as environmental information develops.

The Act provides two complementary means for government to express and apply its resource management policies, namely:-

- (a) National policy statements; and
- (b) National environmental standards.

Policy statements express national goals and objectives for the environment and its sustainable management. They are descriptive rather than prescriptive and cover issues of

resource protection, use and development. The statements may also deal with general issues, such as New Zealand's obligations in enhancing the global environment, or they may be quite specific about a particular issue or site.

National environmental standards are prescriptive and are promulgated as regulations. They set technical standards relating to the use, development and protection of natural and physical resources, including standards for contaminants, water, soil or air quality.

Regional and district governments bear most responsibility for implementing the Act. As alluded to earlier, the Act restructured regional government into units based primarily on watersheds and their ecosystems thereby providing a more logical division on which to base environmental management.

Directly elected regional authorities are responsible for preparing regional policy statements and plans which must be consistent with and reflect national policy statements and standards and uphold the principle of sustainable management.

Canada

For its green plan, Canada has developed via public consultation a list of "priority objectives for Canadians" that would lead it towards sustainability.

The two primary objectives are to achieve certain specific resource goals (such as reductions in emissions) and that of changing behaviour. Provincial round table (i.e. public discussions on particular issues) have developed sustainable development strategies with recommendations for their provincial and local governments.

Steps are underway towards legally obligating the government to integrate environmental considerations into all its actions.

Recommendation(s):

1. That steps be taken towards developing a national green plan.
2. That the following should be features of such a plan:-
 - (a) An extensive public consultation process.
 - (b) Highly publicized policy statements, standards and performance targets, audits and reports for various sectors and at various levels including at the national, local government and community levels.
3. That as far as possible such a plan should be translated into and underpinned by legislation as is the case with New Zealand and its Resource Management Act.

5.2 Constitutional Imperatives

The Jamaican Constitution

As regards, providing a broader setting for the development of EMS, it is also important to consider the provisions of the Jamaica Constitution which not only supersedes the provisions of any legislative instrument but of itself provides the ultimate port of call as

regards citizens' rights. Appropriate constitutional provisions are therefore important in promoting EMS use. Currently, the "Supreme Law of the land" protects a scheme for natural resource ownership based on the principles of private ownership.

There is a general right to "...*life, liberty... the enjoyment of property and the protection of the law...*" (per **Section 13(a)**).

Section 18 (which deals with compulsory acquisition of property) makes allowance for legislative instruments not to be deemed to be unconstitutional where they might otherwise be so had they not been directed at property "...*being in a dangerous state or injurious to the health of human beings, animals or plants.*" (per **Section 18(2)(i)**).

Section 18(3) provides that "*Nothing in this section shall be construed as affecting the making or operation of any law so far as it provides for the orderly marketing or production or growth or extraction of any agricultural product or mineral or any article or thing prepared for market or manufactured therefor or for the reasonable restriction of the use of any property in the interests of safeguarding the interests of others or the protection of tenants, licensees or others having rights in or over such property.*" Overall, the Constitution which was made in 1962 does not purport to position environmental rights among those deemed fundamental for the citizen.

Under the proposed new Charter of Rights and Freedom there is now to be "*the right, compatible with sustainable development, to enjoy a healthy and productive environment*" per **Section 13(2)(o)** of the **Charter of Rights (Constitutional Amendment) Act, 1999**. This provision may be considered vis-a-vis other constitutional provisions.

Miscellaneous Constitutional Provisions in Various Latin American Countries

Argentina

Article 41 of the Argentinean Constitution provides that everyone has the right to live in a clean environment.

Brazil

Strict, joint and several liability is imposed on any persons who is "directly or indirectly" responsible for environmental degradation.

Article 5 of the Brazilian Constitution authorizes citizens to bring a "popular action" to address violations of public rights, and registered environmental groups have statutory standing to pursue such claims. This is in addition to the usual civil law rights that citizens have as in Jamaica to pursue claims for wrongs such as nuisance and negligence.

Chile

The Chilean Constitution includes specific environmental protection, including the right to live in an environment free of contamination (**Article 19**). Protection of these rights are enforceable through an expedited writ of protection (**Article 20**). An umbrella environmental law enacted in March 1994 authorizes citizens to file actions compelling environmental restoration.

Mexico

Article 73 of Mexico's Constitution authorizes the government to protect and preserve ecological equilibrium

Peru

Under The Peruvian Constitution an individual has a right to "enjoy a balanced environment adequate for the development of his life."

Dutch Constitutional Provision

Beyond Latin America and elsewhere in the Netherlands, **Article 21** of the Dutch Constitution provides that *"The public authorities shall endeavour to ensure a good quality of life in the Netherlands, and to protect and enhance the living environment."*

Jamaican Position Vis-à-vis

The **Section 13(2)(o)** provision in Jamaica's new Charter of Rights compares favourably with the provisions set out above from the various countries. However, the efficacy of such a provision would appear to depend much on the meaning ascribed by the courts to key terms such as "sustainable development" and "healthy and productive environment".

Overall, the provision strengthens the position of the private individual as regards the environment. However, this needs to be buttressed by more specific and clear enforcement enabling legislative provisions such as are contained in **Article 5** of the Brazillian Constitution (and as alluded to earlier¹¹)

Recommendation(s):

That further consideration be given to the matter of how protection is to be provided for the rights of private citizens as regards the environment under the Jamaican Constitution.

5.3 The Jamaican Reality - Some Extra-Legal Parameters/ Constraints/Opportunities

Existing constraints/opportunities include:-

- (1) Inadequate technological and other resources to effectively implement particular legislation, to carry out necessary environmental monitoring, audits, etc.;
- (2) An insufficient level of environmental awareness in the business sector, amongst consumers and the broad masses of Jamaicans means, inter alia:-
 - (a) That enviro-labelling of products and generally programmes which depend on consumer reaction to rating environmental performance of enterprises may not attain the full effect desired; and
 - (b) Lack of political mileage to be gained pursuing certain environmental strategies thereby resulting in reduced impetus to pass requisite legislation which is accorded lower priority;

¹¹ See: Recommendations re 4.2.

- (3) Limited purchasing power among consumers means that choices are more likely to be made on the basis of affordability without special regard to environmental ramifications;
- (4) Preponderance of small scale enterprises can place economies of scale constraints as regards incurring particular costs to utilize particular environment-friendly technologies and approaches; and
- (5) Normally, multi-national corporations operating in the economy are already committed in parent country to certain standards of environment-friendly behaviour by parent country laws and thus:-
 - (a) Are likely to be more receptive to environmental regulation here; and
 - (b) Should not be permitted to operate in Jamaica at any standard lower than they would be allowed to or would have in their country of origin.

Recommendation(s):

1. That provisions for promoting EMS use have regard to the differing level of resource capabilities of enterprises and that the programme begins with pilot projects, in selected sectors such as tourism and the bauxite/alumina sectors.
2. That an extensive programme of heightening environmental awareness should accompany any consumer targeted programme for rating products or enterprises as regards environmental impact or performance.
3. That in establishing certain environmental-related requirements for enterprises, such as e.g. disclosure and reporting requirements regard should be had inter alia, to the size, nature and impact of the enterprise. Various thresholds need to be established to trigger obligations.
4. That foreign enterprises operating in Jamaica should not be permitted to operate at any standard lower than they would be allowed to or would have in their country of origin.

6. LEGISLATIVE INSTRUMENTS AND RELATED MECHANISMS THAT MAY FACILITATE OR HINDER IMPLEMENTATION OF A NATIONAL EMS POLICY

6.1 Main Environmental Licensing and Related Regulations and Guidelines

The Natural Resources Conservation Authority Act, 1991 (The NRCA Act)

Jamaica's centerpiece environmental enactment, the NRCA Act is the primary legislative instrument as regards licensing of activities affecting the environment.

The purpose of the Act as indicated in its long title is to *"provide for the management, conservation and protection of the natural resources of Jamaica to establish a Natural Resources Conservation Authority...and to provide for matters incidental thereto or connected therewith."* A major function of the Authority is:-

"to take such steps as necessary for the effective management of the physical environment of Jamaica so as to ensure the conservation, protection and proper use of its natural resource." (per **Section 4(1)(a)**).

This function is very wide and far reaching.

In performing its functions the NRCA is empowered (per **Section 4(2)**) to:-

- (a) *develop, implement and monitor plans and programmes relating to the management of the environment and the conservation and protection of natural resources;*
- (c) *formulate standards and codes of practice to be observed for the improvement and maintenance of the quality of the environment generally, including the release of substances into the environment in connection with any works, activity or undertaking;*
- (d) *investigate the effect on the environment of any activity that causes or might cause pollution or that involves or might involve waste management or disposal, and take such action as it thinks appropriate;*
- (f) *undertake studies in relation to the environment and encourage and promote research into the use of techniques for the management of pollution and the conservation of natural resources;*
- (g) *conduct seminars and training programmes and gather and disseminate information relating to environmental matters;*
- (h) *do anything or enter into any arrangement which in the opinion of the Authority, is necessary to ensure the proper performance of its functions."*

These provision of the Act, clearly facilitate promotion of EMS use.

Section 4(2)(a) is clearly wide enough to encompass the NRCA actively developing, implementing and monitoring plans and programmes for promoting EMS use.

Section 4(2)(h), for instance facilitates the Authority entering into appropriate agreements with enterprises as regards EMS implementation.

Section 4(2)(d) allows for the formulation of standards and codes of practice. As noted, the mechanisms of Agreement and Code of Practice/ "Guidelines" are useful tools for promoting EMS use. Already, the NRCA has developed a number of Standards, including National Trade Effluent Standards, National Stock Emission Standards, Motor Vehicle Emission Standards and National Sewage Effluent Standards.

The Act provides for a permit and licence system. The system is amenable to promoting EMS use. It seeks to avoid or minimize negative environmental impacts of particular development, undertakings, constructions or activities. Objectives of the system include:-

- (a) Facilitating the monitoring of discharges to the environment and monitoring to verify compliance with conditions set for approval;
- (b) Facilitating the setting of standards to be met by applicants for licences and permits;
- (c) Ensuring that environmental considerations are taken into account early in the planning of new projects;
- (d) Having a database of all discharges and permit holders;
- (e) Providing a mechanism to compel upgrading of existing facilities and dischargers over a reasonable period of time; and
- (f) Allowing the NRCA in the future to verify that goods and services are produced in an environmentally sound manner.

The NRCA issues permits to persons responsible for undertaking any enterprise, construction or development of a prescribed category in a prescribed area (per **Section 9**).

The categories of enterprises, constructions and developments for which permits are required are set out in the **Schedule to The Natural resources (Prescribed Areas) (Prohibition of Categories of Enterprise Construction and Development) Order, 1996** made pursuant to **Section 9(1)** of the Act. All of Jamaica has been designated a prescribed area. Accordingly a permit is required to carry out anywhere in Jamaica any undertaking falling within the several prescribed categories enterprises, constructions and developments.

Licences are issued by the NRCA for discharge of trade or sewerage effluent or for construction or modification of any works for such discharge (per **Section 12(1)(a) & (b)**). An Applicant for a licence or permit is required to complete and submit to the NRCA, the relevant Application form and as appropriate a Project Information Form (PIF).¹² Guidelines for project proponents are issued along with the application forms.

Based on information provided in the PIF, the NRCA may require the applicant to conduct an Environmental Impact Assessment (EIA) as provided for by **Section 10**. The EIA outlines the impact the proposed project is likely to have on the area in which the physical

¹² As prescribed in **The Natural Resources Conservation (Permits and Licences) Regulations, 1996**

development will be carried out. Permits and licences are granted with across the board fixed costs to applicants.¹³

Consideration should be given to developing a scale of costs that would take into account factors such as the nature and extent of the development, undertaking, construction or activity involved and the environmental impact involved and the extent to which an appropriate EMS is or will be utilized and the relative costs for putting such EMS in place.

This would not only help to promote EMS use but also allow for creative utilization of the Polluter Pay Principle and as relevant the USER pay principle. Further, on going costs/fees could be applied by the NRCA depending on the said factors.

These requirements could be reflected in the conditions attached to the licence or permit. It follows too that such factors would help determine whether a permit or licence is granted revoked, suspended or renewed as provided for under **Part 1** of the Act.

At present the conditions attached to the licence and permit do go some way in encouraging EMS use.¹⁴ However, consideration could be given to augmenting and strengthening these conditions as indicated.

The Natural Resources Conservation (Permits and Licences) Regulations, 1996

The Regulations provide detailed rules for the permit and licence system. Matters covered include the application for, grant and firm, suspension, revocation renewal, conditions in, modification of licences and/or permits. **Regulation 24 (i)**, alluded to earlier deals with fees and provides as follows:-

“The Fee specified in the second column shall be payable in respect of the matters respectively specified in relation thereto in the first column - Applications and Grants of Permits and Licences Fee

(a)	Upon each application for a permit or licence	\$1,000.00
(b)	Upon the grant of a permit	\$15,000.00
(c)	Upon the grant or renewal of a licence ...	\$5,000.00”

Another particularly noteworthy provision is **Regulation 22** which requires every person who is granted a licence to keep all records of the operation including any environmental monitoring for a period of not less than ten years. This stipulation facilitates EMS use and monitoring by the NRCA and as may become necessary appropriate sanctions by the Court for breaches.

Recommendation(s):

1. That, generally, the NRCA should actively develop plans and programmes for promoting EMS use (in accordance with the mandate of **Section 4(1)(a)**).

¹³ As prescribed per **Regulation 24(1)**, *ibid*.

¹⁴ See: Appendices for an example of a licence and permit.

2. That the NRCA should enter into agreements with enterprises for them to implement appropriate EMSs (as allowed by **Section 4(2)(h)**) and incorporate the relevant terms and conditions in licences and permits as applicable.
3. That the licence and permit system be utilized in the fostering of EMS use and that the current across the board fee be done away with and a new fee structure be developed to take into account EMS use, cost of EMS implementation and factors such as the scale, environmental impact and developmental value of the undertaking or activity, the polluter pay principle and as appropriate the user pay principle.

Possible reoccurring fees should be referable to the enterprise's environmental performance, subject to the NRCA's verification capabilities. **Regulation 24 (1)** should be amended accordingly.

4. That the NRCA should accelerate the development of standards and codes of practice (as provided for by **Section 4(2)(d)**) towards utilization in engendering EMS use.

The Beach Control Act, 1956

Section 11 empowers the NRCA to "...grant licences for the use of the foreshore or the floor of the sea for any public purpose, or in connection with any business or trade or for any other purpose..." The cost for obtaining such a licence could be made to reflect application of the user pay principle as regards beach use.

The NRCA is (per **Section 15(b)**) empowered "to do anything and to enter into any transaction...which in their opinion is calculated to facilitate the proper discharge of their functions and duties..." under the Act. The Authority may (per **Section 18**) also make regulations generally for the proper carrying out of the purposes and provisions of the Act.

These various provisions would appear to provide some scope for the NRCA to enter into arrangements with entities towards the utilization of EMSs. However, the extent to which regulations can be made to that end appears to be more constrained than obtains under the NRCA Act.

Recommendation(s):

1. That the user pay principle be applied in determining the cost of obtaining licences and a scale of fees be determined accordingly with implementation of EMS, the cost of such implementation being factored in such determination along with considerations such as the extent, nature, environmental impact and developmental value of the usage concerned.
2. That the NRCA enter into agreements with beach enterprises as to appropriate EMS for beach use with the appropriate terms and conditions incorporated in the licences.

The Fishing Industry Act, 1976

Section 3 generally prohibits fishing without a licence.

Section 6 sets out matters to be considered on application for a licence namely:-

- “...(a) *the desirability in the interest of the fishing industry of granting a licence;*
- (b) *whether or not the applicant operates or assists in the operation of a canoe or other vessel, or is a member of the crew of a deep-sea fishing vessel;*
- (c) *such other matters as in his opinion are relevant to the application.”*

One matter that the Minister could properly take into account in deciding whether to grant a licence is whether the applicant has environment-friendly methods and systems for fishing. Under powers given to him by **Section 19(1)**, the Minister from time to time declares particular periods to be closed seasons as regards particular species of fish.

The issuance of licences and the declaration of closed seasons constitute the main controlling legal mechanisms utilized to manage fisheries stocks. The fines for breaches are generally low and do not provide sufficient deterrent. The Minister is empowered (per **Section 25**) to make various regulations, including:-

- “...(b) *prescribing the form of any licence or certificate of registration to be issued under this Act;*
- (e) *making provision in respect of the inspection from time to time of boats used in fishing;*
- (f) *prescribing or prohibiting the use of various types of fishing equipment*
- (g) *prescribing or prohibiting methods of fishing within certain areas or at certain periods;*
- (h) *making provision in respect of the marketing or disposal of fish;*
- (i) *making provision in respect of the management and control of fishing beaches;*
- (j) *making provision in respect of the keeping of statistics in connection with the fishing industry;*
- (k) *prescribing measures for conservation of fish;*
- (o) *prescribing anything required or permitted by this Act to be prescribed.”*

Very limited regulations have been made under the Act. There is clearly scope for more to be developed under **Section 25** which would encourage use of EMSs.

A **Draft Fisheries Bill** slated to replace the Act (and **The Wildlife Protection Act**) has been under consideration for some time now.

Recommendation(s):

1. That in considering whether to grant a fishing licence, the Minister should take into account whether the applicant has in place environment-friendly methods and systems for fishing and dealing with the fishing product. **Section 6** could be amended accordingly in the interim pending final settlement of the provisions of the **Draft Fisheries Bill**.

2. That the process of finalizing the replacement **Draft Fisheries Bill** be accelerated.

Draft Fisheries Bill (Second Draft 3/4/96)

Under the Bill, the management, development and conservation of all fish within Jamaican waters is slated to be the responsibility of the relevant portfolio Minister (per **Section 5(1)**). There is to be appointed (per **Section 5(2)**) a Director of Fisheries with responsibility (per **Section 5(3)**) for:-

- “(a) the conservation of fish stocks;*
- (b) the assessment of fish stocks and the collection of statistics;*
- (c) the development and management of fisheries;*
- (d) the monitoring, control and surveillance of fishing operations;*
- (e) ...the preparation and periodic review of fishery management plans and the submission of the same to the Minister and Cabinet;*
- (f) the regulation of the conduct of fishing operations and aquaculture and operations ancillary thereto;*
- (g) the issue, variation, suspension and revocation of permits and licences for fishing, aquaculture and other activities for which permits or licences are required under this Act;*
- (h) the collection of fees in respect of permits and licences...”*

Section 6 provides as follows:-

“In exercising powers under and in relation to this Act, the Minister or the director, as the case may be, shall have regard to –

- (a) the principle that the country’s fisheries resources shall be managed, developed and protected as a renewable asset so as to ensure production from those resources of the optimum sustainable yield; and*
- (b) the principle that the country’s marine, coastal and aquatic environments shall be conserved and renewed as an asset for succeeding generations; and*
- (c) the need to apply the precautionary approach to the conservation of the fisheries resources taking account of the best scientific evidence available, so nevertheless, that the absence of adequate scientific information should not be used as a reason for postponing or failing to take conservation and management measures; and*
- (d) the utilization of the country’s fisheries resources so as to achieve economic growth, human resource development, employment creation and a sound ecological balance, consistent with the country’s national development objectives; and*

- (e) *any principles of maximum sustainable yields, allowable levels of fishing or total allowable catch which may be supported or adopted nationally from time to time; and*
- (f) *any relevant international obligations or bilateral or multilateral agreements of Jamaica, or applicable rules of international law, relating to the exercise of jurisdiction by Jamaica in the exclusive economic zone or archipelagic waters.”*

Section 7 provides that:

“The purpose of any fishery management plan is to conserve, enhance, protect, allocate and manage the fishery resources within the fishery waters of Jamaica having regard to the need for:-

- (a) *planning, managing, controlling and implementing such measures as may be necessary to achieve those purposes;*
- (b) *promoting and developing commercial fishing and aquaculture and recreational fishing; and*
- (c) *providing for optimum yields from any fishery and maintaining the quality of the yield without detrimentally affecting the fishery habitat and environment.”*

Section 8 provides:-

“The Minister, for the purposes specified in Section 7 of this Act, may from time to time by order published in the Gazette, declare any area of the fishery waters to be a fishery management area for the management of such species of fish as are specified in the notice.”

Section 9 provides:-

- (1) *In respect of each fishery management area, the Director shall prepare a fishery management plan for the conservation, management and development of the fishery in the fishery management area.*
- (2) *Each fishery management plan shall -*
 - (a) *identify each fishery and its characteristics, including its current state of exploitation; and*
 - (b) *specify the objectives to be achieved in the management and development of the fishery; and*
 - (c) *specify the management and development strategies to be adopted for each fishery; and*
 - (d) *specify the limitations, if any to be applied to the issue of licences in respect of each fishery; and*
 - (e) *identify any possible adverse environmental effects of the operation of fishing activities in the fisheries, together with proposals for the management of those effects; and*

- (f) *specify the amount of fishing, if any, to be allocated to foreign fishing vessels; and*
 - (g) *specify the statistical and other data required to be given or reported for effective management and development.*
- (3) *The Director shall, during the preparation of a fishery management plan, consult as appropriate with other Government departments and agencies affected by the Plan.*
- (4) *Where any fishery management area includes any fresh or estuarine waters where any fish indigenous to or acclimatized in Jamaica are found, the Director -*
- (a) *shall not prepare a fishery management plan without first having consulted with the Chairman of the Natural Resources Conservation Authority; and*
 - (b) *shall, in preparing the plan, have regard to the advice, if any, of the Chairman of the Natural Resources Conservation Authority relating to the Responsibilities conferred on the Natural Resources Conservation Authority by the Natural Resources Conservation Authority Act 1991*
- (5) *A fishery management plan shall be kept under review and shall be revised as necessary.*
- (6) *Each fishery management plan and each review thereof shall be submitted to Cabinet for approval, and shall enter into force upon such approval.”*

It is evident from the provisions quoted and the general tenor of the Bill, that it has environmental management as a core focus and is facilitative of promoting EMS use.

As regards the issue of a fishing permit **Section 18(3) & (4)** provides:-

- “(3) *The Director may issue a fishing permit to any person authorizing such person to fish in the fishery waters following submission of an application in the prescribed form.*
- (4) *In considering applications for fishing permits the Director shall have regard to –*
- (a) *the desirability in the interests of the fishing industry of granting a permit;*
 - (b) *whether or not the applicant operates or assists in the operation of a fishing vessel, or is a member of the crew of a fishing vessel; and*
 - (c) *such other matters as in the opinion of the Director are relevant to the application.”*

Section 18(7) provides:-

“An application for a fishing permit may be denied on one of the following grounds –

- (a) *that it is necessary in the opinion of the Director to do so in order to give effect to any licensing programme specified in an applicable fisheries management plan;*
- (b) *that the Director has reason to believe that the applicant will not comply with the conditions of the licence;*

- (c) *such other grounds as may be specified in this Act or in any regulations made under this Act.*"

The matter of conservation and management of the fisheries stock and/or the need to use or have in place methods and systems towards ensuring this is not expressly specified as one of the matters to which regard should be had by the Director in considering applications for permits.

This should be done although such a concern may be addressed under the broad sweep of [best] *"interests of the fishing industry"* in **Section 18(4)(a)** or any *"applicable fisheries management plan"* in **Section 18(7)(a)**. Such a concern may also be reflected in the conditions attached to the issuance of the licence in accordance with Section 34(3) which provides as follows:-

"The Director... may attach to any licence such special conditions as he thinks fit, including conditions relating to –

- (a) *the type and method of fishing or related activity authorised;*
- (b) *the areas within which such fishing or related activities are authorised; and*
- (c) *the target species and amount of fish authorised to be taken, including any restriction on by-catch and discards."*

Various fishing methods are expressly prohibited (per **Section 50(1)**).

A licence is also required to operate a fish processing establishment (per **Section 28(1)**).

The export of fish or fish products is prohibited unless the Director is satisfied that the fish has been prepared or processed in a licensed fish processing establishment and the fish or the container of the fish has been marked in accordance with *"such standards as may be prescribed and any other relevant law"* (per **Section 29**).

Further, as regards export of fish, **Section 30** provides:-

The Minister may, with the consent of Cabinet, make regulations prohibiting or restricting the export from Jamaica of any prescribed species or size of fish or other aquatic organism where, in his opinion, such action is required –

- (a) *to protect the supply of fish to the domestic markets of Jamaica; or*
- (b) *in the interests of proper management of the fishery."*

The Minister is empowered (per **Section 89**) to make various regulations, which may provide for, inter alia:-

- (a) *prescribing measures for the conservation, management, development, licensing and regulation of fisheries or any particular fishery, including closed seasons and areas;*
- (b) *licensing, authorization or registration in respect of any vessel or class or category of vessels to be used for fishing, related activities or any other purpose pursuant to this Act, including the form, issuance requirements, grounds for denial, terms and*

- conditions and fees, charges, royalties and other forms of compensation related to such licensing, authorization or registration;*
- (c) *prescribing different classes of fishing permits and the areas of fishing method or type of fishing gear in respect of which each class of permit shall be valid.*
 - (d) *the operation of, and conditions and procedures to be observed by any other vessel which may enter the fishery waters for any purpose under this Act;*
 - (e) *the operation of, and conditions and procedures to be observed by any other vessel which may enter the fishery waters for any purpose under this Act;*
 - (f) *the catching, loading, landing, handling, transshipping, transporting, possession and disposal of fish;*
 - (g) *the import, export, distribution and marketing of fish and fish products;*
 - (h) *the manner in which any fishing gear is to be stowed;*
 - (i) *the appointment, powers and duties of authorize officers and observers;*
 - (j) *the duties and procedures to be followed by the master and crew of any vessel in respect of authorised officers and observers;*
 - (k) *rewards to be paid to any person providing information on the operations of fishing vessels leading to a conviction of an offence against this Act;*
 - (l) *the licensing, control and use of fish aggregating devices and the rights to the aggregated fish, and prescribing times and the minimum distances from such devices any vessel may fish around such devices;*
 - (m) *regulating or prohibiting the use of self-contained underwater diving apparatus, spear guns or other similar devises;*
 - (n) *establishing standards and measures for the safety of local fishermen and fishing vessels;*
 - (o) *regulating aquaculture;*
 - (p) *requiring the provision of statistical and other information related to fisheries and aquaculture;*
 - (q) *the control, inspection and conditions of operation of fish processing establishments;*
 - (r) *the prevention of marine pollution;*
 - (s) *regulating or prohibiting, either generally or in any specified fishery*
 - (i) *the taking of coral and shells;*
 - (ii) *the setting of fish traps or nets; or*
 - (iii) *the taking of aquarium fish;*

- (t) *prescribing measures for the protection of particular species as appropriate;*
- (u) *prescribing any other matter which is required or authorised to be prescribed.*

There is already some Draft Regulations.

The Fisheries Regulations

The Regulations deal with conservation and management measures, fishing and aquaculture permits, registration and licensing of fishing vessels, recording of catch and effort data, fish processing establishment licence, export of fish and fish products and aquaculture.

Notably, in the “General Conditions Applicable to Licences” contained in **Schedule 7** of the **Regulations** there is contained in **Condition 2 (ii)** the following:-

- “...*(f) the master shall cause a fishing logbook to be maintained at all times while the vessel is in the fishery waters and up-to-date entries to be made daily and in such form as the Director may from time to time require for the purpose of recording the fishing operations or related activities of the vessel;*
- (g) in particular, but without limiting the generality of the preceding paragraph (f), the master shall cause the following information to be entered relating to the activities of the vessel during that day -*
 - (i) the fishing effort of the vessel;*
 - (ii) the methods of fishing used;*
 - (iii) the areas in which fishing was undertaken*
 - (iv) the species of fish taken, and the quantity and condition of each species;*
 - (v) the species of fish taken and returned to the sea, and the quantity and condition of each species; and*
 - (vi) such other information as the Director may reasonably require in writing in order to ascertain the fishing or related activities of that vessel in the fishery waters;*
- (h) the master shall certify that the information contained in the logbook maintained under paragraph (f) is true, complete and correct;*
- (i) the operator shall cause the logbook maintained under paragraph (f) to be transmitted in its original and unaltered form to the Director or to any other person or organization designated by him:*
 - (i) not later than fourteen days after the completion of the voyage to which the logbook relates; or*
 - (ii) at any other time at the request of the Director or any authorised officer;*
- (j) the master shall cause reports containing information referred to in paragraph (i) to be made to the Jamaica Coast Guard, or to such other authority as the Director may designate in writing, at the following times -*
 - (i) immediately upon entry into the fishery waters;*
 - (ii) every Wednesday or such other day as the Director may specify while the vessel is in the fishery waters;*

- (iii) *immediately upon departure from the fishery waters; and*
- (iv) *such other times as the Director may specify in writing;...*

These stipulations apply to a local fishing vessel licence and a locally-based foreign fishing vessel licence. Similar requirements obtain in respect of a foreign fishing vessel licence. Overall the stipulations encourage EMS use.

As regards considering an application for a fish processing establishment licence, the Director is required to take into account, inter alia, environmental factors (per **Regulation 26 (2) (b)**). This can ultimately encourage EMS use. However, it seems advisable to expressly state in the Regulations that the Director is required to take into account whether there is in place an EMS or plans or steps to do so.

Recommendation(s):

1. That the matter of the conservation and management of the fisheries stock and/or the need to use or have in place methods and systems to this end by expressly specified as one of the matters to which regard should be had by the Director considering applications for permits. **Section 18** should be amended accordingly.
2. That the Director be required to take into account whether there is in place an appropriate EMS or plans or steps to put one in place when considering to grant a fish processing establishment licence. **Regulation 26(2)(b)** should be amended accordingly.

The Pesticides Act, 1987

This Act established the Pesticides Control Authority (per **Section 3(1)**)

The Authority's functions (per **Section 4**) are:-

- ...(a) to register pesticides;*
- (b) to license persons to import or manufacture registered pesticides;*
- (c) to authorize persons to sell restricted pesticides'*
- (d) to register premises in which a restricted pesticide may be sold;*
- (e) to license pest control operators;*
- (f) to consider and determine applications made pursuant to this Act and to deal with all aspects of the importation, manufacture, packaging, preparation for sale, disposal and use of pesticides...*

Section 8 provides that *"No person shall manufacture, or import any pesticide unless he first obtains in the prescribed manner a licence to manufacture or import, as the case may require, that pesticide."*

Persons are prohibited (per **Section 9(1)**) from selling a restricted pesticide unless duly authorized to do so, the premises in which the sale is carried out has been duly registered and the sale carried out in accordance with the Act. The Minister is per **Section 16(1)** empowered to make regulations:-

- ...“(c) *for the licensing of persons to import or manufacture registered pesticides*
- (d) *relating to restricted pesticides, the authorization and the eligibility therefor of persons to sell restricted pesticides and the premises in which such pesticides may be sold;*
- (e) *relating to pest control operators, their employees and any medical or other examination which they may be required to undergo, and fixing the amount and type of insurance or bond to be carried or furnished by registered pest control operators;*
- (f) *as respects the labelling, packaging, storage, transportation and use of pesticides;*
- ... (h) *governing the aerial application of pesticides;*
- (m) *prescribing the permissible level of any pesticide or breakdown product thereof, at any specified time, in any kind of plant or animal product intended for consumption by human beings or domestic animals;*
- (n) *regulating the periods during which particular pesticides may or may not be used on certain agricultural crops;*
- (o) *respecting the disposal of pesticides and packages.”*

The matter of the labelling, packaging, storage, transportation, use and disposal of pesticides need to have adequate regulations as provided for by **section 16(i)(f) & (o)**, if EMS use as regards pesticides is to be properly facilitated and encouraged.

Recommendation(s):

That regulations be promulgated expressly providing for environmental impact concerns to be taken into account and towards promoting EMS use.

6.2 Financial, Corporate and Related Provisions

The Auditor General

The Auditor General is empowered (per **Section 122** of the **Jamaican Constitution**) to audit and report on the accounts of all Ministries and Departments of Government at least once each year. His department has right of access to all relevant accounting records of these bodies. The Auditor-General’s Report is laid before Parliament.

The Auditor-General’s duties include bringing to attention extravagant or unauthorized expenditure, irregularities in official accounts and improper variations from the Estimates approved by Parliament.

The Public Accounts Committee of Parliament (whose deliberations attract significant mass media and public attention) acts in close collaboration with him and pays careful attention to his reports. The functions of the Auditor General are centered around the examination of “accounts” vis-a-vis the expenditure of public funds.

Accounts

The term “accounts” is not defined in the Constitution but is normally understood as relating to financial transactions.

The concept of environmental accounting or auditing is different. The question arises, therefore whether the services of the Auditor General or some other new public officer could be utilized to report to Parliament on the environmental performance of the various Ministries, agencies and departments of Government.

There is legislative precedent for this in Canada where the role of the Auditor General has been expanded in this regard by way of an amendment to Canada’s Auditor General Act. Moreover, the concept of Accounting is being widened as exemplified by the **Global Reporting Initiative Sustainability Report Guidelines**¹⁵ which encompass, inter alia, environmental performance indicators. Notably, the wording of **Section 122(5)** of the **Constitution** is as follows:-

“Nothing in this section shall prevent the performance by the Auditor-General of -

- (a) such other functions in relation to the accounts of the Government of Jamaica and the accounts of other public authorities and other bodies administering public funds in Jamaica as may be prescribed by or under any law for the time being in force in Jamaica; or*
- (b) such other functions in relation to the supervision and control of expenditure from public funds in Jamaica as may be so prescribed...”*

The Auditor General is more specifically governed by **The Financial Administration and Audit Act, 1959**.

The Financial Administration and Audit Act, 1959

Section 25 (1) of this Act sets out the duties of the Auditor General and provides as follows:-

*“ The Auditor General shall, in performing his functions under **section 122(1)** of the Constitution ascertain whether in his opinion:-*

- (a) The accounts referred to in that section are being faithfully and properly kept;*
- (b) The rules and procedures framed and applied are sufficient to secure an effective check on the assessment, collection and proper allocation of the revenue and other receipts of the Government;*
- (c) All money expended and charged to an appropriation account has been applied to the purpose for which the provision made by Parliament was intended and that any*

¹⁵ **The Global Reporting Initiative (GRI) Sustainability Reporting Guidelines** seek to assist those enterprises and other organizations that choose to publish reports about their performance and progress as regards the environmental, social and economic aspects of sustainable development. The Global Report Initiative (GRI) was established in late 1997 with the objective of providing globally applicable guidelines for preparing enterprise-level sustainability reports. Through the common thread of sustainability, it addresses the environmental, economic and social aspects of an enterprise’s performance. The GRI seeks to elevate enterprise-level sustainable development reporting to the level of general acceptance and practice now accorded financial reporting. In addition to the GRI, there are the sustainable business indicators of the World Business Council for Sustainable Development.

payment of public money has been incurred with due regard to the avoidance of waste and extravagance;

- (d) *Essential records are maintained and the rules and procedures framed and applied are sufficient to safeguard the control of Government property;*
- (e) *The provisions of this or any other enactment relating to the administration of public moneys and Government property have been complied with;*
- (f) *Satisfactory procedures have been established to measure and report on the effectiveness of programmes and services.”*

In its current state, the section is not readily conducive to extending the scope of the Auditor-General duties to encompass auditing of environmental performance.

Section 33 of the Act empowers the relevant Minister (the Minister of Finance) to require the appointment of an Audit Committee for any public body (i.e. a statutory body or authority or any government company). The Section provides as follows:-

“ The relevant Minister may require a public body to appoint a committee from among its members to be called an Audit Committee which shall be responsible for:-

- (a) *Assessing the adequacy and scope of the arrangements for the internal and external audit of the accounts of that body;*
- (b) *Examining the reports of internal and external auditors in relation to such accounts; and*
- (c) *Ascertaining what action has been taken in respect of recommendations contained in such reports.”*

Each Government Department is required to have a system of internal audit for examining *“the financial transactions and accounts of the department”* (per **Section 34 (1)**).

Section 34 (2) provides that *“officers who are assigned to internal audit shall perform such functions as may be prescribed by the Financial Secretary but nothing in this subsection shall prevent an accounting officer from assigning such additional duties and responsibilities to such officers as the accounting officer may think fit.”*

The officer who is in charge of internal audit in a department is required to submit regular reports to the Accounting officer for the Department and quarterly reports to the Financial Secretary with the Auditor-General having access to these various reports (per **section 34 (3) & (4)**).

Upon noting the stipulations of the sections of the Act, it is clear that as regards environmental accounting and audits, amendment could be made to extend the scope of the Auditor General duties, the Audit Committee’s work and Internal Audit generally. Notably, **Section 50 (1)** empowers that Minister to make regulations in relation to:-

“requirements in relation to the budgeting, financial, reporting, accounting and auditing in public bodies”.

This provision would appear to provide a facility for the Minister to include environmental accounting and auditing for public bodies. The promotion of the use of EMS in public bodies could be thus encouraged. However, as regards Government Departments en toto, internal audit and the Auditor-General duties generally, appropriate amendments to the Act are necessary.

The Financial Administration (Supplies) Regulations, 1963

These Regulations made under the Act deal with “supplies” for the public service and covers ...“any articles required for the public services or any services required in connection with such articles”. However, there is now under consideration a **Draft Government Procurement Regulation**.

Draft Government Procurement Regulation

Article 44 of the Draft (“Penultimate”) Government Procurement Regulation (GPR) is herein set out in full for ease of reference and purposes of the comments to be made thereafter. It is submitted that the Article needs substantial revisiting.

“Article 44 - Environmental Concerns and Occupational Freedoms

- (a) *Procuring entities shall conduct their procurement activities in a manner that will result in effective enforcement of Clean Air and Clean Water Standards. Except as provided in 44.2 (b), procuring entities shall not enter into, renew, or extend contracts with firms proposing to use facilities listed by the National Resources Conservation Authority (NRCA) as violating facilities under the Air or the Water Standards.*
- (b) *The procuring entity may exempt any contract or subcontract from the requirement in 44.2 (a) for a period of one year when it is in the paramount interest of the Nation to do so.*

44.3 Ozone-depleting Substances

As a signatory to the Montreal Protocol, GOJ is committed to the prohibition of chlorofluorocarbons (CFCs). Effective April 1, 1998, GOJ has instituted an importation and manufacturing prohibition on goods and supplies which contain CFCs. It is therefore a violation of the GPR to knowingly procure items containing such substances. It is incumbent upon the procuring entity to ensure that this specification is explicitly stated in applicable solicitation documents.

44.4 Occupational Rights and Freedoms

- (a) *The contractor shall, in the execution of the contract, pay rates of wages and observe hours and conditions of labour not less favourable than those established for the trade or industry in the district where the work is carried out by machinery of negotiation or arbitration to which parties are organizations of employers and trade unions representative respectively of substantial proportions of the employers and workers engaged in the trade or industry in the district.*

- (b) *The contractor shall in respect of all persons employed by him (whether in execution of the contract or otherwise) in every factory, workshop or place occupied or used by him for the execution of the contract, comply with the general conditions required by the Factories Act and any regulations thereunder.*
- (c) *The contractor shall be responsible for the observance of these Conditions by sub-contractors employed in the execution of the contract, and shall notify the procuring entity of the names and addresses of all such sub-contractors.”*

Recommendation(s):

1. That new legislation be enacted to empower the Auditor-General to carry out environmental auditing and reporting functions as regards governmental/public bodies and agencies.
2. That the Draft Government Procurement Regulation be amended taking into account the following comments:-
 - (a) The Article is internally inconsistent in form and substance.
 - (b) It is inconsistent in form in that **Article 44.4** is captioned “Occupational Rights and Freedoms”, yet **Article 44** in so far as Occupational matters are concerned is limited to “Occupational Freedoms” “Rights” are different from and not necessarily subsumed in “Freedoms”. There is for instance at present in Jamaica for employees “freedom to strike” but not a “right to strike”. Moreover, it is not readily apparent what “freedoms” are being referred to in **Article 44.4**. If one of the two terms “freedoms” or “rights” is to be preferred then it ought to be “rights”.
 - (3) **Article 44** is inconsistent in substance because **Article 44.1** suggests that the focus of the Article is protecting and improving the quality of the environment yet it purports to deal with Occupational Rights and Freedoms under **Article 44.4**.
 - (4) If the real aim of **Article 44** is to focus on the environment, then it appears **Article 44.4** belongs elsewhere.
 - (5) **Article 44.4** itself warrants further comment:-
 - (a) “Contractor” is not defined and needs to be.
 - (b) Implicit in **Article 44.4(a)** is the notion that terms of employment negotiated by trade unions are to be the absolute benchmark in such matters. This appears to be unnecessarily restrictive.
 - (6) **Article 44(2)** needs to be delimited from its constricted focus on Clean Air and Clean Water Standards. Other pollution media need to be addressed also bearing in mind the wide purview of **Article 44.1**.
 - (7) Provision needs to be made in the Article for subsequent changes from time to time in environmental priorities or focus. Thus the Article could be drafted to allow for the timely incorporation of other Standards or Guidelines with the Natural Resources Conservation Authority indicating these from time to time.

- (8) Apart from the reminder in **Article 44.3** concerning Ozone-depleting Substances, the Natural Resources Conservation Authority could also develop and update a list of any other environment-unfriendly prohibited goods and provision be made for easy incorporation in the Regulation.
- (9) For the procurement of certain goods which have having regard to their nature or volume (or both) prima-facie raise serious environmental concerns, provision should be made for the NRCA to be consulted prior to procurement.

The Jamaica Stock Exchange Rules

Under **Rule 403** - Application for Listing (**paragraphs xi & ii**) a Company applying to have itself listed on the Exchange is required to provide financial statements and “*a full description of the operation which is carried on or which is proposed to be carried on by the Company*”.

It appears the scope of this disclosure requirement could be extended to require as applicable information as to the company’s environmental performance and the presence or absence of an EMS.

Recommendation(s):

That **Rule 403** be amended to require a company engaged in certain activities (with particular environmental consequences) and meeting criteria to be prescribed (e.g. scale and nature of operation, etc.) to provide information as regards its environmental performance, whether it has an EMS in place, its compliance with applicable environmental or related laws and any consequential outstanding or likely liability.

The Companies Act, 1965

The Act stipulates several disclosure requirements for companies. There are requirements for filing Annual Returns (per **Sections 121-124** and **The Fifth Schedule**) and appropriate Accounts (per **Section 123**). Reporting obligations of Auditors are specified (per **Section 155**). Requirements as to particulars in a prospectus are specified (per **Section 40. The Third Schedule**).

Recommendation(s):

1. That a company carrying out certain activities (with particular environmental consequences) and meeting criteria to be prescribed (e.g. scale and nature of operation) be provided the facility of making a statement on its environmental performance annually and as to whether it is utilizing an EMS.
2. That the scope of the report on companies by Auditors be expanded to encompass environment performance notations, inclusive of whether an EMS is in place.
3. That the specific requirements as to particulars in a prospectus be extended to include information on environmental performance, whether an EMS is being or will be utilized, compliance with applicable environmental or related laws and any consequential outstanding or likely liability. **Section 40** and the **Third Schedule** should be amended accordingly.

Income Tax Act, 1955

Provision is made for wear and tear allowance for particular assets under the Act (**First Schedule**). These allowances, termed capital allowances, are deductible in arriving at the chargeable income of corporation. Capital allowances can be viewed as incentive allowances to encourage investment in productive assets. The basis of the relief given is that the net cost of the asset (i.e. cost less scrap value) should be allowed over the useful life of the asset. Amounts are written off periodically.

Recommendation(s):

1. That particular environment-friendly equipment be granted capital allowance concessions.
2. That special concessions be granted under the Act to particular enterprises wholly engaged in particular environment-friendly activities.

Incentives Legislation

Incentives Legislation exist in respect of a number of areas. Thus there is **The Industrial Incentives Act, 1950, The Shipping Incentives Act, 1978, The Resort Cottage (Incentives) Act, 1971, The Motion Picture Industry (Encouragement) Act, 1948 Petroleum Refining Industry (Encouragement) Act, 1962, The Hotel (Incentives) Act, 1968** etc. under which there are concessions in respect of income tax, customs duty and/or other taxes. Environment Incentives Legislation could likewise be developed in respect of environment-friendly commodities or activities.

Recommendation(s):

1. That new Environment Management Incentives and Disincentives Legislation be promulgated to provide for concessions in respect of income tax, custom duty and other taxes in respect of particular prescribed environment-friendly machinery, products and systems.
2. That such legislation also provide for the levying of additional taxes on particular environment-unfriendly machinery, products and systems.
3. That such legislation empower the relevant Minister to make regulations towards the promotion of EMS use.
4. That provision be made in such legislation for the development of pilot projects towards encouragement of EMS use and for the designation by relevant Minister of particular sectors enterprises, or activities for special treatment to be prescribed, depending on environmental performance.

The Industrial Incentives Act, 1956

Under **Section 3** of the Act, the Minister may by order, declare that a product which is being manufactured in Jamaica is an "approved product" for the purpose of the Act if he is satisfied that the manufacture of the product would:-

- “(a) *be of benefit to the Island, both economic and non-economic considerations being taken into account; and*
- (b) *have a beneficial effect on employment both in number and wages...”*

Section 3(3) provides that: the Minister before declaring a product to be an “approved product” should have regard to the following considerations:-

- “(a) *the effect which approval would have on existing industries;*
- (b) *whether manufacture of the product would utilize raw materials or skill available to the Island;*
- (c) *whether the existing capacity for manufacture of the product is sufficient to meet the demand for the product;*
- (d) *the element of risk involved in establishing a successful manufacture of the product.”*

Recommendation(s):

1. That an important criterion as regards the Minister declaring a product to be an “approved product” should be whether the manufacturing entity concerned utilizes an EMS. **Section 3(3)** could be amended accordingly in the interim, pending the development of the proposed Environmental Management (Incentives and Disincentives) Legislation.

6.3 Economic Development and Planning

Local Government

Here, consideration is being given to the role that local government can play in facilitating and promoting EMS use.

The Parish Councils Act, 1901

A parish council is composed of the Councillors from the various electoral divisions of the parish who together constitute a corporation with rights, inter alia, to enter into contracts (per **Section 3**). Parish Councils are empowered (per **Section 121(1)**) to make regulations, inter alia:-

- (f) prohibiting or removing encroachments and nuisances in any thoroughfare or public place;
- (o) providing for the establishment of silence zones;
- (r) regulating the construction of buildings in towns and imposing suitable conditions and restrictions as to the elevation, size and design of houses to be built, and the extent of the accommodation to be afforded.
- (s) governing the installation of sewers on premises in towns;

- (t) regulating the management of public parks and other public places in towns, and the management and use of parochial buildings;
- (y) for the regulation and control of rivers and, in particular, but without prejudice to the generality of the foregoing, for the regulation of prescribed boats and vessels used on rivers, of landing places and piers used in connection with such boats and vessels and of bathing and other recreational uses of rivers..”

Also, **Section 129** requires the Auditor-General to ...“*prepare and submit to the Minister an abstract of the accounts of each parish for the past year, accompanied by such remarks as the Auditor-General may deem it his duty to make on any items in such accounts, and by a report on the financial position of the parish.*”

Recommendation(s):

1. That consideration be given to having Parish Councils play a greater role in the conservation of the environment and to rationalize and synchronize their roles with those of the NRCA and other agencies.
2. That consideration be given to empowering Parish Councils under **The Parish Councils Act**, to play a greater role in the environmental impact assessment review process and in consultations with communities.
3. That Parish Councils be expressly fixed with responsibility to monitor environmental breaches and report same to the NRCA or other relevant authority towards having them remedied.
4. That Parish Councils be obligated to promote environment-friendly behaviour in the various electoral divisions and that particular Codes of Conduct of particular relevance to the parishes concerned be developed to this end and disseminated and utilized in the various communities with EMS use being promoted (as far as flexible).
5. That Parish Councils be obliged to observe environment-friendly behaviour themselves and be subject to a Code of Conduct to be developed to this end.
6. That **Section 129** of the Act be amended to provide for the Auditor-General to make environment-audit reports in respect of each parish.
7. That the regulations contemplated under **Section 14(1) of The Public Health Act** relating to “air, soil and water pollution” be provided for under The Parish Councils Act and the requisite regulations made.

The Public Health Act, 1985

The Act provides for Parish Councils to be “Local Boards of Health” in respect of each parish with the Kingston and Saint Andrew Corporation Council serving that function for the Corporate Area of Kingston and Saint Andrew (per **Section 5**).

Section 7 of the Act empowers these Local Boards to make regulations relating, inter alia, to “nuisances” and “the sanitary collection and disposal of garbage and other waste matter.”

Section 14(1) empowers the relevant Minister to make regulations relating to, inter alia, “air, soil and water pollution.” No such regulation have been made. The main implementing functionaries under the Act are Public Health Inspectors.

Section 3(1) of the Act established a Central Health Committee comprising the Chief Medical Officer, Director of Veterinary Services and six to nine (6-9) others appointed by the relevant Minister.

Various Local Boards of Health have divested themselves of functions under the Act as exemplified by e.g. **The Public Health (St. Thomas Local Board of Health) (Divestment of Function Order), 1994** made under **Section 13** of the **Public Health Act**, by which the St. Thomas Local Board of Health was divested of its function to carry out the activity of public cleansing in respect of the parish and the Permanent Secretary of the Ministry of Local Government was vested with the function for a period of 5 years as of the 17th July, 1994.

The Litter Act, 1986

This Act prohibits the throwing, dropping or otherwise depositing or leaving of any litter in or into any public place (per **Section 3**).

A local authority (that is, a Parish Council or the Kingston and Saint Andrew Corporation Council in the case of the parishes of Kingston and Saint Andrew) has power to order the removal of litter where it is left in a public place so as to cause or contribute to that place's defacement. Penalties under the Act are low.

Industry Development - The Bauxite/Alumina Sector

The Bauxite and Alumina Industries (Encouragement) Act, 1950

Section 2(2) of the Act generally requires recognized bauxite/alumina producers in Jamaica to make payment to the Government “*for securing that the total area and the fertility and the productivity of land available for agricultural and pastoral purposes shall not be diminished to any greater extent or for any longer period than can in the opinion of the Commissioner of Mines economically be avoided...*” due to such producers' mining and related activities.

This provision encourages EMS use by the Bauxite/Alumina companies operating in Jamaica. These companies are on pain of payment of compensation to the Government obliged to carry out their mining activities with due regard to conservation of the land.

There has thus been in place a rehabilitation system of reclamation, restoration, certification and reutilization of lands mined. By way of reclamation mined-out pits are reshaped and re-soiled. Notably, Government guidelines for restoration which were developed to ensure acceptable restoration standards had industry-wide inputs.

This active involvement of industry in the development of guidelines is a good precedent for future development of other guidelines for other sectors of the economy and is in keeping with the shift towards consensus building in regulating or otherwise influencing environment performance of enterprises.

Restoration encompasses all activities necessary to produce a crop on the land after it has been reclaimed. After the process of reclamation and restoration, Government officers

inspect the land and issue a certificate of compliance. There is then reutilization of the land. An active reforestation program on mined-out lands is underway towards addressing environmental problems caused by the removal of trees for mining.

Overall, it is clear that the **Section 2(2)** provision has played an important catalytic role in all of this and as a “stick” encourages the use of EMS.

Recommendation(s):

That pilot projects for promoting or encouraging continued EMS use in the bauxite/alumina sector be provided for and be promoted under the aegis of the proposed Environmental Management (Incentives & Disincentives) Legislation.

Industry Development – The Tourism Sector

The Tourist Board Act, 1955

Persons are required to be licensed under the Act where they provide “tourist accommodation” (per **Section 22**). Such accommodation includes hotels, resort cottages or any other premises, boats, ships or vehicles or places where accommodation is offered to tourists for reward. (per **Section 2**). Licences are also required to operate or maintain a “tourism enterprise” (per **Section 23A & 23B**)

Such enterprise includes the provision of sites and other facilities for camping, water sports and any other service utilized by or offered to tourists and declared by the Minister, by order to be a “tourism enterprise” (per **Section 2**).

Various services offered to tourists have been declared to be tourism enterprises by virtue of **Paragraph 2 of The Tourist Board (Tourism Enterprises) Order, 1985**.

This **Order** made pursuant to **Section 2 of The Tourist Board Act** provides as follows:-

“The following services are hereby declared to be tourism enterprises for the purposes of the Act if such services are utilized by or offered to tourists-

- (a) *...car rental or U-Drive service...;*
- (b) *sites and other facilities for camping;*
- (c) *water sports services;*
- (d) *services involving sight-seeing tours, including sea and river cruises;*
- (e) *services involving exhibition or use of –*
 - (i) *historical sites;*
 - (ii) *great houses;*
 - (iii) *spas;*
 - (iv) *caves;*
 - (v) *bird sanctuaries;*
 - (vi) *waterfalls;*
 - (vii) *lakes;*
 - (viii) *lagoons;*

- (f) *services involving the organization of –*
 - (i) *special events such as feasts and parties;*
 - (ii) *equestrian activities;*
 - (iii) *safaris;*
 - (iv) *river rafting...*

The licences in respect of both tourist accommodation and tourism enterprise are issuable by the Tourist Board and may be granted subject to conditions. (**Sections 23(2) & 23B(2)**). The Board may revoke or suspend licences. (**Section 231**). As regards tourist accommodation, revocation of the licence may be effected forthwith where the matter concerns action taken under the **Public Health Act** or the safety of occupants of the accommodation. Where the concerns relate to other matters a notice period of at least ninety days would have to be given (**Section 23D(3)**).

The Tourist (Prescribed Areas) Regulations, 1985

These Regulations are made pursuant to **Section 16 of The Tourist Board Act**. Under these Regulations in order to be a Vendor in certain areas designated as “prescribed areas” one needs to obtain a licence from the Tourist Board and act in accordance with the terms and conditions of such licence. (per **Regulation 4**). **Regulation 4** prohibits any person from engaging as a vendor:-

- “(a) *in or on any street, sidewalk, park, beach or area of water adjacent to a beach;*
- (b) *in or any other public place within a prescribed area, unless that person is the holder of a licence granted under these Regulations and such activities are carried out in accordance with the terms and conditions of that licence.”*

“Vendor” means any person who –

- “(a) *sells or offers for sale, rents or offers for rent to members of the public any goods or services; or*
- (b) *solicits, orders for, invites attention to, advertises or promotes in any manner whatsoever, any goods or services, but does not include a taxi operator or a contract car operator.”* (per **Regulation 2**).

Areas designated “prescribed areas” include major tourist areas in Ocho Rios, Montego Bay, Negril and Portland. (per **First Schedule**). The Board may, in its discretion refuse to grant or renew a vendor’s licence (per **Regulation 6(1)**).

Regulation 7 stipulates reasons for which the Board may take action leading to the possible suspension or revocation of a vendor’s licence. The stated reasons presently have nothing to do with environmental breaches or concerns. It is being proposed that such breaches should provide a basis for at least suspension of such licences. This would help to ensure that the functionaries in the tourist industry help protect the very environment that plays such a critical role in the sustenance and marketability of the industry.

The licences issued also should include obligations to keep the environment clean. Consideration also needs to be given to expanding the list of “prescribed areas” to include

other tourist areas, particularly growing eco-tourism areas on the South Coast where the need for particular care in managing the environment is axiomatic.

Tourist Accommodation (Licence Duties) Act, 1984

This Act provides for the imposition of a licence duty in respect of tourist accommodation. (per **Sections 3 & 4**). Consideration could be given to applying the user-pay principle and have appropriate environmental considerations being part of the basis for determining the amount of licence duty that is to be paid. **The Tourist Accommodation (Licence Duties) Regulation, 1988 (Appendix)** which deals with rate of licence duty essentially on a “per bedroom” basis could thus be modified accordingly.

The Tourist (Duty-Free) Shopping System Act, 1974

The Act provides for the issuance of tourist (duty-free) shop operator's licence or permit or shop licence. (per **Sections 3,4 & 5**). The relevant licence or permit is issued by the Commissioner of Customs who may refuse to renew or grant any such license or permit (per **Section 7**).

Section 8 of the Act specifies circumstances under which the Commissioner would be obliged to cancel a licence or permit.

Consideration could be given to adding to this list for automatic cancellation of a licence or permit sale to tourists of specified endangered animals or plants in consonance with the provisions of **The Endangered Species (Protection Conservation and Regulation of Trade) Act** and **The Wild Life Protection Act**.

Recommendation(s):

1. That pilot projects for promoting or encouraging continued EMS use in the tourism sector be provided for and promoted under the aegis of the proposed Environmental Management (Incentives and Disincentives) Legislation.
2. That the issuance, renewal suspension or cancellation of licences in respect of tourist accommodation, tourism enterprise, vendor in prescribed areas be made subject to environmental performance considerations.
3. That eco-tourism areas on the South Coast be included in the list of “prescribed areas” as provided for in **The Tourist (Prescribed Areas) Regulations, 1985**.
4. That consideration be given to applying the User pay and Polluter Pay Principles in determining the amount of duty payable under **The Tourist Accommodation (Licence Duties) Act, 1984** and a scale of fees be developed accordingly.
5. That the issuance, renewal, suspension or cancellation of the tourist (duty-free) shop operator's licence or permit or shop licence be made subject to whether the Applicant has breached particular environmental legislation such as **The Endangered Species (Protection Conservation and Regulation of Trade) Act** and **The Wild Life Protection Act**.

6.4 Trade

The Fair Competition Act, 1993

Section 37(1) of this Act prohibits misleading advertising and provides as follows:-

“A person shall not, in pursuance of trade and for the purpose of promoting, directly or indirectly, the supply or use of goods or services or for the purpose of promoting, directly or indirectly, any business interest, by any means -

- (a) *make a representation to the public that is false or misleading in a material respect;*
- (b) *make a representation to the public in the form of a statement, warranty or guarantee of performance, efficacy or length of life of goods that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation;*
- (c) *make a representation to the public in the form a statement, warranty, or guarantee that services are of a particular kind, standard, quality, or quantity, or that they are supplied by any particular person or by any person of a particular trade, qualification or skill.”*

Hence, advertising of products as environment-friendly need to comply with this stipulation. Facilities need to be in place to ensure that the attributes claimed for the product are not misleading. Further, claimed endorsements of products as environment-friendly would need to comply with **Section 38** which provides as follows:-

“ A person shall not, for the purpose of promoting, directly or indirectly, the supply or use of any goods, or for the purpose of promoting, directly or indirectly, any business interest -

- (a) *make a representation to the public that a test as to the performance, efficacy or length of life of the goods has been made by any person; or*
- (b) *publish a testimonial with respect to the goods, unless he can establish that -*
 - (i) *the representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given, as the case may be; or*
 - (ii) *before the representation or testimonial was made or published, it was approved and permission to make or publish it was given in writing by the person who made the test or gave the testimonial, as the case may be, and it accords with the representation or testimonial previously made published or approved.”*

The Act recognizes (per **Section 19**) the situation where an enterprise holds a dominant position in a market, that is, where ... *“if by itself or together with an interconnected company, it occupies such a position of strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.”*

Abuse of a dominant position is prohibited. Such abuse is deemed to take place (per **Section 20(1)**) if the enterprise concerned impedes the maintenance or development of effective competition in the market and for instance:-

... *“(e) limits production of goods or services to the prejudice of consumers;*

- (f) *makes the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements.”*

Section 20(2) provides the enterprise with possible defences to a claim that it is abusing its position of dominance. It provides as follows:-

“An enterprise shall not be treated as abusing a dominant position -

- (a) *if it is shown that -*
- (i) *its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and*
 - (ii) *consumers were allowed a fair share of the resulting benefit;*
- (b) *by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trade mark.”*

It is submitted that particular environment-friendly behaviour should be expressly and unequivocally taken into account as a defence for an enterprise. Thus where it can be shown that the behaviour of the enterprise was warranted for environment conservation purposes then upon appropriate verification (by the NRCA), no offence would be deemed to have been committed.

The availability of such a defence to an enterprise would encourage the use of EMSs. **Section 17** deals with provisions of agreement having the effect of lessening competition and could affect agreements entered into between a Government Agency such as the NRCA and a licensee. The Section covers agreements which contain provisions that *“limit or control production, markets, technical development or investment”* being provisions which are likely to have the effect of *“...substantially lessening competition in a market.”*

Section 17(3) generally prohibits anyone from giving effect to any such provision and provides that such provision is unenforceable. However the prohibition and non-enforceability does not apply to any agreement the entry into which has been authorized under **Part V** of the Act or which the Fair Trading Commission is satisfied (per **Section 17(4)**):-

- “(a) contributes to:-*
- (i) *the improvement of production or distribution of goods and services; or*
 - (ii) *the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit;*
- (b) *imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objectives mentioned in paragraph (a); or*
- (c) *does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.”*

These latter ameliorative stipulations minimize the likelihood of a licence or permit-related agreement being deemed to be in breach of the Act. Also under **Part V** of the Act,, *“...any*

*person who proposes to enter into or carry out an agreement...which in the opinion of that person, is an agreement...prohibited by this Act, may apply to the Commission for an authorization to do so.”(per **Section 29(1)**).*

As regards such application the Commission “...*may notwithstanding any other provision of the Act, if it is satisfied that the agreement or practice, as the case may be, is likely to promote the public benefit grant an authorization subject tot such terms and conditions as it thinks fit.*”(per **Section 29(2)(a)**). **Section 30** deals with the effect of such authorization and provides:-

“While an authorization granted under section 29 remains in force, nothing in this Act shall prevent the person to whom it is granted from giving effect to any agreement or any provision of an agreement or from engaging in any practice to which the authorization relates.”

As already noted, the facility of the NRCA (or other Government Agency) entering into agreement with a person issued a licence or permit can be a very useful device in promoting EMS use. However, it is clear that care needs to be taken to ensure that the provisions of the Act as regards uncompetitive practices are not violated. The NRCA and other Government Agencies are bound by the provisions of the Act. (In this regard, **Section 54** provides that “*subject to any provision to the contrary in or under this or any other Act, this Act binds the Crown.*”)

It therefore seems advisable for the NRCA (and other Governmental licensing agencies) who wish to make particular agreements with licencees to consult with the Fair Trading Commission and put in place the requisite arrangements.

Recommendation(s):

1. That consideration be given to including particular environment-friendly behaviour as part of an enterprise’s defence to a claim that it is abusing its position of dominance in circumstances where taken as a whole the enterprise’s conduct as regards the environment renders it necessary for it to behave in the manner about which there is concern.
2. That the NRCA (or other licence or permit issuing Government Agency) consult with the Fair Trading Commission as regards the entry into agreements with any person or group of persons which may have the effect of lessening competition although such agreement may be geared towards promoting EMS use or environment-friendly conduct in general.

The Trade Act, 1955

Section 8 empowers the Minister to by order:-

- (a) prohibit the importation or exportation of goods from or to any country;
- (b) require importers or exporters to have to obtain a licence to import or export particular goods; and
- (c) regulate the distribution, purchase or sale of goods.

This Section has been utilized to prohibit the use of products having CFCs by way of **The Trade (Prohibition of Importation) (Equipment Containing Chlorofluorocarbons) Orders, 1998** which came into effect on April, 1999.

The Food and Drugs Act, 1975

Section 4(1) generally prohibits anyone from importing into Jamaica “...any food, drug, cosmetic or device unless it wholly conforms to the law of the country in which it was manufactured or produced and is accompanied by a certificate in prescribed form and manner that it does not contravene any known requirement of the law of that country and that its sale therein for consumption or use by or for man or animal, as the case may be, would not constitute a violation of the law thereof.”

This helps to guard against Jamaica being used as a dumping ground for environmentally-unfriendly items which have been deemed such in their country of origin. The provision thus provides some protection to a Jamaican company employing an EMS in pursuant of producing environmentally-friendly products. Such a company might otherwise become subject to unfair competition from overseas imports.

The Act requires that food, drug, cosmetics and devices be correctly labelled, packaged, treated, processed and not advertised in a misleading or deceptive manner. (per **Sections 6, 9, 13 & 16**). The Minister is empowered (per **Section 21**) to make regulations, inter alia:-

- “(b) *respecting -*
 - (i) *the labelling and packaging and the offering, exposing and advertising for sale of food, drugs, cosmetics and devices;*
 - (ii) *the size, dimensions, fill and other specifications of packages of food, drugs, cosmetics and devices;*
 - (iii) *the sale, the prohibition of sale or the conditions of sale of any food, drug, cosmetic or device; and*
 - (iv) *the use, the prohibition of use or the conditions of use of any substance as an ingredient in any food, drug, cosmetic or device, to prevent the consumer or purchaser thereof from being deceived or misled as to its quantity, character, value, composition, merit or safety or to prevent injury to the health of the consumer or purchaser;*
- (c) *prescribing standards of composition, strength potency, purity, quality or other property of any article of food, drug, cosmetic or device;*
- (d) *respecting the importation of foods, drugs, cosmetics and devices, in order to ensure compliance with this act;*
- (e) *respecting the method of preparation, manufacture, preserving, packaging, storing and testing of any food, drug, cosmetic or device in the interests of, or for the prevention of injury to, the health of the consumer or purchaser;*

- (f) *providing for the registration of drugs or devices, the granting of licences for the manufacture or importation of any drug or device and the imposition of fees in respect of any such registration or licence;*
 - (g) *exempting any food, drug, cosmetic or device from all or any of the provisions of this Act and prescribing the conditions of such exemption;*
 - (h) *prescribing forms for the purposes of this Act;*
 - (i) *respecting the powers and duties of inspectors and analysts and the taking of samples and the seizure, detention, forfeiture and disposal of articles;*
 - (j) *providing for the analysis of food, drugs, or cosmetics other than for the purposes of this Act and prescribing a tariff of fees to be paid for such analysis...*
- The Food and Drugs Regulations, 1975** has been promulgated pursuant to **Section 21**.

The Food and Drugs Regulations, 1975

Advertisement of any food, drug, cosmetic or device need to comply with the Regulations (per **Regulation 3(1)**). **Regulation 11(1)** requires any package of food being sold to be labelled in accordance with the Regulations. Similar provisions obtain in respect of drugs (per **Regulation 44(1)**). Overall, the **Regulations** help to buttress the Act in encouraging EMS use.

The Factories Act, 1943

Under the Act (per **Section 2**), “factory” means “...any premises in which, or within the close or curtilage or precincts of which:-

- (a) *acetylene, steam, water, wind, electric, internal combustion or other mechanical power is used; or*
- (b) *ten or more persons are employed in manual labour, in any process for or incidental to any of the following purposes, namely -*
 - (i) *the making of any article or of part of any article; or*
 - (ii) *the altering, repairing, ornamenting, finishing, cleaning or washing, or the breaking up or demolition of any article; or*
 - (iii) *the adapting for sale of any article, being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain...*

The Act requires that factories be registered (per **Section 6**) and that they be inspected to ensure their compliance with various standards and requirements as set out in **The Factories Regulations, 1961** and other Regulations made pursuant to **Section 12** of the Act.

Part III of The Factories Regulations, 1961 sets out various requirements for factories as regards health and welfare which to some extent encourage environment-friendly behaviour and indirectly the use of EMSs.

Recommendation(s):

That the Factories Regulations should be amended by incorporating provisions expressly directed at encouraging EMS use.

The Wild Life Protection Act, 1945

This Act, inter alia, expressly prohibits or have the effect of preventing trade in particular animals. Thus trade in immature fish, sea turtles and black corals and yellow-bill parrots are proscribed.

The Endangered Species (Protection Conservation and Regulation of Trade) Act, 2000

As noted earlier, this Act seeks to incorporate into Jamaican Law the stipulations of **The United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)**.

It seeks to further the protection, conservation and management of endangered species of Wild Flora and Fauna in Jamaica. Generally, trade in species threatened with extinction is prohibited. Provision is made for the regulation of trade in particular species not threatened with extinction and for a management authority to take all necessary steps to protect endangered species against over-exploitation in international trade. Such an authority also has the power to grant permits and certificates. Numerous species are specified in the **Schedules** to the Act. **Section 19(1)** provides that:

“Every person who proposes to trade in any specimen of a species specified in any of the Schedules shall apply in the prescribed form to the Management Authority for the appropriate permit or certificate as follows -

- (a) an export permit;*
- (b) an import permit;*
- (c) a re-export certificate;*
- (d) an introduction from sea certificate.”*

The Management Authority impose conditions to the grant of such permits or certificates (per **Section 19(3)**).

Generally, before the Authority grants the relevant permit or certificate as regards living specimen it has to be satisfied that the specimen “...will be prepared and transported in such a manner as to minimize damage, risk of injury, cruel treatment or deterioration of its health” or that “...the proposed recipient is suitably equipped to house and care for it.” A scientific authority, comprising mainly scientists, is to advise the management authority as to the trade in endangered species and the Minister on general trading policy.

The Act also seeks to prevent or limit the unlawful trade in and the unlawful possession of specified species and stipulates penalties for the breach of any clause. In effect, the Act encourages EMS use.

The Aquaculture, Inland and Marine Products and By-Products (Inspection, Licensing and Export) Act

The Act specifies public health and safety standards in the export aquaculture, inland and marine products and their by-products. It seeks to ensure that these products and by-

products meet internationally acceptable standards of wholesomeness and fitness for human consumption.

The Act establishes a programme for the licensing of exporters, the inspection of the relevant products, licensed processing establishments, factory vessels, freezer vessels and carrier vessels and, where necessary, condemnation and prohibition of the exportation of unfit products. Provision is made for the issue of licences, export health certificates and operating certificates to operators who process aquaculture, inland and marine products for export. **Section 10(1)** provides:

“Every person who proposes to export or enter for export any aquaculture, inland or marine product or its by-product shall apply in the prescribed form and manner to the competent authority for a licence to do so.”

Similarly, **Section 11(1)** provides:

“Every person who proposes to operate a processing establishment, factory vessel, freezer vessel or carrier vessel shall apply to the competent authority in the prescribed form and manner for a licence to do so.”

The Minister is empowered to make various regulations (per **Section 37(1)**) of the Act. These are yet to be made and as earlier indicated court action has been instituted seeking to have the Minister make these regulations.

While the general thrust of the Act is more sanitary in nature, there is scope for broader environmental impact considerations to be taken into account in respect of the issuance of licences particularly as regards the operation of a processing establishment, factory vessel, freezer vessel or carrier vessel.

Recommendation(s):

That in the promulgation of the requisite regulations the matter of EMS use be incorporated in the considerations and conditions as regards grant of a licence for the operation of a processing establishment, factory vessel, freezer vessel or carrier vessel.

CARICOM

The first CARICOM Ministerial Conference on the Environment held in Port of Spain, Trinidad (May 31-June 2, 1989) produced **The Port of Spain Accord on the Management and Conservation of the Caribbean Environment.**

An important approach agreed upon was the development of legislative framework adequate the requirements of sound environmental management and the required machinery or their enforcement. There was also agreement for the establishment of a regional consultative forum with a mandate to pursue the identification of, and the allocation of responsibility for action on programmes, projects and studies relating to the priority problems and strategic approaches identified. Promoting the use of EMSs in the CARICOM region ought to be part of the strategic approaches within the purview of such a forum as well as of the CARICOM policy and political directorate.

Recommendation(s):

That consideration be given to developing an appropriate cooperative agreement among member states of CARICOM for the promotion of EMS use.¹⁶

NAFTA

The North American Free Trade Association (NAFTA) contains environmental obligations for its member states, having to do with e.g. the polluter pay principle, public participation and civil action by parties and generally adherence to particular environmental standards.

CARICOM member Trinidad & Tobago has through its **Environmental Management Act, 1995** gone a far way in complying with the NAFTA requirements as it has inter alia, upgraded its environmental standards and applies the polluter pay principle thereby addressing what the USA refers to as subsidies to industries resulting from tax regulations.

A regulatory framework which encourages EMS use would appear to be a plus in any desire or quest to seek NAFTA parity.

World Trade Organization (WTO)

There is an increasing momentum to integrate environmental issues into the global trade agenda. The matter of EMS use in Jamaica is not divorced from a number of these issues and related realities and contentions which arise in the global trade context. Some of these contentions include:-

- the polluter pays principle supports improved efficiency in the allocation of environmental resources and helps prevent distortions;
- lowering environmental standards gives countries a competitive advantage;
- eco-dumping occurs when environmental costs are externalized;
- trade agreements may override environmental regulations unless appropriate protection is built in; and
- trade restrictions should be available as leverage to promote worldwide environmental protection.

The WTO Committee on Trade and Environment (CTE) has a broad mandate to study inter alia, the relationship between multilateral environmental agreements (such as CITES and The Montreal Ozone Layer Protocol to which Jamaica is a party) and the WTO, developing guidelines for eco-labelling and packaging requirements, the impact of differential environmental standards on trade competitiveness and the definition of appropriate limits for unilateral trade actions in support of environmental policies.

Already, there are significant WTO rules for environmental protection which are relevant to measures such as incentives and improving product and process standards being contemplated in relation to encouraging EMS use in Jamaica. Examples of some of these provisions in WTO agreements include the following:-

Rule of Exceptions (Article XX), which allows exceptions for measures 'necessary to protect human, animal or plant life or health' and 'relating to the conservation of exhaustible

¹⁶ Examples of Cooperative Agreements involving different states are appended.

natural resources', if such measures are made effective in conjunction with restrictions on domestic production or consumption. The word 'environment' is not expressly found in **Article XX**, but the text has been interpreted as general environmental protection. However, 'measures must not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail' nor be a 'disguised restriction to international trade.'

Technical Barriers to Trade (TBT) Agreement, which specifically covers environmental protection and recognizes the legitimacy of government policies to this end. Any tighter standards imposed in pursuance of this objective must be scientifically justified and necessary to achieve legitimate objectives. The Agreement provides that, in addition to the two conditions imposed by **Article XX**, environmental standards should not create unnecessary obstacles to trade, and countries can seek resolution of disputes that may arise.

The Sanitary and Phytosanitary Agreement negotiated in the Uruguay Round specifically mentions the environmental issue, in broadly the same terms as the TBT Agreement.

The Agreement on Subsidies and Countervailing Measures specifies that subsidies provided for the adaptation of existing facilities to new environmental requirements cannot be countervailed by a partner country. Subsidies are allowed for up to 20% of firms' costs in adapting to new environmental laws.

The Agreement on Agriculture exempts payments made to farmers under government environmental or conservation programmes from the general requirement to reduce subsidies.

The Trade-Related Intellectual Property Rights (TRIPS) Agreement allows governments to refuse to issue patents that threaten human, animal or plant life or health, or risk serious damage to the environment (**TRIPS Article 27**). Generally, there is also the option of preventing others from using, without permission, information of commercial value so long as reasonable efforts have been made to keep it secret. (**TRIPS Article 39 – Section 7**).

GATS Article 14: policies affecting trade in services for protecting human, animal or plant life or health are exempt from normal GATS disciplines under certain conditions.

Recommendation(s):

That in addition to paying cognizance to the WTO stipulations thus far, Jamaica should (with the involvement of its regional and other partners) develop, articulate and lobby for the adoption of positions in the WTO which is in keeping with Jamaica's best interests as regards sustainable development and the pursuit of programmes such as promoting EMS use.

6.5 Standards and Their Implementation

The Standards Act, 1969

This Act established the Bureau of Standards (per **Section 3 (1)**). **Section 6** sets out the Bureau's functions and provides as follows:-

“The Bureau shall promote and encourage the maintenance of Standardization in relation to commodities, processes and practices and shall exercise such other functions as may be prescribed; and for these purposes the Bureau shall have power:-

- (a) to make recommendations to the Minister in respect of the formulation of specifications and the promulgation and application of standard specifications, and compulsory standard specifications;*
- (b) to promote research in relation to specifications and to provide for the examination and testing of commodities, processes and practices;*
- (c) to provide for the registration and use of standard marks;*
- (d) to provide for examination, testing and calibration of instruments, appliances and apparatus in relation to the accuracy thereof;*
- (e) to encourage or undertake educational work in connection with standardization;*
- (f) to make arrangements for the inspection of any operation which is being carried out in or upon any premises in connection with the manufacture, modification, process or practice for which a standard specification or a compulsory standard specification has been declared;*
- (g) to do such other things as may be expedient or necessary for the proper performance of its functions under this Act.”*

The Bureau is empowered to formulate at the behest of the Minister specifications for commodities, processes and practices. Standard marks may be prescribed by the Bureau. Licences to use such marks are also granted by the Bureau. **Section 11** of the Act empowers the Minister to make regulations, inter alia, for:-

- “(a) regulating the promulgation of standard specifications and compulsory standard specification;*
- (b) regulating the issue of licences to use standard marks, prescribing terms and conditions upon or subject to which such licences may be issued, suspended or revoked, and prescribing fees to be paid in respect of such licences;*
- (c) prohibiting either absolutely or subject to such conditions as may be prescribed and regulating the sale of any commodity or class or commodity or the use in any trade or business of any commodity, process or practice, in respect of which a compulsory standard specification has been declared unless the same conforms to the specification;*
- (d) with respect to the packaging, labelling, description and advertising of any commodity for which a standard specification has been declared;*
- (e) with respect to the inspection and testing of commodities, processes and practices and the entry upon the premises for these purposes;*
- (f) requiring such persons as may be prescribed to keep in relation to such commodities, processes or practices as may be prescribed, such books and*

records as the Bureau may consider necessary for the proper administration and enforcement of this Act;

- (g) *prescribing forms for the purposes of this Act;*
- (h) *prescribing matters in respect of which fees are to be payable, the amount of such fees and the persons liable to pay them, and authorizing the refund or remission of such books and records as the Bureau may consider necessary for the proper administration and enforcement of this Act..”*

The provisions generally provide amply for the Bureau to promote such standards as it deems appropriate in respect of EMS use as well as to sanction such eco-labelling or marking for products or enterprises as it deems fit. Already the Bureau has in place a programme towards ISO 14001 certification.

Recommendation(s):

1. That consideration be given to clearly providing for certification by entities other than the Bureau.
2. That consideration be given to allowing for the recognition of certification by suitable bodies from overseas and locally (upon such terms as may be deemed appropriate).
3. That the various outstanding matters for which regulations were contemplated under **Section 11** be provided for in regulations to strengthen the efficacy of the Act.
4. That the fine set out in **Section 11 (j)** be increased.

However, there appears to be no provision for certification other than by the Bureau. Generally, use can be made by the Minister of his power under the Act to make regulations which promote EMS use. Consideration could be given to recognizing upon such terms as may be deemed appropriate certification by suitable bodies from overseas and locally. This would allow for greater flexibility as regards ISO 14001 certification while ensuring that the requisite standard is met. Relatively few regulations have been made under the Act. **The Standard Regulations, 1983** provides for, inter alia:-

- (a) the granting and revocation of licences to use a standard mark;
- (b) the keeping of a register of licences
- (c) the Bureau entering into agreement with licensee to provide certification services;
and
- (d) restrictions on the use of a standard mark.

6.6 Sentencing an Offender to Implement EMS

The Criminal Justice (Reform) Act, 1978

Section 10 of this Act provides for the making of “a community service order” requiring a person convicted of a criminal offence to perform unpaid community work under supervision for between a minimum of 40 hours and maximum of 240 hours. This provision is amenable to use for sentencing offenders convicted of breaches of environmental laws for such offenders to carry out particular environment-friendly or environment-enhancement community service. However, the provision is not suited for use by the court to order the implementation of an EMS.

In the first place, such an Order would likely be considered to be stretching the community service concept unduly. Secondly, the “hours” limitation would likely place an impracticable time limitation as regards institution of an EMS. Thirdly, there would be the problem of supervision as the court will not make a community service order unless it is satisfied *“that arrangements can be made in the area in which the offender resides, or will reside, for him to perform work under such order and for proper supervision of that work...”* (per **Section 10(2)(a)**).

This in itself points to a fourth difficulty as the reference to residence highlights the fact that the section contemplates individual offenders and not corporations or other organizations. Fifthly, a pre-condition for the court to make a community order is that, *“...after considering a report by a probation officer in respect of the offender and his circumstances and (if the court thinks it necessary) after hearing a probation officer, that the offender is a suitable person to perform work under such an order.”* (per **Section 10(2)(b)**). These noted hindrances as regards use of **Section 10** are useful in pointing the way forward as to possible legislative amendments to providing a court with the option of sentencing an offender to implementing an EMS.

Recommendation(s):

1. That the Act be amended to provide for the sentencing of an offender to implement an EMS.
2. That to this end a Schedule of a number of environment-related legislation be made, breach of which would give the court the option to sentence the offender to implement an EMS.
3. That such amendment(s) should encompass:-
 - (a) circumstances when such an Order would be appropriate;
 - (b) clarity as to what is required of the convicted offender under such an order;
 - (c) time frame within which to implement EMS;
 - (d) satisfying the court that such implementation can be checked, monitored and “supervised”;
 - (e) designating and empowering the appropriate Government Agency to report as to the appropriateness of having an implementation of EMS order made in respect of the particular offender;
 - (f) sanctions where EMS not implemented as ordered; and
 - (g) as applicable, which persons in the corporation/organization are to be deemed responsible/liable for not carrying out the Order.

7. INSTRUCTIVE APPROACHES FROM OTHER COUNTRIES

7.1 Indonesia¹⁷

Since 1995, Indonesia has had in place a public reporting initiative entitled “Programme for Pollution Control Evaluation and Rating” (PROPER). Under PROPER, industrial enterprises are evaluated by Indonesia’s Environmental Impact and Management Agency for their environmental performance and the results in the form of a five colour rating scheme disseminated to the public. Hence, “industrial enterprise” refers to an individual production unit, facility, factory or plant. Accordingly, several enterprises within a single company could be rated in PROPER which only assigns ratings to the enterprise and not to the company.

PROPER has its genesis in the desire of Indonesian regulators to reinforce the existing command-and-control system, which had failed to reduce pollution, largely due to problems of enforcement. Indonesia is said to have a weak regulatory system, and, even when regulations exist on paper, actual implementation remains extremely limited. PROPER was conceived as a way of creating an incentive for compliance by exploiting the ideas of honour and shame which are powerful motivators in many Asian societies.

It has the additional advantage of communicating with audiences that have no familiarity with main stream business language or may even be illiterate. The rating process entails extensive data collection, verification and analysis components. There is an advisory committee to ensure stakeholder’s participation in the process. The ratings are evaluated by the Minister of Environment. The five colour codes are applied as follows:-

Rating	Performance	Definition	Level
Gold		Excellent	All requirements of Green, plus similar levels of pollution control for air and hazardous waste. Polluter reaches high international standards by making extensive use of clean technology, waste minimization, pollution prevention, recycling, etc.
Green		Good	Pollution level is lower than the discharge standards by at least 50%. Polluter also ensures proper disposal of sludge; good housekeeping; accurate pollution records; and reasonable maintenance of the waste-water treatment system.

¹⁷ Information extracted and adapted from: The case of Indonesia’s Programme for Pollution Control, Evaluation and Rating (PROPER) – Shakeb Afsah and Damayanti Ratunanda.

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Rating Performance	Definition	Level
Blue	Adequate	Polluter only applies effort sufficient to meet the standard.
Red	Poor	Polluter makes some effort to control pollution, but not sufficiently to achieve compliance.
Black	Very Poor	Polluter makes no effort to control pollution, or causes serious environmental damage.

Overall, PROPER is expected to: promote compliance with existing regulations, reward firms whose performance exceeds regulatory standards and create incentives for clean technology adoption.

Recommendation(s):

1. That consideration be given to adapting and utilizing the features of PROPER for Jamaica by way of a Pilot Project under the proposed Environmental Management (Incentives & Disincentives) Legislation.
2. That to this end the NRCA, Bureau of Standards, Consumer Affairs Commission Scientific Research Authority with representation from environmental NGOs, the Scientific, Business and the Environmental Communities be engaged in developing a credible and effective programme that can garner public involvement and support.

7.2 India

The **Green Rating Project (GRP)**¹⁸ of India is based on voluntary compliance of Companies and utilizes an assessment and rating system which facilitates a complementary use of the carrot and stick approaches to encourage the utilization of EMS by companies. The objectives of the GRP are:-

- to monitor the environmental performance of Indian companies and create a reputational incentive for improving this performance over time through a transparent rating system;
- to raise the importance of environmental management to the level of top management, including the CEO; and

¹⁸ **The Green Rating Project** published 1999 by The Centre for Science and Environment, India.

- to make the managers of the company aware of what is expected of them in terms of good environmental management, which goes beyond the rules and norms set by the government, so that companies being to take a proactive role on this front.

Through a process of assessment, following study of the sector concerned and examination of data provided by the Company (in response to questionnaires about its environmental management systems, policies and performance) as well as gleaned from on site inspection and secondary sources a company profile is developed and rating system utilized to rate the Company. Before finalization of the profile, the Company concerned is sent a draft of the profile and due consideration is given to any information contained therein with which the company disagrees and can provide satisfactory evidence in support of its position. Involved in this rating exercise are:-

- a Project Advisory Panel (PAP) which ultimately sanctions the environmental performance rating given and is comprised of eminent politicians, scientists, civil society leaders, lawyers and judges, and industrial leaders;
- a Technical Advisory Panel (TAP) which is sector specific and is comprised of leading technical experts who review the profiles and comments of the company and generally serve as consultants in the matter;
- a Green Rating Network (GRN) which includes volunteers from across the country who inspect the operation; and
- the GRP Team at the Centre for Science and Environment which is involved in the processing of the data and the finalisation of the ratings.

The rating exercise provides Companies which have already made or are currently making an effort to improve their environmental performance with an incentive to seek public recognition of the effort they are making thereby enhancing their reputation. Conversely, a company which does not voluntarily disclose information is given the lowest rating. Here, the *raison d'être* is that whereas a company can legitimately argue that its profits and its financial dealings are its private business, its environmental impact is a public matter simply because the environment belongs to the public and not the company. Accordingly, non-disclosure of its environmental performance is unacceptable.

Particular weightage in the ratings is given to companies that are trying to make a positive difference. The starting point assumption utilized is that most Indian Companies have been performing badly on the environmental front - partly because of inadequate enforcement of Indian environmental laws and partly because political and industrial leaders have not been paying due cognizance to pollution control. In these circumstances, if a company is making an effort to set up good environmental management policies and systems to bring about a change in its current environmental performance, then that effort ought to be respected and accorded certain weightage.

Over time this weightage would be reduced and full weightage given mainly to actual environmental performance. Weightage is distributed in accordance with criteria established in respect of the following:-

1. Corporate Environmental Policy and Management System
2. Plant and Product-Level Environmental Performance

3. Community and regulatory perception and compliance status

“**Green Leaves**” Awards (ranging from No Award, One Leaf Award up to a the highest “Five Leaves Award”) are given in accordance with total weighted score achieved utilizing the various criteria.

Recommendation(s):

That the system of the different advisory panels which augurs well for independence, transparency, credibility and participation be adapted and utilized in conjunction with the proposed adaptation of PROPER for Jamaica.

7.3 Trinidad & Tobago

The Environmental Management Act, 1995 of Trinidad and Tobago established an Environmental Management Authority (EMA) and seeks to rationalize existing environmental laws and integrate environmental management programmes.

The Authority is expected to also promote and implement incentive programmes which encourage the voluntary use of effective management systems. These include voluntary facility environmental audit programmes, investigation and evaluation systems, establishment of environmental certification or labelling programmes, operation of deposit-refund systems for specified materials to increase the level of recycling, re-use or other authorized disposition.

The EMA is required, inter alia, to develop a framework, a certificate of environmental clearance, ascertain the extent of air and noise pollution, water pollution, waste handling and disposal, and must characterize or describe the types of pollution and maintain a register of same.

The Act requires public comment in the law-making process and allows any private party to institute a civil action against any other person for a claimed violation of any of the specified environmental requirements. As alluded to earlier, the Act goes a far way in complying with requirements under NAFTA in particular as regards the polluter pay principle, public participation and provides for civil action by private parties.

7.4 European Union (EU)

The European Community Eco-Management and Audit Scheme (EMAS) Council Regulation (EEC) No. 1836/93

EMAS

The EMAS Regulation establishes an environmental management and audit system which provides for corporate participation on a site-specific basis. The Regulation is referred to as a “Voluntary Regulation” since participation in the programme is voluntary and not obligatory.

EMAS seeks to improve environmental performance in the industrial sector through the voluntary adoption of its provisions, including the installation of an EMS and the production of an independently verified environmental report.

Participation entitles a company to register a participating site on an E.U. list of participating sites and to use an E.U. approved statement of participation to publicize its participation in the programme.

The expectation is that companies will find it advantageous to participate voluntarily in the scheme, inter alia, to avoid being placed at a competitive disadvantage and to establish “environmental probity”. There is further the hope that disclosure (via required publication of statements covering “significant” environmental issues after validation by external auditors) will induce companies not just to achieve compliance with the law, but to go well beyond the minimum dictates of the law.

Apart from market related considerations, there are important law related inducements for participation. A company may find it useful for liability reasons to participate in the EMAS scheme (or at least to follow national or international management and auditing standards). Such an environmental management programme will likely minimize the occurrence of environmental violations and hence a company’s and management’s exposure to prosecution. A properly operated environmental management and legal compliance programme might also be useful in a defence to prosecution or in even persuading prosecutors not to bring legal action. To participate in the EMAS scheme a company must implement various requirements:-

- (a) An EMAS covering the particular site inclusive of a definition of management responsibilities, preparation of an environmental effects register, establishment of organization structures, training and operating and record-keeping procedures and periodic audits.
- (b) An environmental policy, including a commitment to “compliance with all relevant regulatory requirements regarding the environment”, and to “continuous improvement of environmental performance”, and must be based on “good management practices”.
- (c) *Verification by an external auditor of the company’s EMS and a public environmental statement noting “significant environmental issues”, including an emission’s register.*

The EMAS Regulation provides for the recognition of national and ISO standards on EMS and auditing. Recognition was given in early 1996, to inter alia, the British BS-7750 standard as a means of becoming EMAS-certified. An important aspect of relevance to the Jamaican economy with its prepondence of small enterprises is the allowance by EMAS for special assistance to small and medium-size businesses for information, training and technical support; provision for a simplified verification process and requirement for less frequent reporting.

Recommendation(s):

That special consideration and support be given to smaller enterprises as regards their utilizing EMSs.

United Kingdom

In 1992, the British Standard – specification for Environmental Management Systems – BS7750 was promulgated. It was developed taking into account an earlier draft of the

EMAS Regulation which it sought to complement. Compliance with the British Standard does not of itself confer immunity from legal obligations.

Belgium

Under Belgium law, Environmental groups can bring their own enforcement and clean-up actions.

Recommendation(s):

That consideration be given to empowering designated (“registered”) environmental groups in particular circumstances to bring their own enforcement and clean-up actions.

Netherlands

A primary feature of the Dutch system of environmental policy and regulations is its heavy reliance on Environmental Agreements between government and industry. These Agreements are wholly or partly designed to realize specific environmental policy goals set by central government. They manifest a recognition that environmental protection is a shared responsibility, since it is the government and the private sector that are agreeing on how environmental policy should be implemented.

Central government is generally represented by the relevant Ministers of Government. Other authorities or their umbrella organizations often sign the Agreement. These include, for instance, the Dutch provinces, Water Agency and the association of Dutch municipalities. Industry is represented not only by individual companies but also by Branch Associations. The Agreements are varied and may be broadly categorized into:-

- (a) Target Group Environmental Agreements which are designed to reduce emissions
- (b) Energy Efficiency Agreements which implement central government’s policy on energy efficiency
- (c) Agreements concerning a Waste Disposal Fee whereby companies importing products in to the Netherlands must sign an agreement undertaking to contribute to a waste disposal fee. Thus a purchaser of a new car must pay an amount into a fund which will later be used to pay for demolition of that car. These Agreements are inter-company agreements but can assume the character of the Environmental Agreements between government and industry as the Environment Minister can if necessary declare them to be generally binding.
- (d) Miscellaneous Environmental Agreements which are primarily aimed at the general quality of products and production processes.

For industry, the Environmental Agreements provide for a company the advantages of:-

- (a) flexibility in the pursuit of its goals and in carrying out its responsibilities in improving its environmental performance;
- (b) certainty and consistency in government policy
- (c) facilitating integrated solutions to environmental problems in consonance with the investment rhythm of the company; and

- (d) reduced legislation

Government benefits from:-

- (a) speed of implementation;
- (b) greater scope for customization; and
- (c) increased support for environmental measures and targets

The Agreements do not bypass laws and licences. However, they can elaborate in more detail the broad requirements imposed by the law and environmental licences. There is no legislation governing environmental agreements and this has facilitated their development on a practical basis. However, there is “Guidelines for Environmental Agreements” issued by the Prime Minister and the Communication and Recommendation of the European Commission on Environmental Agreements. In the drafting of the Agreements, use may be made of these Guidelines and Recommendations.

Recommendation(s):

1. That consideration be given to imposing a waste disposal fee in respect of particular items brought into January.

Provision for this could be made in the proposed Environmental Management (Incentives and Disincentives) Legislation.
2. That to by way of pilot projects enter into agreement for EMS use with bodies representing particular sectors of industry with attendant incentives (or disincentives).

Provision for this could be made in the proposed Environmental Management (Incentives and Disincentives) Legislation.
3. That a “Guidelines for Environmental Agreements” be developed and utilized.

Bavarian Pact

In the German federal state of Bavaria there is agreement (**The Bavarian Environmental Pact**) between the state government and industry under which Bavaria promises “to work to ensure that Companies registered as an inspected location in the context of EMAS are relieved of the burden of reporting and documentary requirements, checks and monitoring by the supervisory authorities.”

Companies are relieved of the requirements to the extent that they assume the responsibilities themselves through EMAS implementation. Here, provision needs to be made for compliance with all relevant regulatory requirements regarding the environment (the so-called “compliance approach”).

It appears, a significant outcome of this is a partial privatization of the enforcement of environmental laws where authorities shift their attention from sites registered to EMAS towards “problem companies”. Concepts of “substitution” and “deregulation” have emerged in this context. Here “substitution” means simplification and/or phasing out of traditional

regulatory law in the executive sphere. In connection with EMAS, “deregulation” means simplification and/or phasing out of regulatory provisions at a legislative level.

Substitution and deregulation are based on the principle of functional equivalence and the compliance-approach which are established in the EMAS regulation. The principle of functional equivalence requires that the respective instruments specified by EMAS and regulatory law are equivalent in their objectives and have the same effect for steering purposes.

7.5 USA

Here, note is being taken of miscellaneous approaches at the state and national levels inclusive of incentives provision as well as initiatives in the sphere of law enforcement and environmental legislation and legal policy.

Incentives

Overall, it appears that in various states as well as at the national level as regards the Environment Protection Agency (EPA), there is an increasing momentum to develop a so called “alternative track” or “performance track” to encourage companies to use innovative environmental performance strategies.

Performance Track

The concept “performance track” generally refers to allowing top performers more flexibility in how they meet regulatory requirements if they do more to protect the environment and assure accountability. EMSs are considered vital to the concept as doing more would normally entail their usage in improving environmental performance.

Wisconsin¹⁹

Wisconsin, in 1997 put in place an environmental innovation law **The Wisconsin Cooperative Environmental Agreement Law²⁰** which created an environmental cooperation pilot programme designed to “evaluate innovative regulatory methods” to achieve greater environmental performance “both with respect to the effects that are regulated... and (those) that are unregulated.” A two tiered system is utilized, whereby regulated entities must participate in the bottom tier which is comparatively inflexible, inhospitable and costly in terms of its transaction and administrative costs.

The second tier, called The Green Tier is highly flexible in how statutorily set environmental standards may be met. Entry in The Green Tier is earned by accomplishments recorded in the control Tier. Compliance with existing statutory environmental standards is a floor from which the participants move up.

Green Tier participants are regulated by performance contracts that meet the negotiated needs of the parties. Depending on the performance “due diligence” designation may be merited or the sanction of the court may be invoked resulting in an “environmental performance decree”. Green Tier contracts require a credible EMS which produces results

¹⁹ Much of the information presented here has been extracted and adapted from: A Green Tier for Greater Environmental Protection – George E. Meyer.

²⁰ See: Appendices for text.

and communicates progress to the public. Reference is made to ISO 14001 as one system but usage of other systems is invited, including those systems applicable to a facility, firm or sector.

The law requires compliance and public reporting that are similar to Europe's EMAS system apparently to compensate for deemed shortcomings of ISO 14001. An example of such deemed shortcoming is ISOs requirement that the registered party "commit to compliance" rather than "obey the law". To a significant extent, it appears deemed shortcomings to which the Wisconsin law pays cognizance, have to do with unclear or poor compliance language regarding environmental perceived lax public reporting standards.

Recommendation(s):

1. That in developing the proposed Environmental Management (Incentives and Disincentives) Legislation, particular note be taken of **The Wisconsin Cooperative Environmental Agreement Law, 1997**.

Oregon

In 1997, the Oregon state legislature passed "green permits" legislation to encourage regulated facilities to achieve environmental results that are significantly better than otherwise provided by law. A tiered system is utilized whereby greater environmental performance is rewarded with increasing regulatory benefits. The system requires demonstrated reductions in targeted environmental impacts. For participating companies, compliance with standards is the baseline level of performance required under the programme.

EMS incentives are expected to achieve the environmental results envisaged in the legislation. Incentives include public recognition as an environmental leader, regulatory and operational flexibility and technical assistance.

Colorado

Colorado has created a voluntary environmental leadership programme that offers financial incentives to companies which carryout particular environmentally beneficial activities.

Connecticut

On June 8, 1999, Connecticut State Assembly passed a bill known as "**An Act Concerning Exemplary Environmental Management Systems**".²¹

The bill pays cognizance to internationally recognized principles of sustainability and is designed to reward companies that demonstrate "an exemplary record of compliance with environmental laws". It authorizes the Department of Environmental Protection (DEP) commissioner to establish a pilot incentive programme for businesses that have a history of operating in a manner that best protects the environment.

Such business must (1) have registered to the ISO 14001 Environmental Management System (EMS) standard and adopted internally recognized sustainability principles, or (2)

²¹ Much of the information presented here is extracted and adapted from: OLR Amended Bill Analysis (<http://www.cga.state.ct.us/olr/1999/special/analyses/6830.htm>).

in the case of small businesses, have adopted an equivalent EMS which meets certain minimum data collection requirement. The pilot programme may be based on any model plan, or replicate any pilot program, developed by a “multistate working group.” The programme incentives must include:-

- (1) expedited permit application review; and
- (2) public recognition of the businesses involved, such as an exclusive symbol or seal for use in advertising or other public displays.

They may also include:-

- (1) less frequent reporting, to the extent consistent with federal law, of information required as a condition of doing business in the state;
- (2) a facility-wide DEP permit approval process;
- (3) a permit that allows changes in a facility’s process so long as its total emissions do not increase; and
- (4) reduced DEP permit fees.

The bill establishes eligibility criteria and requires DEP to set up advisory boards to review program applications. DEP must issue a certificate to each business approved under the pilot program.

A business that needs to obtain a permit or other approval from Connecticut’s Commissioner of Environmental Protection may apply for the benefits of the programme once it has been certified in ISO 14001 and demonstrated that it has adopted internationally-recognized principles for sustainability.²² Small businesses are given the option of adopting an equivalent EMS, rather than the ISO 14000 standard, and are not required to adopt “sustainability principles” to be eligible for the DEP program.

Businesses that need a DEP approval or permit and have a history of operating in a manner that best protects the environment are eligible for the programme. They must demonstrate to a DEP advisory board that (1) they have exemplary environmental compliance records, including no DEP notices of violation in the past five years other than unintentional minor violations; (2) any unintentional minor violations and related DEP orders have been remedied; and (3) their consistent practices protect the environment beyond what is required by law. They must also satisfy the commissioner that they are registered to the ISO 14001 standard or, in the case of small businesses, an equivalent EMS system which meets certain data collection components advocated by the federal Environmental Protection Agency (EPA). Businesses must apply to DEP on forms and in a manner provided by DEP. DEP must convene advisory boards to approve the applications. The boards must include:-

²² One such is that of The Natural Step (TNS) which is an international network of non-profit educational organizations working to accelerate the movement towards a sustainable society. TNS provides a planning framework grounded in natural science which serves as a guide for businesses, communities, academia, government entities and individuals undertaking the path of sustainable development. Others are the Coalition for Environmentally Responsible Economies (CERES) and the Hanover Principles.

- (1) a representative of the applicant's industry (but with no business relations to the applicant);
- (2) the attorney general or his designee;
- (3) the DEP commissioner or his designee; and
- (4) the Council on Environmental Quality chairman.

After a business is approved, the DEP commissioner may offer it programme benefits and certificate of approval. DEP must revoke a business' certificate of approval if it ceases to meet the program requirements. Such businesses are not entitled to any further program benefits but may reapply at any time.

Other States

Similar incentives are being developed in Pennsylvania, New Jersey and elsewhere in the United States of America under a variety of tiered programmes under varying nomenclature – “Star Track”, “Gold Track”, “Silver Track” and the like.

Wisconsin

Cooperation Agreements with Foreign States - Apart from promulgating legislation, Wisconsin has also sought to engender EMS use by entering into agreement with the state of Bavaria in Germany, itself a leader in environmental matters in Europe and a state with which Wisconsin has many social, cultural and industrial ties, and a propensity for government innovation and generally compatible ties.

There is in place between the two states a Memorandum of Understanding (MOU) – **The Wisconsin- Bavaria Regulatory Reform Partnership**. The MOU seeks, inter alia, to engage business, government and citizen groups committed to innovation with emphasis on testing tools such as EMSs. Under the MOU, there is agreement to establish joint projects to promote businesses participation in EMSs under the ISO 14000 standard and EMAS and provide strong support for cooperation with small and medium-sized enterprises for their environmental performance and compliance results. There is emphasis on trans-Atlantic trade. Under the requirement to have EMSs, businesses in both states are verified to EMAS and ISO 14000 standard.

New Jersey

New Jersey in 1996 entered into a Memorandum of Intent with Israel whereby the parties agreed to various cooperative efforts. Specified efforts include developing a joint EMS project towards achieving:-

1. establishment of an infrastructure for the implementation of a comprehensive EMS;
2. an exchange and sharing of knowledge, data, experiences and findings; and
3. promotion and education for quality and environmental awareness.

Specified broad areas of cooperation include those pertaining to:-

1. Standards of environmental management;

2. Management education in Corporate Industrial Practices;
3. Development and Dissemination of Sustainable Policy Instruments; and
4. Capacity Building and Infrastructure Development for Environmental Improvement.

Recommendation(s):

That both bilateral Agreements (Wisconsin/Bavaria and New Jersey/Israel) be noted as indicative of cooperative agreements that Jamaica could enter into towards promoting EMS use.

Other Instructive Approaches from USA

Environmental Audit

Intimately bound up with an EMS is the tool of environmental audit. In the USA, there are particular noteworthy legal ramifications. Apart from the basic reason of enabling management to develop an understanding of the impact of environmental issues on business, there are sound legal reasons for a company conducting an environmental audit. These include evaluating the company's potential environmental liabilities, as well as helping to minimize such liabilities and related sanctions for breach. A company's demonstration of "environmental good faith" may limit or mitigate possible criminal or civil penalties the government may seek for a violation. The EPA's auditing policy is that:

In fashioning enforcement responses to violations, EPA policy is to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems. When regulated entities take reasonable precautions to avoid non-compliance, expeditiously correct underlying environmental problems discovered through audits or other means, and implement measures to prevent their recurrence, EPA may exercise its discretion to consider such actions as honest and genuine efforts to assure compliance.

The securities laws' disclosure obligations may also require undertaking an audit to ensure that the company has not inadvertently failed to disclose certain environmental liabilities.²³ Thus, by conducting an audit, the company can readily have the information needed to satisfy the requisite filing requirements of the Securities and Exchange Commission (SEC) and may save time and expense in dealing with the SEC in the context of an enforcement action related to nondisclosure of material facts.

Criminal Enforcement Policy and Objectives

The imposition of severe fines, expensive remedial measures, and, more importantly, imprisonment for high ranking corporate and government officials are forceful deterrents to environmental crimes. Prosecutors target corporate officers and employees, as well as

²³ In **SEC v. United States Steel Corp.**, [19979-80 Transfer Binder] Fed. Sec. L. Rep. (CCH) 82,319 (Oct. 18, 1979), the SEC found that U.S. Steel failed to comply with applicable disclosure statutes in its filing by not disclosing material environmental liabilities or potential outlays necessary to comply with environmental statutes. In approving U.S. Steel's settlement offer, the Commission required it to conduct a comprehensive environmental audit which would identify its environmental problems and recommend solutions to be reviewed and enacted by the company's audit committee.

federal employees, in order to ensure personal accountability for serious environmental crimes. This approach recognizes that criminal convictions punish individuals much more severely than corporations. When threatened with jail, corporate and government officers and employees not only have a powerful incentive to comply personally, but also to prevent others under their supervision from engaging in activities that could result in liability being imputed to them or to their corporation.

Prosecution Guidelines

The U.S. Department of Justice has established guidelines for prosecution of environmental violations.²⁴ The policy is designed to encourage self-policing, self-auditing, and voluntary disclosure. These actions are mitigating factors for prosecutors to consider in deciding whether to seek indictments, and if so, for what kind of violations. Under the guidelines, the Department of Justice evaluates six primary factors in determining whether to prosecute violators, including

1. Whether the violating entity made a voluntary disclosure of the matter under investigation;
2. The extent and timeliness of the violating entity's cooperation;
3. Preventive measures and compliance programs instituted by the violating entity;
4. The violating entity's compliance record;
5. The existence of an internal system within the violating entity for disciplining employees who commit violations and the effectiveness of that system; and
6. The violating entity's efforts to correct ongoing compliance problems.

All of these factors are evaluated on a continuum. In theory, this approach is intended to provide greater leniency to companies that satisfy more of the criteria, while making prosecution more likely for companies that satisfy fewer criteria. Prosecutors are to consider gradations within each of these factors with the result of the greater a regulated entity's good faith cooperation, the more leniency it should expect.

In practice, however, the considerations are not mechanically or pedantically applied. The Department of Justice guidelines are no more than guides to Justice Department attorneys. Deviations are allowed and frequently occur. The federal government cannot be forced to adhere strictly to them. Accordingly, too much reliance should not be placed on construing the guidelines as a basis for legal action. Nevertheless, through these guidelines the Department of Justice has attempted to promote uniformity in enforcement. Overall, the guidelines broadly parallel those for corporate criminal sentencing and are intended to reduce concern among regulated entities that perform voluntary and mandatory audits that reveal environmental violations. There are doubts however as to whether the policy has achieved that goal. Many companies fear that full disclosure will provide factual support for prosecutors seeking evidence of intent to commit or knowledge of violations. The Department of Justice policy does not guarantee that an audit will remain privileged.

Sentencing Guidelines

²⁴ U.S. Department of Justice, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (July 1, 1991) (unpublished memo).

Under the U.S. Sentencing Guidelines, the fact that the convicted corporate defendant had an effective programme “to prevent and detect violations of law” may be a mitigating factor. The Guidelines explain that an effective compliance programme is one that is “reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct.” The Guidelines delineate the outlines of an effective compliance programme noting in particular:-

- (a) compliance standards;
- (b) definition of organizational responsibility;
- (c) training;
- (d) monitoring and auditing; and
- (e) response to legal violations and failures of the programme.

There is recognition that the specific actions necessary for a particular company will depend on its size, the likelihood of offences given the nature of its business, and prior history of violations.

Recommendation(s):

That “Prosecution Guidelines” and “Sentencing Guidelines be developed and used generally in respect of environmental law breaches and more particularly in encouraging EMS use whether voluntarily or by virtue of a court order as proposed in respect of amending **The Criminal Justice (Reform) Act, 1978**.

Responsible Corporate Officer Doctrine

The responsible corporate officer doctrine reflects a policy of prosecuting the highest-ranking company official against whom a case can be made. No mental element or act in furtherance of a violation is necessary to sustain a conviction. It is only necessary that the officer had the power to prevent the violation from occurring.

The United States Supreme Court established the standard to be applied to responsible corporate officers in the landmark case of **United States v. Park**.²⁵ That case made it clear that a corporate officer can be held criminally liable if the officer had “*by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.*”²⁶ The responsible corporate officer doctrine is designed to prevent high level employees from escaping liability when they choose to ignore violations.

Citizen Suits

²⁵ 421 U.S. 658 (1975). In the case, the president (Park) of a retail food chain was convicted of food adulteration under the Food Drug and Cosmetic Act (FDCA). Park had been notified that food stored in the warehouse prior to its distribution had been contaminated by rats. Park was convicted even though he had delegated the responsibility for compliance with the applicable rules to other officials in the company. Id. At 673-74.

²⁶ 421 U.S. at 673-74

In addition to federal enforcement actions initiated by the EPA, most environmental statutes provide private individuals and organizations with the authority to participate in enforcement through citizens suits. The statutes generally authorize any person to bring a civil action against any alleged violator, or against the EPA for a failure to perform a nondiscretionary duty.

When suing the federal government, citizen suits normally proceed under two broad bases. The first is where the government, through its Agency, has failed to perform a duty that is mandated by law. A typical example of this is where a statute directs the EPA to promulgate a regulation implementing a statutory provision within a specific time frame, and the Agency fails to do so. Called a “deadline suit,” this litigation usually results in the EPA being placed on an enforceable schedule to promulgate the required regulations.

The second basis is where the federal government itself is alleged to be in violation of the statute. This type of action can arise in numerous circumstances but the most common is where a federal agency is in violation of a permit or some other statutory requirement. Usually the remedy sought is injunctive relief to order the affected agency to comply with its permit requirements, or to otherwise comply with the law, and penalties.

As a prerequisite to any citizen suit, the statutes normally require the private party to provide 60-days’ notice to the federal government (both EPA and the Department of Justice), the state where the alleged violation took place, and the alleged violator prior to actually commencing of the lawsuit. The purpose of the notice requirement is to give the primary enforcement authorities the opportunity to initiate an action on their own and to avoid litigation by allowing the alleged violator to correct any infraction and to negotiate with the citizen any resolution of the threatened action.

A second prerequisite under some statutes is that a citizen suit can only be initiated against an entity alleged to be in current violation of the particular statute. Hence, citizens may not maintain an action where they allege that violations of the law occurred wholly in the past and need to “make a good faith allegation of continuous or intermittent violation.”²⁷ A third prerequisite is that any person or organization bringing a citizen suit must establish proper standing by alleging an injury in fact.

Citizen suit provisions generally enable a citizen—typically an environmental group—to sue a company or facility for violating its permit, statutory requirements, or regulatory limits. Also, citizens are usually authorized to sue the EPA for failure to adequately enforce the provisions of the statute.

Business Regulatory Laws

At both the federal and state levels regulatory authorities are being utilized to police environmental claims made for products. The Securities and Exchange Commission requires full disclosure of environmental liabilities in statements and reports falling under its jurisdiction. It appears more and more business regulatory laws are being innovatively engaged in the quest to enforce increasingly stringent standards of protection for the environment.

Tax Laws and Economic Incentives

²⁷ *Gwaltney of Smithfield v Chesapeake Bay Foundation*, 484 U.S. at 64

Generally, there is also an increasing tendency at both the state and federal levels towards using the tax laws to create incentives in favour of environmentally benign products and activities and disincentives against products and activities considered to be environmentally detrimental.

Gas guzzler taxes, recycling tax credits, taxes on the use of virgin materials or on hazardous waste generation are among the approaches that have been adopted or initiated.

Local and Municipal Laws

Although local government entities are not as pervasively involved in environmental regulation as their counterparts at the state and federal levels, the localities have much power to control the location and operation of facilities within their jurisdictions. Their impact is often more immediate and engaging of proactive local community support.

Matters that have attracted particular attention at the local government level include the operation of local waterworks and waste treatment plants, local recycling initiatives and associated product initiatives, zoning and noise control ordinances, nuisance laws, air emission requirements, landfill restrictions or closures, local emergency planning and initiatives relating to waste site cleanup.

Toxic Torts

Toxic torts relates to situations where the injuries involved allegedly arose from exposure to a toxic substance and which has similarly affected a large number of persons. Liability may be grounded in traditional bases for liability such as negligence and nuisance. However, most significantly such liability may be grounded on developing product liability and market share liability theories which relieves the Plaintiff of the need to establish fault or renders non-fatal the inability to precisely single out the perpetrator.

Guideposts for Environmental Legislation

Overall, it appears that some of the guideposts for new environmental legislation in the USA are that they should do the following:-

- (a) honour and exceed existing and future statutory standards for health, safety and the environment and allow them to be efficiently met;
- (b) promote attention to unregulated environmental needs;
- (c) promote continuous improvement of performance to benchmarks of beyond compliance;
- (d) permit the balancing of environmental, economical and community needs over a reasonable period of time;
- (e) report performance information to the public that is accurate, timely, credible, relevant and usable to interested parties; and
- (f) empower citizens to take legal action where their environmental rights are being breached.

Recommendation(s):

1. That provision be made in **The Criminal Justice (Reform) Act, 1978** for particular officers to be personally amenable to criminal prosecution in specified circumstances for breach of particular environmental laws.
2. That taxes be applied to discourage environment-unfriendly products and processes and that these be provided for under the proposed Environment (Incentives and Disincentives Legislation).
3. That citizens be clearly empowered statutorily to take action to have relevant government agencies act without undue delay (having regard to all relevant circumstances).

7.6 Canada

Canadian law allows the courts to sanction not only a corporation which is guilty of an environmental offence or a civil wrong, but also, the directors, officers, employees and agents of that corporation in certain circumstances e.g. **Section 34(10)** of British Columbia's **Waste Management Act** provides that:-

“where a corporation commits an offence under this Act, any employee, officer, director or agent of the corporation who authorized, permitted or acquiesced in the offence commits the offence notwithstanding that the corporation is convicted.”

Similar wording is found in several other provincial statutes and the federal **Fisheries Act** and the **Canadian Environmental Protection Act (CEPA)**. Ontario's personal liability provision goes further and establishes a positive duty on directors and officers to “take all reasonable care to prevent the corporation from causing or permitting such unlawful deposit”. The Ontario-type positive duty imposition is not unique as many U.S. jurisdictions have in recent years amended their statutes to impose a positive duty to prevent environmental harm. Canada has a growing list of statutory causes of action which provide citizen's with rights to sue for civil damages arising from environmental problems. These causes of action appear to help remove some of the difficulties of standing and evidence which create obstacles to victims of pollution under the law.

Some examples include:-

- ...“(a) *British Columbia's **Waste Management Amendment Act** which enables a plaintiff to sue “responsible persons” for contributions for the remediation costs;*
- (b) *Ontario's **Environmental Protection Act**, which provides that a person who suffered damage from a spill (which may include a sudden disposal of waste) or has cleaned up the spill may apply for compensation from the provincial government;*
- (c) *the federal **Fisheries Act**, which provides commercial fishers with the right to sue for lost income attributable to an unauthorized deposit of deleterious substances;*
and
- (d) *the **Canadian Environmental Protection Act**, which provides a statutory right to claim compensation for loss or injury to person or property as a result of conduct which is contrary to any provision of the Act or its regulations; and*

- (e) the **Yukon Environment Act** which allows any two citizens to petition the Minister of Environment to investigate an environmental problem.

*Apart from these civil actions, some jurisdictions have gone so far as to provide citizens with powers usually left to prosecutors. Statutory enforcement proceedings such as found in Ontario's **Environmental Bill of Rights Act** enable citizens to, in effect, act as prosecutors by undertaking enforcement action."*

1992 amendments to the **Auditor General Act** requires Ministers to have sustainable development strategies prepared for their departments and created the position of Commissioner of the Environment and Sustainable Development. Under the Act, the principal duty of the Commissioner is to monitor and report annually to Parliament on the extent to which departments have implemented their action plans and met their objectives for sustainable development.

The Canadian Environmental Protection Act (CEPA), also provides : -

- (a) the right to bring civil suits in cases of significant damage to the environment if the government fails to enforce the Act;
- (b) "whistle blower" protection provisions to encourage reporting of CEPA violations;
- (c) use of environmental protection alternative measures (EPAMs) to provide for corrective action and penalties without the need to proceed with a lengthy court case; and
- (d) the ability to issue on the spot orders to stop illegal activity or to require action to correct a violation to protect the environment and public safety.

To encourage the practice of environmental auditing, inspections and investigations under the **Canadian Environmental Protection Act** are slated to be conducted in a manner which will not inhibit the practice or quality of auditing. Inspectors are not to request environmental audit reports during routine inspections to verify compliance with the Act. Access to environmental audit reports may be required when inspectors or investigating specialists have reasonable grounds to believe that:

- (a) an offence has been committed;
- (b) the audit's findings will be relevant to the particular violation, necessary to its investigation and required as evidence;
- (c) the information being sought through the audit cannot be obtained from other sources through the exercise of the inspector's or investigation specialist's powers.

In particular reference to the latter criterion, environmental audit reports must not be used to shelter monitoring, compliance or other information that would otherwise be accessible to inspectors under CEPA.

Any demand for access to environment audit reports during investigations has to be made under the authority of a search warrant. The only exception to the use of a search warrant is exigent circumstances, that is, when the delay necessary to obtain a warrant would

likely result in danger to the environment or human life, or the loss or destruction of evidence.

8. RECOMMENDATIONS²⁸

Legislative Instruments and Related Mechanisms Generally

1. That consideration be given to having the Jamaican citizen and environmental non-governmental organizations (NGOs) more empowered to bring court actions in respect of particular environmental breaches.
2. That the consequential legislative amendments should, inter alia, seek to address some of the technical legal impediments to bringing such actions.
3. That generally, use should be made of Agreements between regulator and regulated, incentives, Codes of conduct and/or Guidelines in encouraging EMS implementation.

General Problems and Issues Concerning Effectiveness and Implementation of Jamaican Environmental Legislative Instruments

That the following be done:-

1. Review and update penalties for breach of environmental laws.
2. Consult with and sensitize judiciary as to the full implications and/or gravity of particular environmental breaches.
3. Have environmental law breaches and their implications feature prominently in the training of Police Officers.
4. Expand capacity and develop and adhere to appropriate action time tables towards speedy implementation of requisite Regulations.
5. Have legislation specify deadline for passage of particular regulations.
6. Enact timely legislation necessary to incorporate international convention to which Jamaica becomes a party.

Green Plan Considerations

1. That steps be taken towards developing a national green plan.
2. That the following should be features of such a plan:-
 - (a) an extensive public consultation process
 - (b) highly publicized policy statements, standards and performance targets, audits and reports for various sectors and at various levels including at the national, local government and community levels.
3. That as far as possible such a plan should be translated into and underpinned by legislation as is the case with New Zealand and its Resource Management Act.

²⁸ As extracted from body of text.

The Jamaican Constitution

That further consideration be given to the matter of how protection is to be provided for the rights of private citizens as regards the environment under the Jamaican Constitution.

The Jamaican Reality – Some Extra-Legal Parameters/Constraints/Opportunities

1. That provisions for promoting EMS use have regard to the differing level of resource capabilities of enterprises and that the programme begins with pilot projects, in selected sectors such as tourism and the bauxite/alumina sectors.
2. That an extensive programme of heightening environmental awareness should accompany any consumer targeted programme for rating products or enterprises as regards environmental impact or performance.
3. That in establishing certain environmental-related requirements for enterprises, such as e.g. disclosure and reporting requirements regard should be had inter alia, to the size, nature and impact of the enterprise. Various thresholds need to be established to trigger obligations.
4. That foreign enterprises operating in Jamaica should not be permitted to operate at any standard lower than they would be allowed to or would have in their country of origin.

The National Resources Conservation Authority Act, 1991 (The NRCA Act)

1. That, generally, the NRCA should actively develop plans and programmes for promoting EMS use (in accordance with the mandate of **Section 4(1)(a)**).
2. That the NRCA should enter into agreements with enterprises for them to implement appropriate EMSs (as allowed by **Section 4(2)(h)**) and incorporate the relevant terms and conditions in licences and permits as applicable.
3. That the licence and permit system be utilized in the fostering of EMS use and that the current across the board fee be done away with and a new fee structure be developed to take into account EMS use, cost of EMS implementation and factors such as the scale, environmental impact and developmental value of the undertaking or activity, the polluter pay principle and as appropriate the user pay principle. Possible reoccurring fees should be referable to the enterprise's environmental performance, subject to the NRCA's verification capabilities. **Regulation 24 (1)** should be amended accordingly.
4. That the NRCA should accelerate the development of standards and codes of practice (as provided for by **Section 4(2)(d)**) towards utilization in engendering EMS use.

The Beach Control Act, 1956

1. That the user pay principle be applied in determining the cost of obtaining licences and a scale of fees be determined accordingly with implementation of EMS, the cost of such implementation being factored in such determination along with considerations such as the extent, nature, environmental impact and developmental value of the usage concerned.
2. That the NRCA enter into agreements with beach enterprises as to appropriate EMS for beach use with the appropriate terms and conditions incorporated in the licences.

The Fishing Industry Act, 1976

1. That in considering whether to grant a fishing licence, the Minister should take into account whether the applicant has in place environment-friendly methods and systems for fishing and dealing with the fishing product. **Section 6** could be amended accordingly in the interim pending final settlement of the provisions of the **Draft Fisheries Bill**.
2. That the process of finalizing the replacement **Draft Fisheries Bill** be accelerated.

Draft Fisheries Bill (Second Draft 3/4/96)

1. That the matter of the conservation and management of the fisheries stock and/or the need to use or have in place methods and systems to this end be expressly specified as one of the matters to which regard should be had by the Director considering applications for permits. **Section 18** should be amended accordingly.
2. That the Director be required to take into account whether there is in place an appropriate EMS or plans or steps to put one in place when considering to grant a fish processing establishment licence. **Regulation 26(2)(b)** should be amended accordingly.

The Pesticides Act, 1987

That regulations be promulgated expressly providing for environmental impact concerns to be taken into account and towards promoting EMS use.

The Financial Administration and Audit Act, 1959

1. That new legislation be enacted to empower the Auditor-General to carry out environmental auditing and reporting functions as regards governmental/public bodies and agencies.
2. That the Draft Government Procurement Regulation be amended taking into account the following comments:-
 - (a) The Article is internally inconsistent in form and substance
 - (b) It is inconsistent in form in that **Article 44.4** is captioned "Occupational Rights and Freedoms", yet **Article 44** in so far as Occupational matters are concerned is limited to "Occupational Freedoms" "Rights" are different from and not necessarily subsumed in "Freedoms". There is for instance at present in Jamaica for employees "freedom to strike" but not a "right to strike". Moreover, it is not readily apparent what "freedoms" are being referred to in **Article 44.4**. If one of the two terms "freedoms" or "rights" is to be preferred then it ought to be "rights".
 - (c) **Article 44** is inconsistent in substance because **Article 44.1** suggests that the focus of the Article is protecting and improving the quality of the environment yet it purports to deal with Occupational Rights and Freedoms under **Article 44.4**.
 - (d) If the real aim of **Article 44** is to focus on the environment, then it appears **Article 44.4** belongs elsewhere.
 - (e) **Article 44.4** itself warrants further comment
 - (i) "contractor" is not defined and needs to be.

- (ii) Implicit in **Article 44.4(a)** is the notion that terms of employment negotiated by trade unions are to be the absolute benchmark in such matters. This appears to be unnecessarily restrictive.
- (f) **Article 44(2)** needs to be delimited from its constricted focus on Clean Air and Clean Water Standards. Other pollution media need to be addressed also bearing in mind the wide purview of **Article 44.1**.
- (g) Provision needs to be made in the Article for subsequent changes from time to time in environmental priorities or focus. Thus the Article could be drafted to allow for the timely incorporation of other Standards or Guidelines with the Natural Resources Conservation Authority indicating these from time to time.
- (h) Apart from the reminder in **Article 44.3** concerning Ozone-depleting Substances, the Natural Resources Conservation Authority could also develop and update a list of any other environment-unfriendly prohibited goods and provision be made for easy incorporation in the Regulation.
- (i) For the procurement of certain goods which have having regards to their nature or volume (or both) prima-facie raise serious environmental concerns, provision should be made for the NRCA to be consulted prior to procurement.

The Jamaica Stock Exchange Rules

That **Rule 403** be amended to require a company engaged in certain activities (with particular environmental consequences) and meeting criteria to be prescribed (e.g. scale and nature of operation, etc.) to provide information as regards its environmental performance, whether it has an EMS in place, its compliance with applicable environmental or related laws and any consequential outstanding or likely liability.

The Companies Act, 1965

1. That a company carrying out certain activities (with particular environmental consequences) and meeting criteria to be prescribed (e.g. scale and nature of operation) be provided the facility of making a statement on its environmental performance annually and as to whether it is utilizing an EMS.
2. That the scope of the report on companies by Auditors be expanded to encompass environment performance notations, inclusive of whether an EMS is in place.
3. That the specific requirements as to particulars in a prospectus be extended to include information on environmental performance, whether an EMS is being or will be utilized, compliance with applicable environmental or related laws and any consequential outstanding or likely liability. **Section 40** and the **Third Schedule** should be mended accordingly.

Income Tax Act, 1955

1. That particular environment-friendly equipment be granted capital allowance concessions.
2. That special concessions be granted under the Act to particular enterprises wholly engaged in part environment-friendly activities.

Incentives Legislation

1. That new Environment Management Incentives and Disincentives Legislation be promulgated to provide for concessions in respect of income tax, custom duty and other taxes in respect of particular prescribed environment-friendly machinery, products and systems
2. That such legislation also provide for the levying of additional taxes on particular environment-unfriendly machinery, products and systems.
3. That such legislation empower the relevant Minister to make regulations towards the promotion of EMS use.
4. That provision be made in such legislation for the development of pilot projects towards encouragement of EMS use and for the designation by relevant Minister of particular sectors enterprises, or activities for special treatment to be prescribed, depending on environmental performance.

The Industrial Incentives Act, 1956

1. That an important criterion as regards the Minister declaring a product to be an “approved product” should be whether the manufacturing entity concerned utilizes an EMS. **Section 3(3)** could be amended accordingly in the interim, pending the development of the proposed Environmental Management (Incentives and Disincentives) Legislation.

The Parish Councils Act, 1901

1. That consideration be given to having Parish Councils play a greater role in the conservation of the environment and to rationalize and synchronize their roles with those of the NRCA and other agencies.
2. That consideration be given to empowering Parish Councils under **The Parish Councils Act**, to play a greater role in the environmental impact assessment review process and in consultations with communities.
3. That Parish Councils be expressly fixed with responsibility to monitor environmental breaches and report same to the NRCA or other relevant authority towards having them remedied.
4. That Parish Councils be obligated to promote environment-friendly behaviour in the various electoral divisions and that particular Codes of Conduct of particular relevance to the parishes concerned be developed to this end and disseminated and utilized in the various communities with EMS use being promoted (as far as flexible).
5. That Parish Councils be obliged to observe environment-friendly behaviour themselves and be subject to a Code of Conduct to be developed to this end.
6. That **Section 129** of the Act be amended to provide for the Auditor-General to make environment-audit reports in respect of each parish.
7. That the regulations contemplated under **Section 14(1)** of **The Public Health Act** relating to “air, soil and water pollution” be provided for under The Parish Councils Act and the requisite regulations made.

The Bauxite/Alumina Sector

That pilot projects for promoting or encouraging continued EMS use in the bauxite/alumina sector be provided for and be promoted under the aegis of the proposed Environmental Management (Incentives & Disincentives) Legislation.

The Tourist Sector

1. That pilot projects for promoting or encouraging continued EMS use in the tourism sector be provided for and promoted under the aegis of the proposed Environmental Management (Incentives and Disincentives) Legislation.
2. That the issuance, renewal suspension or cancellation of licences in respect of tourist accommodation, tourism enterprise, vendor in prescribed areas be made subject to environmental performance considerations.
3. That eco-tourism areas on the South Coast be included in the list of "prescribed areas" as provided for in **The Tourist (Prescribed Areas) Regulations, 1985**.
4. That consideration be given to applying the User pay and Polluter Pay Principles in determining the amount of duty payable under **The Tourist Accommodation (Licence Duties) Act, 1984** and a scale of fees be developed accordingly.
5. That the issuance, renewal, suspension or cancellation of the tourist (duty-free) shop operator's licence or permit or shop licence be made subject to whether the Applicant has breached particular environmental legislation such as **The Endangered Species (Protection Conservation and Regulation of Trade) Act** and **The Wild Life Protection Act**.

The Fair Competition Act, 1993

1. That consideration be given to including particular environment-friendly behaviour as part of an enterprise's defence to a claim that it is abusing its position of dominance in circumstances where taken as a whole the enterprise's conduct as regards the environment renders it necessary for it to behave in the manner about which there is concern.
2. That the NRCA (or other licence or permit issuing Government Agency) consult with the Fair Trading Commission as regards the entry into agreements with any person or group of persons which may have the effect of lessening competition although such agreement may be geared towards promoting EMS use or environment-friendly conduct in general.

The Factories Act, 1943

That the Factories Regulations should be amended by incorporating provisions expressly directed at encouraging EMS use.

The Aquaculture, Inland and Marine Products and By-Products (Inspection, Licensing and Export) Act

That in the promulgation of the requisite regulations the matter of EMS use be incorporated in the considerations and conditions as regards grant of a licence for the operation of a processing establishment, factory vessel, freezer vessel or carrier vessel.

CARICOM

That consideration be given to developing an appropriate cooperative agreement among member states of CARICOM for the promotion of EMS use.²⁹

World Trade Organization (WTO)

That in addition to paying cognizance to the WTO stipulations thus far, Jamaica should (with the involvement of its regional and other partners) develop, articulate and lobby for the adoption of positions in the WTO which is in keeping with Jamaica's best interests as regards sustainable development and the pursuit of programmes such as promoting EMS use.

The Standards Act, 1969

1. That consideration be given to clearly providing for certification by entities other than the Bureau of Standards.
2. That consideration be given to allowing for the recognition of certification by suitable bodies from overseas and locally (upon such terms as may be deemed appropriate).
3. That the various outstanding matters for which regulations were contemplated under **Section 11** be provided for in regulations to strengthen the efficacy of the Act.
4. That the fine set out in **Section 11 (j)** be increased.

The Criminal Justice (Reform) Act, 1978

1. That the Act be amended to provide for the sentencing of an offender to implement an EMS.
2. That to this end a Schedule of a number of environment-related legislation be made, breach of which would give the court the option to sentence the offender to implement an EMS.
3. That such amendment(s) should encompass:-
 - (a) circumstances when such an Order would be appropriate;
 - (b) clarity as to what is required of the convicted offender under such an order;
 - (c) time frame within which to implement EMS;
 - (d) satisfying the court that such implementation can be checked, monitored and "supervised";
 - (e) designating and empowering the appropriate Government Agency to report as to the appropriateness of having an implementation of EMS order made in respect of the particular offender;
 - (f) sanctions where EMS not implemented as ordered; and
 - (g) as applicable, which persons in the corporation/organization are to be deemed responsible/liable for not carrying out the Order.

²⁹ *Examples of Cooperative Agreements involving different states are appended.*

Instructive Approaches from other Countries Indonesia

1. That consideration be given to adapting and utilizing the features of PROPER for Jamaica by way of a Pilot Project under the proposed Environmental Management (Incentives & Disincentives) Legislation.
2. That to this end the NRCA, Bureau of Standards, Consumer Affairs Commission Scientific Research Authority with representation from environmental NGOs, the Scientific, Business and the Environmental Communities be engaged in developing a credible and effective programme that can garner public involvement and support.

India

1. That the system of the different advisory panels which augurs well for independence, transparency, credibility and participation be adapted and utilized in conjunction with the proposed adaptation of PROPER for Jamaica.

The European Community Eco-Management and Audit Scheme (EMAS) Council Regulation (EEC) No. 1836/93

That special consideration and support be given to smaller enterprises as regards their utilizing EMSs.

Belgium

That consideration be given to empowering designated (“registered”) environmental groups in particular circumstances to bring their own enforcement and clean-up actions.

Netherlands

1. That consideration be given to imposing a waste disposal fee in respect of particular items brought into Jamaica. Provision for this could be made in the proposed Environmental Management (Incentives and Disincentives) Legislation.
2. That to by way of pilot projects enter into agreement for EMS use with bodies representing particular sectors of industry with attendant incentives (or disincentives). Provision for this could be made in the proposed Environmental Management (Incentives and Disincentives) Legislation.
3. That a “Guidelines for Environmental Agreements” be developed and utilized.

USA

1. That in developing the proposed Environmental Management (Incentives and Disincentives) Legislation, particular note be taken of **The Wisconsin Cooperative Environmental Agreement Law, 1997**.
2. That both bilateral Agreements (Wisconsin/Bavaria and New Jersey/Israel) be noted as indicative of cooperative agreements that Jamaica could enter into towards promoting EMS use.
3. That “Prosecution Guidelines” and “Sentencing Guidelines be developed and used generally in respect of environmental law breaches and more particularly in encouraging EMS use

whether voluntarily or by virtue of a court order as proposed in respect of amending **The Criminal Justice (Reform) Act, 1978**.

4. That provision be made in **The Criminal Justice (Reform) Act, 1978** for particular officers of companies to be personally amenable to criminal prosecution in specified circumstances for breach of particular environmental laws.
5. That taxes be applied to discourage environment-unfriendly products and processes and that these be provided for under the proposed Environment (Incentives and Disincentives Legislation).
6. That citizens be clearly empowered statutorily to take action to have relevant government agencies act without undue delay (having regard to all relevant circumstances).

9. CONCLUDING COMMENTS

Upon examining the various legislative instruments, mechanisms and approaches in Jamaica and other countries it is clear that there already exists in Jamaican law, facilities and provisions for promoting EMS use. It is however even more evident that there is need for legislative and related changes in order to effectively promote EMS use. As a necessary component of part of a broader national EMS policy and strategy, these changes are but part of the challenge. The submission is however that these changes need to be tackled with urgency if the process is to move forward duly buttressed.

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LIST OF ENVIRONMENT RELATED LEGISLATION

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| 1. Animals (Diseases and Importation) Act, 1948 | 20. Jamaica National Heritage Trust Act, 1985 |
| 2. Aquaculture, Inland and Marine Products and By-Products (Inspection, Licensing and Export) Act, 1999 | 21. Kingston Improvement Act, 1890 |
| 3. Bark of Trees (Sale Prevention) Act, 1929 | 22. Kingston & Saint Andrew Water Supply Act, 1911 |
| 4. Bauxite & Alumina Industries (Special Provisions) Act, 1977 | 23. Litter Act, 1985 |
| 5. Beach Control Act, 1956 | 24. Local Improvements Act, 1914 |
| 6. Black River Upper Morass Reclamation Act, 1941 | 25. Marine Board Act, 1903 |
| 7. Caribbean Agricultural Research & Development Institute Act 1982 | 26. Milk River Bath Act, 1927 |
| 8. Carriage of Goods Act 1889 | 27. Minerals (Vesting) Act, 1947 |
| 9. Clean Air Act, 1964 | 28. Mining Act, 1947 |
| 10. Country Fires Act, 1942 | 29. Morant & Pedro Cays Act, 1907 |
| 11. Endangered Species (Protection Conservation and Regulation of Trade) Act, 2000 | 30. Natural Resources Conservation Authority Act, 1991 |
| 12. Exclusive Economic Zone Act, 1991 | 31. National Water Commission Act, 1963 |
| 13. Factories Act, 1943 | 32. Parish Councils Act, 1901 |
| 14. Fishing Industry Act, 1975 | 33. Parish Councils Building Act, 1908 |
| 15. Flood-water Control Act, 1958 | 34. Parishes Water Supply Act, 1889 |
| 16. Forest Act, 1937 | 35. Pesticides Act, 1987 |
| 17. Harbours Act, 1874 | 36. Petroleum Act, 1979 |
| 18. Institute of Jamaica Act, 1978 | 37. Petroleum and Oil Fuel (Landing & Storage) Act, 1925 |
| 19. Irrigation Act, 1949 | 38. Port Authority Act, 1972 |
| | 39. Public Health Act, 1985 |
| | 40. Quarries Control Act, 1984 |

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| 41. | River Rafting Act, 1970 | 45. | Urban Renewal (Tax Relief) Act, 1995 |
| 42. | Tourist Board Act, 1955 | 46. | Water Act, 1922 |
| 43. | Underground Water Control Act,
1962 | 47. | Watersheds Protection Act, 1963 |
| 44. | Urban Development Corporation Act,
1968 | 48. | Wildlife Protection Act, 1945 |

LIST OF INTERNATIONAL ENVIRONMENT-RELATED TREATIES TO WHICH JAMAICA IS A PARTY

The International and Regional Treaties and Conventions to which Jamaica is presently a party, include:-

1. International Plant Protection Convention, Rome, 1951. **Accession:** 24 November 1969
2. Convention on the Territorial Sea and the Contiguous Zone, Geneva, 1958. **Accession:** 8 October, 1965
3. Convention on the Continental Shelf, Geneva, 1958. **Accession:** 8 October 1965. **Entry into Force:** 7 November, 1965
4. Convention on the High Seas, Geneva, 1958. **Succession:** October, 1965. **Entry into Force:** 30 September, 1962
5. Convention on Fishing and Conservation of the Living Resources of the High Seas, Geneva, 1958 **Succession:** 16 April, 1964. **Entry into Force:** 20 March, 1966.
6. Treaty banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater, Moscow, 1963. **Ratification:** 22 November, 1991
7. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial bodies, London, Moscow, Washington, 1967. **Ratification:** 10 August, 1970
8. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other weapons of Mass Destruction on the Sea Bed and the Ocean Floor and the Subsoil thereof, Washington, 1971. **Ratification:** 30 July, 1986
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12. International Convention on the Prevention of Pollution from Ships, London, 1973. **Ratification:** 13 June, 1991
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22. Convention on International Trade in Endangered Species of Wild Flora & Fauna (CITES) Instrument of Accession deposited, signed on 24 March, 1997. **Effective:** 22 June, 1997
23. Convention of Wetlands of International Importance especially as Waterfowl Habitats (Ramsar Convention) Instrument of **Accession** deposited 13 June 1997. **Effective:** 7 February 1998.
24. The Copenhagen Amendment to the Montreal Protocol on Ozone Depleting Substances. Instrument of **Accession** deposited 6 November, 1997. **Effective:** 4 February 1998
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PRECEDENTS OF JAMAICAN LEGISLATIVE PROVISIONS ENCOURAGING “VOLUNTARY COMPLIANCE”

NRCA PERMIT

NRCA LICENCE

**THE PORT OF SPAIN ACCORD ON THE MANAGEMENT AND CONSERVATION OF THE
CARIBBEAN ENVIRONMENT**

APPENDIX VII

**EUROPEAN COMMUNITY ECO-MANAGEMENT AND AUDIT SCHEME (EMAS) - EEC – COUNCIL
REGULATION NO. 183/93**

WISCONSIN COOPERATIVE ENVIRONMENT AGREEMENT LAW

APPENDIX IX

**MEMORANDUM OF INTENT BETWEEN ISRAEL AND NEW JERSEY CONCERNING A JOINT
ISRAEL-NEW JERSEY PROGRAM TO PROMOTE THE ESTABLISHMENT OF ENVIRONMENTAL
MANAGEMENT SYSTEMS**

MEMORANDUM OF UNDERSTANDING TO CREATE THE WISCONSIN-BAVARIA REGULATORY REFORM WORKING PARTNERSHIP