Abstract

In France, disputes concerning activities which bear environmental risk are initially adjudicated by Administrative Tribunals. These frequently involve claims initiated by associations and local residents against projects which have been granted permits by administrative authorities but whose impact is alleged to be harmful to the health and well-being of the local environment and community. Moreover, far from being the exclusive preserve of “environmental guardians” legal claims are nearly as often initiated by business, industrial or agricultural concerns themselves. In such cases, the disputes do not concern operators seeking a permit for a project. They arise in response to administrative sanctions having been previously issued against the operator-claimant, revealing a failure in the usual mechanisms of negotiated settlements.

Keywords
Environment, Litigation, Administrative Law, Associations, Pollution.

Introduction

In France, State administrative authorities have adjudicating and permitting jurisdiction regionally over any activities presenting an environmental risk perpetrated by the approximately fifty thousand business, industrial or agricultural concerns within their area of oversight. Every year, these regional administrative authorities hand down a total of approximately ten thousand decisions. This control mechanism, which in its current form is based on a law passed in the 1970s\(^1\), is the result of a long, historic process dating back to the industrial era (Bonnaud, Martinais, 2005).\(^2\) The raison d'être for this legislation is to place control of environmental risks under the administrative oversight of regional State services. While only a scant number of these administrative decisions are challenged in court, the existence of these challenges plays an important role in structuring disputes involving the environmental policing of industrial and agricultural activities.

“Toothless law,” “deficient enforcement,” “weaknesses in oversight and sanctions...” are some of the remarks commonly made by informed observers of this law who generally join in denouncing the insufficiency of environmental protection under the laws in France, as currently administered and adjudicated. This inadequacy results, in part, not only from the State's lack of sufficient material and human resources required to administer environmental protection, but also, and more fundamentally, from the structure of this law and its regulations. This law is to ensure that “environmental interests” are as much to be taken into account as the interests of those who are engaging in the activity which is the source of environmental pollution, without necessarily proposing a clear hierarchy between the
competing interests. What is sometimes seen as inadequate protection of the environment may in fact be attributed less to faulty application of the law than to the ambiguity and internal contradictions of the law itself. The judicial practices which result from this situation, i.e. the reluctance of administrative authorities to cite offenders for infractions, and more importantly to transmit their reports to the public prosecutor's office for prosecutions, tend to push parties to seek a negotiated solution to their disputes. These practices were highlighted in France in the studies of the uses of criminal law in environmental matters (Lascoumes, 1989).

To the above may be added the recurring demand of industry to limit the administrative oversight of risk-based activities, a demand often based on the claim of the necessity to remain competitive internationally, inherent in the process of globalisation (Lee, Stokes, 2009). By basing their arguments on the notion that the severity of controls would handicap international economic competitiveness, employers' organisations have taken advantage of the current economic crisis and successfully lobbied the French government in order to obtain a new oversight scheme in which regulations have been eased for roughly 40% of concerns formerly subject to oversight. As a result of these exemptions it has become more difficult for environmentalists and local residents to challenge administrative permits. The exempted industrial operators are no longer required, for example, to produce environmental impact studies for their activities.

In the framework of the above laws, regulations and administrative decisions, the notion of risk is viewed as a function of the probability that certain events, intervening at various stages in the lifecycle of a company (creation, permit, shutdown, transfer...), will be prejudicial to the identified environmental interests. Admittedly, rather than imposing pure and simple suspensions of activity on industrial operators, the legislation imposes moderate objectives of general risk limitation. However, the fact that environmental risk is not understood by the law as an undetermined category but, on the contrary, is associated with specific interests, requires actors and the administration to consider and justify these interests. These interests range from the preservation of habitat (protection of nature and sites) to the protection of community life (public health and conveniences). This plurality of “protected interests,” to quote an expression used in French environmental law, offers, as a corollary, the possibility for complainants to use a plurality of registers of judicial argumentation in the context of proceedings contesting administrative decisions. This is precisely what this study aims to show. The findings are based on 328 cases, corresponding to two years of activity of French administrative tribunals.
Contesting administrative decisions: the diversity of litigation configurations

Administrative oversight of compliance with environmental regulations often stands out for its significant shortcomings. The consequence of this state of affairs is the conclusion, reached by numerous studies on the subject in Europe and North America, that many companies resort to “self-regulatory” practices. These practices replace administrative oversight in matters of environmental regulation. For lack of a better system due, in part, to the public authorities’ shortage of human and financial resources, this situation is sometimes tolerated. However, it may also be deemed a ploy by the State to justify its delegation of regulatory oversight allegedly because of the need to involve companies. For many polluting companies, resorting to “self reporting” is a way to demonstrate its willingness to cooperate while thus hoping to dismiss the threat of external oversight which they know will be selectively targeted (Helland, 1998). It may also be a matter for some companies of showing goodwill by setting higher standards than existing regulations require so as to engage in a relationship of trust with the administration and in this way weaken, over the long term, future investigations (Decker, 2006).

These corporate “self-regulatory” practices are at the heart of an important debate on how to explain that, in many situations, we find compliance by those “self-regulated,” when in fact we would expect inadequate oversight to lead to a situation of generalised non-compliance by them (Harrington). Certain studies focus on reasons other than the deterrence model of compliance through sanctions, deeming that the complexity of the phenomenon cannot be reduced simply to a question of what influence the mode of regulatory oversight may have on environmental performance. It is therefore possible to focus either on internal causes, such as the way a sector of activity is organised or a company’s corporate culture, (Grant, 2002, Roos, 1972) or to posit the hypothesis of a convergence of internal and external causes linked to surrounding social pressures (Kagan and Alii, 2003). Indeed, the role played by interest groups favourable to environmental protection, and in particular their proclivity to use the courts, is a central element of such social pressure (Hamilton, 1993).

A debate remarkably similar to the one surrounding “the deterrence model” can be found in the literature: this time it is a matter of the ability of environmental interest groups to orient the way that the law is applied. This debate is taking shape in the context of the burgeoning importance of environmental law through individual rights which are retained by general interest groups (Miller, 1995). Part of the literature on the subject suggests that the ability of interest groups to influence the way the law is applied is not at all spontaneous but must be considered within the framework of political and institutional evolution over the long term. Therefore, the degree of power which the State could transfer to interest groups in matters of administrative policing of environmental risk such as the ability to report violations or to initiate legal proceedings through a grant to them of standing to sue, for example, remains a decisive precondition for the emergence of sufficiently powerful environmental interest groups. The latter may then be able to take on legal disputes with a view to substantially altering the judicial state of affairs (Naysnerski, Tietenberg, 1992). Yet other authors point out that while the existence of legislation favorable to environmental protectionists may be a necessary condition to their ability to orient the way the law is applied, it remains insufficient for this purpose.

Therefore, the decision by interest groups to enter legal battles is not the mechanical consequence of institutional reforms, like the lifting of legal obstacles to enhance associations'
rights to legal action, claims which would have been heretofore curbed by an unfavorable legal system (Morag-Levine, 2003). The decision to take legal action is also linked to the complex nature of the relations which these groups maintain with the State (Coglianne, 1996). Therefore, when associations bring proceedings before the criminal justice system to denounce violations of environmental law, they often appear as auxiliaries of the State; they participate in the oversight of criminal behavior. Administrative disputes reveal another face of this relationship: submitting disputes to the courts for “legal settlement” as a way to correct the inadequacy of administrative oversight.

Whether they be linked to the evolution of an institutional framework or to the particular configuration of the relationship between the administration and interest groups, a certain number of conditions must be in place not only so that administrative measures may be efficiently called into question and accordingly submitted for judicial oversight but also so that situations in which the administration abstains from intervening may nevertheless be contested (Bowden, Tweedale, 2002). These two states of play illustrate well the different dispute configurations which may be observed involving environmental risk-related litigation, as far as its handling by the administrative justice system in France is concerned.

Environmental disputes in France involving regulated installations are decided on by the Prefect, who is the head of State services at the regional level. The organisation of the administrative oversight system influences which types of legal action parties may choose to take against a prefectorial decision. Legal oversight unfolds in different sequences following the evolution of the industrial project: initial authorisation; complementary regulations, aimed at enforcing compliance with the conditions for carrying out the activity; and formal notice, if not administrative sanctions, in case of non-compliance with the regulations. Sanctions may be financial, requiring monetary deposit to finance studies or clean up or they may come in the form of interruptive measures (injunctive relief), requiring suspension of the activity or complete shutdown.

Indeed, disputes may arise between third parties, such as associations, or local residents acting individually or together, on the one hand, and the administration and applicants for permits to operate, on the other. These disputes concern application for permits, above all, and come into play a priori, i.e., before the environmental risk-bearing activity is actually launched. In this case, the dispute arises at the outset of the process. However, disputes may also arise when industrial operators challenge prefectorial decisions. When an environmentally harmful activity results in administrative sanctions, which cause the company under investigation, prejudice, the dispute occurs a posteriori. The existence of such dispute configurations consequently has a strong impact on the contexts in which environmental risk-related controversies are employed within the contentions of the opposing parties at trial. Therefore, legal action initiated by industrial operators focuses on the issue of non-compliance with administration-imposed regulations, while claims brought by third parties target disputes related to proposed guarantees on the part of the operator within the framework of its application for authorisation, on one hand, and that of the administration on the other in the context of its permit issuance. These guarantees concern the future operations of an industrial installation which may be a source of environmental hazard and pollution.

One of the characteristics of environmental legislation is its positioning at the point of articulation between criminal and administrative law. To a certain extent, the situation in which the industrial operators themselves are at the origin of legal challenges evokes in particular the repressive side of this legislation. An example of this overlapping of criminal
and administrative measures may be found in the dual capacity of the administrator in charge of overseeing risk-bearing industrial installations to either issue administrative sanctions, which are open to attack before administrative tribunals, or to issue violation citations which may lead to criminal prosecution. Administrative sanctions are much less common than the drawing up of ‘official reports’ (referral for prosecution), but the former present the advantage of yielding immediate results such as suspension of activity, shut-down, monetary deposits, etc. whereas when the administration issues a violation citation by official report, it triggers a long and uncertain process which only seldom leads to judicial prosecution or conviction. Moreover, in addition to the above, it is also possible for associations, or third parties, like local residents who are victims of environmental pollution, to combine administrative claims, such as the challenge of an authorisation, with judicial proceedings, either in a criminal framework, for violation of environmental legislation, or on the civil level as well, for public nuisances related to environmental activity. Thus, proceedings within the Administrative Justice System fit into a whole body of procedures in which they may constitute but one avenue.

**Methodology**

The statistical analysis of judicial decisions is the chosen method for the present study. The sample of cases studied has been compiled through the examination of unabridged texts drawn from the documentary database of administrative jurisdictions. An in-depth analysis consisted in applying a coded grid of about 40 variables to the written body of decisions. These variables refer to information about the nature of contested administrative decisions, about the profile of the parties and the activities in question and about both the legal arguments put forward by the parties as well as the magistrates’ opinions. For the period chosen for the study (decisions handed down between 1 January 2006 and 31 December 2007), the analysed sample consists of 328 magistrates’ opinions and decisions.

The structure of administrative proceedings in matters of environmental disputes is profoundly binary in nature. The claims are mainly concentrated on opposite extremes of the spectrum. One is the proceedings for application for formal authorisation to engage in an activity, and before any environmental pollution actually occurs. The other phase is the proceedings for administrative sanctions, after harm has already occurred. Between these two periods, little administrative action takes place. We do not generally witness litigation until environmental pollution reaches a critical level. Nonetheless, frequent administrative decisions are made during this intermediary phase between the authorisation and the violations. These decisions are generally “complementary regulatory measures” which aim at reinforcing the restrictions imposed by the initial authorisation. This may involve, for example, requiring that the activity be moved to a more remote location or that the volume or intensity of the waste or disturbance be reduced. However, these measures rarely lead to claims. The lack of claims during this phase can easily be explained by the fact that these interim decisions, even though they may impose more stringent regulations on industrial operators, do not directly call into question the permit to operate nor do they compromise the future industrial development through court orders or sanctions. These measures rarely trigger legal action by third parties because they intervene “after the battle,” that is to say, once the permit has already been issued.

A distinction can thus be drawn between administrative decisions which give rise to scant claims and those which strongly motivate parties to take legal action due to the serious prejudice they generate. The latter are manifestly over-represented in the body of
administrative cases in contrast to the “repartition structure of prefectorial rulings” (figure 1). The dispute configurations therefore associate, as has been indicated above, the sequential order of industrial, agricultural or business activity with a particular category of claimant. Third party claims are essentially filed \textit{a priori}, while those of industrial operators are most often filed \textit{a posteriori}, as previously stated.

Occasionally, industrial operators seek judicial review \textit{a priori} in the same way that third parties sometimes seek redress \textit{a posteriori}. In these cases, the proceedings are reversed and claimants seek court action against negative decisions. Here, the claimants may request that the court vacate permit denials, while in third party claims, the contest may be the administration's refusal to strengthen measures or sanction violators. These dispute configurations are, however, much scarcer statistically, and this observation leads to phenomena which are not necessarily favorable to environmental protection. Indeed, if industrial operators rarely contest authorisation denials, it is because the refusals are quite rare, a fact which might indicate the administration's inadequate study of permit requests.\textsuperscript{21} As for third parties such as associations, local residents or local authority, once permits are issued, they rarely seek administrative intervention by filing claims with administrative tribunals.\textsuperscript{22}

The redress sought from the administrative tribunals via the claims process studied herein is of a particular nature since it aims to annul an administrative decision. The claims consequently reflect the way this administrative activity operates. Knowledge of the inner workings of this system on a normative and empirical level is imperative in order to understand the logic behind the litigation. In the case of administrative justice, this prerequisite seems easier to meet than in other fields, like criminal sociology, or the sociology of civil disputes, to the extent that the dispute can be traced to administrative decisions and activity for which there are more likely to be written entries. This may not be the case for private law documents or contracts, so it is easier to obtain data on the frequency of claims in the case of administrative justice. It is therefore with regard to the intensity of legal activity in matters of regulation and oversight of industrial installations that the frequency of claims must be assessed. It follows that a claim filed against this administrative activity, be it a decision or other action, constitutes the object of litigious action.\textsuperscript{23}

Disputes involving risk-bearing industrial installations reveal the way that the administrative control of environmental pollution and disturbance works. The sequential nature of this control which is organised in successive steps (permits, complementary directives, formal notifications and sanctions) structures the configuration of disputes observed. Notwithstanding the fact that the types of disputes may be divided into specific categories according to the claimant's status, that is to say, that \textit{a priori} disputes are “reserved” for third parties and \textit{a posteriori} ones for industrial operators, these two dispute configurations are not strictly parallel in nature. Indeed, in cases where authorisations are called into question, the procedural configuration is \textit{tripartite}: third parties seek to block permits issued by the administration, while industrial operators join the administration as defendants to seek to uphold a decision which has been challenged. Moreover, the latter are in this case particularly combative as evidenced by their rare failure to appear in court. Their non-appearance rate, which can be measured by official court documents, is extremely low. On the other hand, third parties are, barring a few exceptions, generally absent from \textit{a posteriori} disputes. We have remarked that, in fact, they rarely contest the administration's denial of their standing to participate. With rather few exceptions, it is also quite unusual for them to join the administration as a defendant when operators seek the cancellation of contentious directives or the award of sanctions.\textsuperscript{24} Therefore, not only are local residents or associations, who are the natural advocates of environmental protection, far from being the
only driving force behind environmental disputes, but, moreover, a part of the body of disputes is, to a certain degree, simply reduced to a face-to-face contention between industrial operators and administrative authorities.

The classification of case types that can be observed in our sample further shows that there is a roughly even distribution of a priori and a posteriori disputes. This equal division shows that the corpus of administrative disputes in the realm of environmental protection is constituted of claims filed by both businesses and laypeople in rather equal proportions. In disputes involving “businesspeople,” these oppose industrial operators seeking to protect their interests against administrative authorities, while in “lay” disputes third parties are pitted against the operators. The administration appears to resort to injunctions, or to sanctions, only when faced with critical situations, a scenario which in turn leads to the filing of a claim by the operator. In the profile of companies which file claims, we find a non-negligible number of entities which are winding up by an order of court (11%) or which have gone out of business (7%). This economic or financial fragility can be explained by the low level of equity capital available to these businesses and the fact that many operators are natural persons, individuals or partnerships (other than corporations). This scenario of low capitalisation makes it all the more difficult for the authorities to obtain the funds for the depolluting of sites and explains the necessity for a mandate of prior monetary deposits.

The configurations in a priori disputes vary, however, from those in a posteriori ones according to the type of activity under dispute. Among the three most common categories of risk-related installations involved in disputes – waste treatment facilities, quarries and industrial livestock farming operations (table 1), we can observe a wide disparity of dispute configurations (figure 2). Livestock farming and quarries are involved in disputes, above all, related to authorisation applications, whereas waste treatment facilities appear in the sample mainly as a result of claims filed by an operator against an injunction or administrative sanction. These facts, which are largely determined by the administrative activity of control, strongly orient, as we shall see later, both the structure of the claims and the type of arguments submitted by the parties in the proceedings.

Companies subject to administrative oversight do not settle for simply being key players in the administrative claims arena. The analysis of appealed administrative decisions shows that industrial operators obtain the reversal of prefectural rulings under dispute in 41% of cases. This proportion is quite close to the reversal rate obtained by “third parties” (45%), a rather high success rate when compared to other areas of administrative disputes. It must further be noted that industrial operators are more likely to employ the services of attorneys than third party claimants. They do so in 80% of the cases where they are the claimants. In addition to the relative success in litigation by industrial operators, it is also interesting to note that in collective actions, measured by the number of claims filed, associations are quantitatively under-represented in cases involving local residents. Nonetheless, when they are the driving force behind legal actions, associations are more likely to win their cases than either third parties or industrial operators. Their claims also lead to a total rescission of the disputed decision in a high number of cases, while the courts, when faced with the requests of other categories of claimants, often simply remove certain prescriptions from the disputed rulings. Associations’ high success rate may be explained by the judiciousness they exhibit when choosing which cases to appeal from prefectural decisions and bring before a civil court judge. This selectivity is a characteristic of “courthouse regulars” who belong to a category of claimants capable of calling up significant scientific and technical expertise, both internally and externally.
Pleadings in appeals against administrative decisions: styles of legal discourse employed by parties in their briefs

In appeal litigation, claimants who seek the reversal of an administrative decision support their case with legal arguments which are the most pertinent and likely to demonstrate that the contested decision was beyond the powers of the administration. In French law, the legal grounds for the appeal are put forward in “the Statements of the Case.” When they solely refer to procedural points, such as the respect for rights to due process of hearing of the parties, or to a right to public disclosure, or to the question of the receipt and consideration of documentary evidence or its exclusion, or relate to mandatory environmental impact studies, they are referred to as *external legality issues*, as opposed to legal points which are deemed *internal legality*.

It seems all the more important to take note of the distinction between these two types of legal arguments on appeal, *internal* or *external legality*, as *external legality* issues are discussed first by the magistrate of the civil court, who hears cases on appeal from Prefectorial orders or decisions, and they may provide him or her with a legal basis to reverse a disputed administrative decision on these alone, without even reaching the examination of *internal legality* issues. This then introduces an intrinsic bias to the systematic study of the elaboration of legal arguments by opposing parties on appeal, insofar as a ruling on appeal which cancels a disputed decision on procedural grounds alone will provide little, if any, information about what other legal issues may have been raised and discussed in the appeal. This bias may explain why decisions based on *external legality* arguments turn out to be more common in decisions on appeal than those based on *internal legality*. Furthermore, developing arguments based on *external legality* does not mean that only secondary dispute issues are put forward. Some legal reasoning of this type may indeed lead to only a cursory examination of the facts. This may be the case, for example, regarding the respect given to formal criteria in the display of public enquiry notices. However, more often than not, a debate of minor issues triggers a more in-depth examination of the main issues in the case, which may, in fact, take up the majority of the proceedings. This is actually the typical situation because the most common arguments are also the ones which lend themselves to the easiest elaboration. This is generally the case when considering the basis for the chief assessor's opinion or the decision to proceed, for example, with a thorough examination of an environmental impact study.

The type of legal arguments put forward is largely dependent on the dispute configuration. Legal grounds related to impact studies or public enquiries are by nature linked to *a priori* disputes aimed at authorisations. On the other hand, when the legal grounds put forward involve the lack of due process in the hearing of the parties during the investigation phase, and in preparation for an industrial operator's trial, the case type relates more to the specific rights of defendants to present their observations to the administrative authorities in case of a dispute. The detailed analysis of elaborated legal arguments makes it possible to distinguish, moreover, within the same dispute configuration, different *types of argument* linked to *specific categories of claimants*. As the factor analysis below shows (figure 3), collective actions, which imply the involvement of associations, appear alone in their ability to gather a sufficient level of expertise necessary for the calling into question of environmental impact studies. The latter are complex in nature, covering the justification for the project, the initial environmental diagnosis and eventual compensatory measures. Individual claims filed by *third parties* focus more on the inner workings of public enquiries or on more fact-based or formalist arguments, for example, the question of whether the application for the issuance of a permit submitted by the operator was adequately completed.
In view of these elements, it is clear that the dispensing with mandatory environmental impact studies in more than one third of the applications for authorisation, as part of the recent legal reform concerning the administrative oversight of risk-bearing industrial installations, will have radical consequences on the environmental protection landscape in administrative and judicial disputes in France.
The most common procedural argument, the attack on the adequacy of the environmental impact study, requires a technical and judicial knowledge of the subject, a fact which explains why it is an argument put forward, above all, by associations. Presented to the administrative authorities by the industrial operator as a central element of the application for authorisation and submitted for public scrutiny, the environmental impact study is a document which is organised, following a mandatory outline, and which examines the different stages in the future chronology of the activity. In addition to the “diagnostic” section, the impact study also contains a “curative” section which compels the industrial operator to make provisions for technical and organisational measures which are within their means, aimed at reducing if not eliminating environmental pollution and disturbances. However, disputes concerning these “compensatory measures” appear generally limited to the reduction of disturbances suffered by the local community and only rarely lead to administrative scrutiny of compensatory measures providing for harm done to the natural environment. Therefore, the majority of cases related to compensatory measures focus on the impact on the immediate health and well-being of local residents.

The distinction between the protection of the health and well-being of the local population and protection of the natural environment is at the heart of the extended definition which the administrative law provides for “environment.” While the debate in external legality concerns procedural issues, such as, the right to adversary proceedings, public access to information or the regularity of documents, such as the impact study, submitted by industrial operators to support their application for authorisation, the debate concerning internal legality revolves around the legal adequacy of the content of administrative decisions. The question of the legality of the latter, like, for example, of the measures imposed on operators by a prefectural order, is therefore discussed with regard to their compliance with environmental protection regulations. The legal arguments put forward by the parties thus hinge on the degree of protection granted to different social or environmental concerns protected under the law. Third party claimants, in general, are more likely to cite interests relative to the protection of community health and well-being, like public conveniences or safety, rather than interests related to the protection of the natural environment, such as the preservation of nature or sites.

But the observation of the legal reasoning employed in environmental disputes highlights an even more striking finding (cf. Table 2). Among the internal legality arguments put forward, the most commonly used one refers to the “designation of the liable party,” that is to say, the identification of the industrial operator who is responsible for respecting the prefectural measures within the administrative oversight system. This finding allows for an even more precise profiling of ‘a posteriori’ cases opposing administrative authorities and industrial operators. When the latter seek redress in court against administrative decisions, a quarter of the cases mention this type of legality. In other words, a significant part of the activity of administrative tribunals consists in hearing cases where the reality of environmental impact is, paradoxically, not even the subject of debate, but where the dispute is limited to identifying the industrial operator to be held accountable. It is likely that these cases correspond to “structurally contentious” situations where the usual mechanisms of negotiation between administrative authorities and the industrial operator are deadlocked. This ‘wrench in the works’ may be due to a dispute over the identity of the liable operator or linked to his or her insolvency (premeditated or not). Formal notifications by administrative authorities or mandated administrative or financial sanctions, such as requirement of monetary deposit or suspension of activity, then provoke claims by the industrial operator.
A certain number of cases of this type involve companies which are either bankrupt or are winding-up by decision of court and which are represented by an attorney designated by the commercial court. These companies refuse to comply with administration-mandated depolluting. The consequences of bankruptcy may also lead to situations where a new industrial operator will agree to take over only a part of the former operator's activities, as in the following case where the buyer excluded from the rescue plan the operations of a site whose depolluting was prohibitively costly, leaving the administrative authorities to deal with the insolvent former industrial operator on their own. In other cases, complex legal arrangements blur the clear identification of the liable party or parties, in particular when the industrial operator and the landowner of the site are two distinct legal entities bound together by contractual relations which are likely to vary over time.

Examination of the principal legal arguments which are advanced in relation to the type of concerned activity allows for a more careful profiling of the facilities targeted by this type of dispute. For example, only waste treatment facilities and industrial activities are involved in cases where the identification of the liable party or parties is an element of the dispute. Inversely, quarries and livestock facilities are not concerned by this dispute configuration. The fact that these activities are long-term may account for a greater stability in their operation, as far as the continuity of the company's legal status or the property ownership of the site are concerned. Lingering instability, over time, is precisely the source of dispute in the cases mentioned above.

Building on these observations, we now return to the dichotomy that we have established between a priori and a posteriori disputes and approach them from the point of view of the types of legal argument. In this way, we may identify the first type of dispute configuration, corresponding to claims initiated by industrial operators against administrative orders, in which the issue of assessment of liability often takes precedence over the examination of the reality of environmental impact. In these situations, the administrative authorities often experience genuine difficulties in attributing liability, as is evidenced by the fact that more than one third of the legal arguments put forward by industrial operators are favorably received by the courts on appeal. As for a priori claims, legal strategies here are strongly weighted toward contesting the environmental impact studies, which are the favorite target of associations. However, contrary to the previous case, the most commonly used legal arguments are not the most successful ones. Taking industrial operators to task over questions of environmental impact study regularity remains a difficult exercise, whose legal arguments are favorably received by courts in only one case out of five.

The high success rate of claims on appeals brought by associations, which has been previously alluded to above, can be in part explained by the plurality of the types of legal argument which they employ. An example is given to us in cases in which claimants support their arguments with the provisions in the Environmental Code which compel administrative authorities to take the financial resources of the industrial operator into account, as a guarantee of its ability to cope with costs that may result from its environmental protection obligations. We might initially think that these provisions apply primarily to industrial sites or waste treatment facilities, where depolluting presents serious problems. And it is likely that the provision was written into the law with this feature in mind (this provision explicitly refers to situations of industrial shut-down). But on the contrary, this legal strategy appears most of the time in agricultural disputes. As the case below shows, livestock facilities are often operations managed by a single industrial operator or by a small handful of people,
whereas the volumes of activity may be considerably large. This fact leads to situations where the risk of debt and financial ruin resulting from major expenses mandated by requirement for compliance with environmental regulations is extremely high.

Judges seem particularly sensitive to the fragility, especially economic, of industrial operators who manage facilities with limited technical, financial and human means. In one half of the cases, this argument is favorably received by the courts. A stringent oversight system is attenuated by an accompanying economic mechanism whose aim, in principle, is environmental hazard and public nuisance prevention. However, employing pragmatic criteria seems to bear more fruit than a blind assessment of environmental impact.

Conclusion

A rather contrasted image of environmental dispute litigation emerges from the analysis of the varied forms of legal challenges brought before the courts. On the one hand, the dynamic litigation activity demonstrated by interest groups and individuals acting in defense of environmental interests highlights the fact that the wielding of legal dispute weaponry remains a key resource in the application of environmental law in France. On the other hand, when companies under oversight are themselves the claimants, they often put the administrative authorities in a difficult position, in particular when the debate focuses on matters of imputability of liability, rather than on the harsh reality of environmental pollution and public nuisance. If particular attention was paid, within the framework of this study, to the varied types of legal arguments, it is because they reveal as well the plurality of dispute strategies. When the environmental “cause” is defended by third parties, i.e. non-industrial operators, strategies focus more on the defense of public health and well-being rather than on the natural environment. Finally, even though they receive the privileged attention of associations, in-depth assessments of the environmental impact of disputed activities are given less weight by judges than are arguments pertaining to companies' economic survival.

Legal challenges brought by companies against administrative decisions stand out for their high success rate. This reality and the fact that on the opposing side we find many particularly isolated individuals seeking redress against minimally-sized industrial operations with scant resources seem to call into question the ability of local residents and associations to use the administrative justice system in an efficient manner in support of environmental protection as well as public health and well-being. Their range of action is all the more limited in the context of the recent evolution of environmental law in France, which tends to narrow the scope of judicial disputes. The fact that environmental protection associations base their legal strategy on a critical analysis of and an attack on the adequacy of environmental impact studies drafted by companies, as a means to contest authorisations, highlights all the more eloquently the consequences of oversight deregulation currently underway in France. Exempting a substantial number of companies from carrying out previously mandatory environmental impact studies has deprived third party litigants of a large part of their arsenal of legal arguments and, therefore, of their ability to successfully challenge administrative decisions. Moreover, the mere availability of legal strategies at the disposal of environmental interest groups, even though the frequency of their use may be limited, is likely to have played an important role not only in the prevention of harmful projects, but also as a preventive measure that may well have spurred on better environmental performance. The most efficient means of dissuasion in many respects is often the judicial dissuasion to which polluters are subjected by these groups rather than administrative dissuasion through selective
sanctions.

References

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12 Hamilton, J., 1993. Politics and Social Costs: Estimating the Impact of Collective Action on Hazardous Waste Facilities. The RAND Journal of Economics, 24, 101-125. The study shows that companies take local residents' ability to organise in a collective manner when they must decide whether to expand their operations. This ability, moreover, to join in collective action is not necessarily proportional to the gravity of the disturbances.
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17 Bowden, S. and Tweedale, G., 2002. Poisoned by the Fluff: Compensation and Litigation for Byssinosis in the Lancashire Cotton Industry. Journal of Law and Society, 29(4), 560-579. The context studied by the authors is that of a refusal of public authorities to take legal action against the industrial operators responsible for pathologies caused by their polluting activities. As a result of administrative default, local interest groups then stood in and filed claims in negligence before the courts.
18 According to available statistics, around five hundred measures of administrative sanction are pronounced annually. There are twice as many notifications of violation by official report (around one thousand), but only a
small fraction of these will give rise to convictions (about a hundred). Source: Annual report of the French Inspectorate of Classified Installations for the Protection of the Environment

19 The Administrative Tribunal Archives is a digital database containing an exhaustive inventory of all legal decisions, unabridged, which have been issued by administrative tribunals in France since 2004. To constitute this sample, a body of decisions comprising the words “code de l’environnement” (systematic reference in this type of case) was first compiled. This corpus was then selectively sorted through for pertinent elements.

20 The decisions of the type “complementary regulations” represent 38% of decisions made by the Prefect but only 14% of decisions challenged on appeal.

21 In 2007, about fifty permit refusals were issued by the administrative authorities while more than two thousand permits were granted!

22 This observation does not mean, however, that local residents remain passive once permits are issued. Other means of action are available aside from claims filed with administrative tribunals: claims in criminal court on the basis of environmental offenses, extra-judicial pressure exerted on companies and administrative authorities.

23 This information is provided by the Inspectorate of Classified Installations for the Protection of the Environment which releases annual data relative to rulings and decisions.

24 Procedural reasons also explain the observed findings. When local residents challenge an operating permit, it is easy for the operator involved to intervene in the case as a defendant: he can indeed justify a manifest interest in upholding the administrative decision. In the opposite situation, when an operator challenges an administrative sanction, it is more difficult for third parties to justify a standing to participate to the extent that the annulment of the decision is not directly prejudicial to them.

25 A quarter of companies in our sample have capital below ten thousand euros.


27 However, if we remove associations from the equation, third parties are just as likely to seek legal representation as operators. Associations sometimes have expert witnesses at their disposal whose presence may negate the need for a law firm’s services.

28 Third parties, with the exception of associations, are in the near totality of cases community members residing near installations. Occasionally, they are a legal entity, for example, another industrial operator of a classified installation nearby or other operators involved in the case because they were formerly associated with the management of the site.

29 Under the term “association” we have identified associations for the protection of the environment and of public health and well-being in a wider sense (associations for the protection of nature, local resident groups...) through their registered name.


31 The statistical analysis of grounds of legality, due to the complexity of applying this method of analysis, was carried out for only one of the years covered in this study (2006): i.e. 498 grounds of legality for 168 cases. Furthermore, only arguments put forward by claimants were examined.

32 The case of “public safety” is particular, since this notion can correspond either to the protection of community life (public health and well-being) or protection of the natural environment (pollution of water resources).

33 Article L512-1 of the Environmental Code.

Table 1. Principal categories of concerns represented in the case sample
<table>
<thead>
<tr>
<th>Type of operation</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quarries</td>
<td>22.1</td>
</tr>
<tr>
<td>Pig Farming</td>
<td>8.4</td>
</tr>
<tr>
<td>Metallic Waste</td>
<td>8.4</td>
</tr>
<tr>
<td>Domestic and Urban Waste</td>
<td>6.4</td>
</tr>
<tr>
<td>Recycled Waste Sorting</td>
<td>5.8</td>
</tr>
<tr>
<td>Poultry Farming</td>
<td>4.5</td>
</tr>
<tr>
<td>Industrial Waste</td>
<td>3.2</td>
</tr>
<tr>
<td>Metalworks</td>
<td>3.2</td>
</tr>
<tr>
<td>Inflammable Liquids</td>
<td>2.6</td>
</tr>
<tr>
<td>Metal Foundries</td>
<td>2.6</td>
</tr>
</tbody>
</table>

Table 2. The principal grounds of legal issues put forward by parties

<table>
<thead>
<tr>
<th>External Legality Grounds</th>
<th>%</th>
<th>Internal Legality Grounds</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental impact study</td>
<td>16.7</td>
<td>Determining the Identity of Liable Operator</td>
<td>16.7</td>
</tr>
<tr>
<td>Rights to Due Process in the Hearing</td>
<td>16.1</td>
<td>Public Safety</td>
<td>11.9</td>
</tr>
<tr>
<td>Public Enquiry</td>
<td>15.5</td>
<td>Public Health and Welfare</td>
<td>10.1</td>
</tr>
<tr>
<td>Applicable Administrative Procedure</td>
<td>13.1</td>
<td>Compliance with Directives</td>
<td>8.9</td>
</tr>
<tr>
<td>Opinion Gatherin</td>
<td>11.9</td>
<td>Compatibility with Planning Regulations</td>
<td>8.3</td>
</tr>
<tr>
<td>Legal Basis of Administrative Decision</td>
<td>11.3</td>
<td>Public Conveniences</td>
<td>7.7</td>
</tr>
<tr>
<td>Petitioner's File</td>
<td>9.5</td>
<td>Operating Permit Compatibility</td>
<td>7.7</td>
</tr>
<tr>
<td>Incompetence of Administrative Authorities</td>
<td>9.5</td>
<td>Protection of the Natural Environment</td>
<td>5.4</td>
</tr>
<tr>
<td>Technical Ability and Financial Capacity</td>
<td>6.5</td>
<td>Assessment of Hazards and Inconveniences</td>
<td>5.4</td>
</tr>
</tbody>
</table>

Figure 1. Type of prefectorial decisions ordered (datas from state administration) and type of prefectorial decisions disputed (datas from the inquiry)

Figure 2. Prefectorial orders under dispute and type of classified activities.
Figure 3. Argumentation profile (external legality issues) by category of claimant (correspondence analysis)