

***LOVE THY NEIGHBOUR?***

***The Potential for Good  
Neighbour Agreements in  
Scotland***



**Friends of  
the Earth**

# **LOVE THY NEIGHBOUR? The potential for Good Neighbour Agreements in Scotland**

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## Foreword

*“Scotland’s industrial past has resulted in some ‘bad neighbour’ developments in the name of economic development. The location and impact of these developments have often been cumulative, placing a disproportionate environmental burden on particular areas. Nevertheless, in the context of this legacy of unsustainable development, there is a need for innovative and forward-looking methods to enable people to have a say in the way in which businesses and developments located in their communities impact upon their lives. The Scottish Executive was interested to learn if Good Neighbour Agreements (GNAs) could be just such a method.*

*From this research, we hope to understand the role that GNAs could play both in encouraging businesses to strive for the highest standards and also in serving to meet the concerns of communities about environmental impacts.*

*It is important that industry is open and accountable to stakeholders, not just shareholders. It is also vital that communities trust the businesses that are located amongst them. GNAs could be a useful tool to assist in the building of trust, in reducing antagonism and in encouraging greater accountability to local people”.*

(from statement provided by Emily Postan, Environmental Justice Co-ordinator, Scottish Executive, May 2003).

*“Good Neighbour Agreements have the potential to provide communities with the capacity to resolve local social and environmental issues, and industry with a transparent and accountable route to achieving higher environmental goals. For this reason SEPA became interested in examining their applicability to Scotland. We therefore welcome FoE Scotland’s research into the development of such mechanisms that encourage communication and joint responsibilities of local communities and businesses.*

*The underlying philosophy of Good Neighbour Agreements, that of greater public participation in decisions made about the environment, fits well with SEPA’s objectives for sustainable development, and we hope to learn from this research whether this type of agreement can lead to good neighbour relationships being formed in Scotland’s communities.”*

(from statement provided by Vanessa Kind, SEPA, December 2004)

## **Summary and Conclusions**

Good Neighbour Agreements (GNAs) are negotiated agreements between a polluting company and the local community whereby the company agrees to adhere to environmental and social standards higher than those required by law.

GNAs can be a useful supplement to effective and stringent environmental regulation in helping deliver environmental justice. They cannot substitute for such regulation. They offer system level benefits for communities in this respect, and for businesses through helping rebuild public trust in business. They can support dialogue and engagement between communities and companies that delivers higher site-specific environmental and social standards and greater corporate accountability to local communities.

The communities most in need of GNAs are the least able to establish them for themselves as they are likely to lack the relevant resources and skills, and have the least existing leverage over the company. Communities cannot trigger GNAs without the capacity for effective engagement. Both theory and practice indicate that this requires leverage, or a “credible threat” (eg of litigation, or the ability to influence or prevent the grant of planning permission). It is hard to conceive of communities obtaining such leverage in the absence of enforceable rights.

In the US community-enabling laws and organizational resources have provided both capacity and credible threat, but GNAs are still of variable value, with some communities struggling to extract a net benefit from the GNA. In Scotland the context is weaker and enabling reforms would strengthen the potential for GNAs. There are currently no existing accountability mechanisms within the Scottish context that achieve the same range of purposes as successful GNAs but Scotland has begun implementing laws that will facilitate greater citizen access to environmental information, creating some of the enabling context that exists in the US.

If a successful GNA model is to be developed for Scotland, it has to be done in a fashion that takes into account the legal, social, economic and political landscape of Scotland. However, we do not believe that the essence of the GNA concept needs to be substantially adapted to the Scottish context as long as the enabling context is established, including enhanced community access to the courts.

Non-binding GNAs risk public distrust as public relations exercises. In particular unilateral voluntary measures by companies have largely proven unhelpful to communities and the environment. Legally-binding GNAs appear to be the only form trusted by communities. A legally-binding basis is necessary but not sufficient for effectiveness. In the Scottish context, Section 75 planning agreements, planning conditions and pollution permits all offer mechanisms for legally underpinning GNAs, but an enforceable private contract would generate least conflicts of interest and offer most flexibility

GNAs imply a shift in power relations between the local community and business: if local communities do not have the opportunity or capacity to negotiate or enforce effective GNAs, and if companies do not recognize the need to be accountable to local communities and to go beyond the legal minimum, then GNAs are unlikely to work.

To build a GNA model in Scotland that is based on co-operation and a recognition of responsibilities from the outset, then GNAs should suit companies who are motivated by enlightened self-interest, who see the advantage in being leaders in setting environmental and social standards. The GNA principle could be applied to a wide range of commercial activity. However at present GNAs do not seem to be an appropriate tool to enhance accountability of Scottish companies operating overseas. Nor does the research indicate a role for industry-wide GNAs.

In order to develop a democratic, effective and robust mechanism, the GNA model should be put to wide consultation with all sectors of society – the state, regulators, business, local communities and NGOs. More detailed research and legal guidance would be necessary to establish the optimum parameters for legally-binding GNAs which meet community needs whilst being acceptable to the companies affected.

Communities are likely to feel more empowered and entitled if there is a defined process and officially sanctioned mechanism. Similarly companies are likely to have greater confidence in a mechanism that had wide acceptance and is recognized by the state. To enable effective GNAs requires state support for capacity building, leverage and opportunity, and implementation.

Existing community grants and capacity building efforts should be reviewed to ensure that they can support communities in developing and implementing GNAs. Leverage for communities is provided by enforceable rights in an enabling legal framework. Opportunities to extend and reinforce community rights should be explored *inter alia* in the implementation of the Aarhus convention and review of Planning legislation.

This report first outlines the nature and potential of GNAs (Chapter 1), and then turns to lessons from experience with GNAs in Scotland and elsewhere – particularly the US (Chapter 2). Chapter 2 also draws lessons from literature on other negotiated and voluntary agreements. Chapter 3 examines how GNAs might work in Scotland – in particular, considering potential for GNAs to be linked to planning permissions or pollution licenses, or to stand alone as private legal agreements. It also anticipates concerns that businesses might raise. Chapter 4 proposes a tentative template and guidelines for Scottish GNAs. Chapter 5 discusses some of the issues raised by GNAs in more depth and draws conclusions.

## Chapter 1: Rationale and Context for Research

### 1.1 WHAT ARE GOOD NEIGHBOUR AGREEMENTS (GNAS)

Good Neighbour Agreements (GNAs) are negotiated agreements between local communities and companies whose activities do or might negatively impact upon the environmental and social well-being of the community. In a typical agreement, the community identifies social and environmental issues of local concern, and the company agrees to standards of social and environmental responsibility that are higher than the legal minimum.

GNAs have been evolving in the US since the late 1970s. They provide a vehicle for community organizations and a corporation to recognize and formalize their roles within a locality. “*The purpose of these agreements is to foster sustainable development in a community by reconciling economic development with the community’s welfare, including the health of its environment and its individual members*” (Lewis & Henkel 1998).

An effective environmental GNA enhances corporate accountability to the local community and other affected stakeholders with regard to company activities that do or might negatively impact upon the environmental and social well-being of the affected community (FoES 2000). GNAs can thus be used as a mechanism for civic regulation to complement the environmental regulatory framework. GNAs can potentially create a direct legal nexus between companies and communities, leading to direct accountability. The strongest form of direct accountability achieved in the US is where the GNA takes the form of a legally-binding private law contract between the company and the community. Table 1 (over) summarizes the possible range of GNAs (Acutt 2003).

### 1.2 WHY RESEARCH GNAS?

GNAs have offered a means whereby communities in the US have attempted to achieve greater corporate accountability, community empowerment and environmental justice for disadvantaged, mainly minority, communities adversely affected by industrial pollution (Lewis & Henkel 1998). Many of the poorest and most vulnerable communities in Scotland live in or near environments degraded by the environmental and social impacts of economic development. The aim of this Friends of the Earth Scotland project is to assess whether the GNA model might be an appropriate and effective mechanism for increasing corporate accountability to communities – especially such vulnerable communities - and improving the environmental performance of companies in Scotland.

At the heart of this question is a complex web of relationships between the state, the regulatory authorities appointed by the state, commercial enterprises, pressure groups and local communities.

*Local communities* often feel disempowered when wishing to ascertain and assert their rights to a decent environment: they frequently lack the information, skills and resources to engage effectively with the environmental protection and planning systems (Gouldson 2003). Nor do they trust that the government and regulatory authorities will necessarily act to protect them, rather perceiving the state and industry as acting in the best interests of government and business (Gouldson 2003; Schlueter interview). And public distrust of corporate interests is growing (WEF survey 2002).

These trends have yet to be reversed, despite new commitments to policies of social inclusion and increased public participation in decision-making and to promote environmental and social justice which are reshaping the policies and practices of *government*.

The traditional style of *environmental regulatory authorities* in the UK has been to engage predominantly with industry (Vogel 1986). SEPA is now faced with the challenge of embracing

a new regulatory approach, based on greater community involvement as a result of its recent Policy and Financial Management Review.

**Table 1: the Evolving Range of GNAs**

Type	Form	Commitments	Actions / rules
<i>Non-binding</i>			
Open door policy	Verbal - ad hoc, voluntary	Company agrees to public access and / or citizen inspections of the facility.	Plant tours, open day events
Community liaison	Verbal - structured or unstructured, voluntary	Company agrees to inform the community of activities	Public meetings, press releases, news letters, brochures, videos, slide shows, internet websites
Written agreement	Charter or Memorandum of understanding – structured, voluntary	Company agrees to dialogue with community and relationship building. Good faith commitment to address community concerns	Gentleman's agreement regarding pollution reduction or social goals
<i>Binding</i>			
Community consultation	Written agreement, may be integrated into permit conditions or required as condition of permit	Company agrees to establishment of a stakeholder advisory committee and HSE procedures and initiatives	Regular meetings and advisory committees
Collective bargaining	Negotiations within the procedures of organised labour unions	Appointment of safety stewards and union HSE committees	Vary according to agreement, but can include right to shut down an operation that presents a danger to workers
Specific extra-regulatory	Private law contract/or permit condition	Negotiation of specific commitments and targets	Vary according to agreement but generally include commitments to beyond-compliance measures
Community compacts	Private law contract/or permit condition	Negotiation of comprehensive environmental and social objectives and targets by broad set of stakeholders.	Breadth of environmental, economic and social issues

Source: (Acutt, 2003)

*Business* is being challenged to become more accountable - not just to shareholders, but to a broader community of stakeholders (Forum for the Future & PIRC 2002). However, even attempts by shareholders and employees, who have a recognized legal relationship with companies, to obtain greater accountability from companies have proved difficult. Attempts by communities who have no recognized legal relationship with companies are bound to be even more difficult. Notions of accountability that are implicitly enshrined in legislation on public participation in environmental decision-making are absent from company law. The underlying asymmetry of power between communities and companies is a key obstacle to genuine and equal dialogue.



So the context is one in which regulators and governments seek to promote a more collaborative approach, treating both business and communities as partners in policy development and implementation. Yet the direct interface between business and community is marked by stark asymmetries of information and power. Although dialogue and engagement between business and community is desirable where community interests are threatened, and where conflict with the community raises the costs of doing business, it is not clear that such engagement is practical in most cases.

There are several reasons for this. The lack of trust is critical. Research into stakeholder relations with company management identifies the central importance of trust, yet the greatest difficulties in establishing trust are where power is unequally distributed (Roberts 2001, Holland 1998, McLaren 2002). To establish trust in such circumstances requires a combination of improved information, rights and influence. Research suggests that even financial shareholders in companies obtain real influence only where they wield a 'credible threat' such as pre-emption rights or the ability to mobilize other shareholders to pass a resolution at the company AGM (Holland 1998, Forum for the Future & PIRC 2002). For communities such a credible threat is hard to conceive except where the impacts of the business are so severe that media exposure would significantly impact the company's reputation and share price.

However, it is conceivable that a negotiated agreement between the company and the community could enable effective and continuing dialogue, and rebuild trust. It is in this context that GNAs seem to merit further examination.

### 1.3 BACKGROUND AND OBJECTIVES OF THE PROJECT

The objectives were:

- To assess the effectiveness of GNAs in the US and other jurisdictions;
- To determine if existing Scottish mechanisms for corporate accountability and stakeholder involvement are adequate;
- To explore how GNAs could complement and be incorporated into the existing Scottish legal framework;
- To develop a set of draft guidelines for the development process of GNAs, with particular emphasis on stakeholder involvement; and
- To produce a draft outline model GNA for Scotland.

#### **Environmental justice**

The concept of environmental justice frames the context for GNAs. Environmental justice also originated in the US in the late 1970s, and rests on a number of fundamental premises:

- That all people have the right to live in a healthy environment and have access to adequate environmental resources;
- That it is predominantly the poorest and least powerful people who live in degraded environments (ESRC 2001);
- It encompasses an "*element of democratic decision-making, or community self-determination.*" (Cole and Foster, cited in Agyeman 2002).

Environmental injustice is evidenced along classic class lines in the UK (Agyeman 2002). A FoE EWNI study found that 662 of the UK's most polluting factories are in areas where the average household income is below £15,000 per annum, but only five such factories are in areas where the average income is above £30,000 (FoE 2001).

Scotland suffers from poverty and structural inequality: a quarter of Scottish households live below half-average income (Dunion & Scandrett 2003). Some of Scotland's past and present economic activities have had a detrimental environmental effect on Scotland's least powerful communities (for instance, opencast coal mining and landfill) (Dunion & Scandrett 2003).

Scotland's First Minister, Jack McConnell, argues that the “gap between the haves and the have-nots is not just an economic issue. For quality of life, closing the gap demands environmental justice too... The people who suffer most from a poor environment are those least able to fight back, and I believe government is about standing up for them and changing that situation.”

**Table 2: Examples of the Potential Benefits of successful GNAs**

<b>GNA business partners</b>	<b>Commitments made</b>	<b>Delivery of commitments</b>
Chevron Refining, Richmond, California	<p><i>Business:</i>                      Install 350 leakless valves in a new project                      Retrofit 200 to 400 valves                      Continue to reduce toxic emissions from the refinery beyond the 60% reduction achieved between 1988 and 1992.                      Fenceline air pollution monitoring                      \$5 million over 5 years to through non profit organisations                      \$2 million contribution to local health centre                      Skilled job training to 100 fenceline neighbours</p> <p><i>Community:</i>                      Assurance sought from the community that a lawsuit would not be filed against the company.</p>	Nearly 100% of its commitments honoured. Both parties would choose to negotiate another GNA under similar circumstances
Rhone-Poulenc	<p><i>Business:</i>                      Negotiate improvement of local emergency notification procedures                      Make water monitoring data available and provide split samples for independent analysis                      Fund and participate in environmental and safety audit program                      Conduct dispersion modelling and prepare hazard assessments</p> <p><i>Community:</i>                      Requested to drop permit challenge</p>	90-100% of commitments in GNA honoured.
Seneca-Babcock industries	<p><i>Business:</i>                      Traffic mitigation, specifying routes etc                      Noise limitations on machinery                      Hours of operation limitations                      Prohibition on acceptance of certain waste types                      Environmental assessment</p> <p><i>Community:</i>                      Company sought an end to protests and negative publicity.</p>	50% success rating by community.
Stillwater Mining	<p><i>Business:</i>                      Mitigation of environmental impacts at new tailings impoundment                      Environmental audit every 5 years                      Citizen participation in all state inspections                      Water quality monitoring and long term zero discharge goal</p> <p><i>Community:</i>                      Confidentiality agreement                      Company sought dismissal of pending lawsuits                      Assurances that further lawsuits would not be filed.</p>	90% of commitments honoured, citizens group rate as nearly a complete success.

McConnell has further stressed the importance of enhancing the relationship between Scottish industry and local communities: “*Industries which discharge to the environment cohabit with communities, and they are interdependent on each other, for workers and for work. Improving relations between a community and industry should be encouraged. Industries should strive to be good neighbours, aiming to distinguish themselves by an engagement with local communities to address their concerns and promote better mutual understanding*” (speech on 18 Feb 2002).

This raises the question: to whom should companies be accountable, other than their legal owners, the shareholders - the local community, the state, society in general? And how is that accountability to be implemented? Stakeholder theories argue that companies need to consider a broader range of stakeholders that are affected by or can have an impact on their operations, rather than just their shareholders. This pluralist view (UK Company Law Review Group, 2001) fits both the corporate social responsibility and corporate accountability discourses: companies need to enter into dialogue with all stakeholders if they are to obtain “social permission” or licence to operate. Implicit in such a concept is the idea that stakeholders have enough power and influence to hamper a company’s operations. But some stakeholder groups - notably local communities - bear the risks of company operations without having the power to affect them. This inherently uneven balance of power between companies and communities suggests that new approaches - such as GNAs - are needed to meet the needs and demands of weak stakeholders.

#### **1.4 WHAT GNAS COULD DELIVER FOR COMMUNITIES AND COMPANIES**

The US experience of GNAs demonstrates that a range of environmental, business and community benefits can result from successful GNAs. Table 2 (above) summarises some examples of these and indicates the extent to which the GNA commitments have been achieved (based on Kenney et al, 2003). Chapter 2 examines the US experience in more detail.

As a salutary lesson of what can possibly be avoided by participation in a GNA the Lewis Chemical Corporation, Hyde Park, MA, was inspected by a community organisation in March 1981. The inspection identified major concerns regarding both explosion and fire hazards at the solvent reprocessing factory. Unfortunately the recommendations were ignored and the plant suffered a major explosion and fire two years later.

## Chapter 2: Lessons from past and present experience

### 2.1 EXPERIENCE WITH GNAS

#### Introduction

It is unwise to simply transpose a model from one context to another and assume that it will work in the same way. This section sets GNAs in the broader context in which they arose in the US – legal, environmental, political, social and economic and explores the factors that allow them to come into being and lead to their success or failure<sup>1</sup>.

#### US GNAs

The underlying concepts of most US GNAs are:

- to promote communication, respect and trust among neighbours
- to ensure that safety, standards and a code of conduct are established and upheld
- to provide all parties with the opportunity to be involved in planning, decision-making, monitoring, evaluating and re-negotiating the agreements
- to provide a structure and process for the resolution of conflicts while minimizing the incidence of litigation

By creating a structure and process, GNAs can enable the parties to the agreement to develop objectives and standards that meet the needs of all parties.

US GNAs have evolved in several ways. The land use planning systems of some US states now use the concept of GNAs to enforce “good neighbour” behaviour. For instance, the zoning laws of Portland, Oregon, require GNAs under certain circumstances (Portland City Code, s33.510.115(c)). The Stadium of Portland GNA<sup>2</sup> assures “*that the input of neighbourhood representatives and nearby property owners will be obtained and will continue to be a vital component in all stages of the planning, redevelopment, construction and operation of the Stadium*”. GNAs have also been recommended as best practice for housing developments<sup>3</sup>. GNAs between project developers of sheltered housing and stakeholders<sup>4</sup> specify how programmes and neighbourhoods interact to improve safety and communication, maintain attractive properties, and help residents succeed at finding a home in the community.

#### Development of environmental GNAs

The environmental justice movement in the US was triggered by studies that showed that polluting industries tend to be situated near racial minorities (Bullard 2002). Frustrated by the inadequate regulation of and limited corporate accountability for negative environmental and social impacts on local communities, citizens’ groups in the US organized themselves from the late 1970s to resist exploitative and polluting industrial practices. Community organizations developed GNAs with environmental clauses as part of a community empowerment strategy. GNAs were seen as a means for reclaiming community power, by-passing the limitations of the regulatory system and dealing directly with companies on community-defined terms and issues (Denny Larson, personal communication).

#### Characteristics of GNAs

In 2001, the Northern Plains Resource Council (NPRC), an environmental NGO, contracted with the Natural Resources Law Center at the University of Colorado School of Law and Anne Fitzgerald Associates to conduct a three-year study of environmental GNAs (Kenney et al

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<sup>1</sup> Several people in the environmental law field that have been contacted have indicated that they had never heard of GNAs or knew very little about them. This would seem to suggest that GNAs are not necessarily that widespread or the environmental instrument most commonly used in the US.

<sup>2</sup> [www.pgepark.com/GNA.pdf](http://www.pgepark.com/GNA.pdf)

<sup>3</sup> [www.csb.org/Whats\\_New/PressRelease/PR072602.htm](http://www.csb.org/Whats_New/PressRelease/PR072602.htm)

<sup>4</sup> [www.csb.org/Publications/gnsc.pdf](http://www.csb.org/Publications/gnsc.pdf)

2003)<sup>5</sup>. NPRC's interest in the project stems from the fact that it is a party to a GNA with Stillwater Mine in Montana, and is contemplating entering into other GNAs. The study's goals include: to evaluate how the NPRC GNA compares with other problem solving strategies, to evaluate the effectiveness of this and other environmental GNAs, and to identify lessons and insights to share within a network of community organizations that have, or are considering, an environmentally-orientated GNA. The project evaluates written agreements located in the US which are primarily concerned with environmental issues and prominently involve at least one non-profit community group. The project has identified 12 cases that potentially fit the project's criteria for inclusion, out of approximately 50 self-defined GNAs in the US. Because of these criteria the findings of this study cannot be generalised to all US GNAs, but are directly relevant to GNAs as an environmental justice tool in Scotland.

Difficulties encountered by the Colorado project mirror those of this project (Kenney et al 2003). GNAs are poorly defined and generally poorly documented. No comprehensive listing of GNAs exists and literature on GNAs is "*exceedingly sparse and dispersed*". (For reference, 10 of the GNAs referred to in the University of Colorado GNA evaluation project – those with detailed information available - are summarised in Appendix 3).

GNAs vary greatly in terms of structure, function, goals, subject matters, and other organizational and substantive characteristics. They operate in an environment where success or failure can be greatly influenced by a wide variety of exogenous factors that cannot be controlled for through typical experimental methods (especially given the low sample size available).

## Content

The form and content of GNAs vary but key provisions may include (Lewis & Henkels 1998):

- Community access to information (typically including operation of the facility, emissions levels or safety procedures);
- Right to inspect the facility (sometimes accompanied by an independent expert);
- Participation of the community in the process of preparing emergency response procedures and accident preparedness plans;
- Company commitments to prevent pollution and reduce waste or emissions levels;
- Company commitment to local community development (such as employment of staff from the neighbourhood or creating a community fund to support local projects); and
- Citizen group concessions such as agreeing to cease protest action and / or legal action.

GNAs range from verbal or written non-binding agreements (eg Rohm & Haas), to complex, legally-binding agreements (eg Stillwater Mining). Most environmental GNAs are legally enforceable (Kenney et al 2003), and this is achieved through two basic mechanisms:

- Attaching the GNA to a federal, state or local government licence, thus making compliance with the GNA an integral part of the legally-binding permit conditions eg emissions or planning permit.
- Use of contract law to create a legally binding contract between the community and company.

GNAs may also be settlement agreements at the conclusion of litigation, and thus enforceable by the court<sup>6</sup>.

## Triggers for GNAs

GNAs have been used in a variety of industrial sectors, including oil refineries, chemical plants and foundries. While some have arisen out of crisis events, others have arisen out of preventative negotiations.

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<sup>5</sup> This appears to be the first and only attempt to undertake a systematic evaluation of existing environmental GNAs in the US. The project - "Evaluating the Use of Good Neighbor Agreements for Environmental and Community Protection" - issued an interim report in April 2003 (Kenney et al 2003).

<sup>6</sup> US GNAs may go by other titles, notably "settlement agreement" if concluded after litigation.

The Colorado project identified a typical trigger pattern for environmental GNAs. A company ignores community complaints about pollution until the company needs a new permit or violates an existing permit. This provides an opportunity for the community to threaten a lawsuit, a permit challenge, or other forms of leverage and activism. (This has long since been identified by stakeholder analysts as typical of opportunities for stakeholder influence – namely, a “credible threat.”) This can be accompanied by a publicity campaign.

The aim of the community is rarely to close the company, but rather to force resolution of community concerns outside the scope of, or beyond the apparent interest or ability of, governmental regulators. Companies, wishing to avoid a lawsuit, delays, permit refusal or negative publicity, accept a community’s offer to negotiate. The resulting GNA reflects a plan to address community concerns, often using creative remedies not available through regulatory or litigation mechanisms. The extent and strength of the GNA is dependent upon the amount of leverage held by the community during the negotiations.

### **Shared characteristics**

The 12 case studies, despite a wide range of contexts, share a number of characteristics. The researchers note that the NPRC/Stillwater Mine (see appendices 3 and 4) - is atypical in both its sophistication and company funding of monitoring and oversight expenses. However it offers insight into what future GNAs could look like and has been included in the analysis.

### **Parties**

The case studies cover 8 states (California, Colorado, Louisiana, Montana, New York, Ohio, Pennsylvania and Texas), 10 community groups, 12 GNAs and 12 companies. Of the companies involved four are refineries/petrochemical, three chemical, two mining and one each industrial gas, pharmaceuticals and waste processing. The companies are significant, and in some cases dominant in the local economy.

The GNAs are widely variable in the resources committed to the community. Community group budgets range from just \$500 to \$2.1 million and the number of paid staff from the community involved in the GNA can be as many as 170. For comparison, local residents employed by the companies ranges from zero to 1,460.

### **Concerns and commitments**

The GNAs were stimulated by a range of concerns, but almost all the cases included nuisance (noise, traffic, odours) public health and environmental impacts. The most frequent commitments sought from the company included pollution mitigation, regular environmental audits, access to environmental data, citizen involvement in audits, traffic mitigation, and access to an emergency response plan.

All the community groups reported that prior to negotiating the GNA they consulted with relevant government agencies and the companies, and engaged in publicity campaigns and grassroots activism. Around half also took legal or regulatory action: Five groups filed or threatened to file lawsuits and seven challenged permit applications.

The companies generally sought commitments through the GNA to end negative publicity, generate positive publicity, and to withhold or drop permit challenges and lawsuits. It is clear that most communities posed a ‘credible threat to the companies concerned’. It should be noted that in many other cases companies threatened with community activism have resorted to legal threats to bring such actions to an end. These so-called SLAPP suits – ‘strategic legal actions against public participation’ - seek injunctions against further community actions and threaten high costs (Rowell, 1996). It is not clear why some companies choose GNAs and others SLAPP suits. We can, however, postulate that the existence of a credible threat by the community, and the resources and knowledge to ignore a SLAPP are likely to enable the GNA route

### **GNA negotiation process**

The negotiation of the GNAs took from 3 to 18 months, except one, which took 4 years. Two-thirds of communities felt they had adequate access to lawyers and legal expertise, technical/economic data and technical consultants. Few felt they had adequate access to trained negotiators.

### **GNA structure and implementation**

Despite a range of contents and mechanisms, most (66%) are legally-binding, and half of these were integrated with a regulatory permit. Most (75%) were indefinite (with no clear termination point) and half had provisions to ensure they would remain in effect after any sale of the plant. Half also had a defined procedure for resolution of disputes between the parties.

A small minority (2 of the 12) provided for company funding of the community. A similar minority had been subject to subsequent amendment.

### **Success and value of US GNAs**

The communities involved were, on balance, content with the outcomes, but a significant minority were equivocal. Half of the communities rated the honouring of commitments as being 90-100% and four rated the overall success at 50%. Seven groups said they would do it again, four were unsure, and one would not. Some groups reported unexpected benefits, such as empowerment of the community group, implementation of state of the art monitoring systems and the emergence of good working relationships between the parties.

Several raised concerns about their ability and viability to participate in the GNA, notably lack of funding, insufficient staff/volunteers to monitor the GNA and turnover of staff and members. GNAs were also seen as a major commitment: “*make sure you are ready for a lot of hard work and a long-term commitment*”, and possibly even a distraction from the “*many issues and battles to be fought*”. Groups concluded that GNAs can be “*worth pursuing, but won’t solve all problems*”, and warned “*be sure you will get further than using other tools*”.

These comments create a picture of some communities struggling to extract a net benefit from the GNA. The lessons communities reported fell broadly into issues around enforceability, independence and capacity.

**Enforceability:** Groups suggested seeking a more legally-binding agreement, ensuring that the legal section is enforceable and legal action financed, hiring independent verifiers, and getting the company to pay for monitoring implementation of the GNA.

**Independence:** Groups suggested reserving the right to be critical of company actions (ie maintain your credible threat), and being careful of a company’s public relations ploys. One also advised independence from government agencies as well as from the company: “*keep government agencies out of the process*”.

**Capacity:** Suggestions included: focusing more on building the community group to prevent burnout and dissolution and better preparing the community negotiating group<sup>7</sup>. Groups also advised negotiating hard: “*be clear, keep it simple*”, “*be tough*”, “*have bottom lines and stick to them*”, and have “*a closed timeframe*”.

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<sup>7</sup> One side-effect of the Colorado study is the formation of an ad hoc network of community leaders of environmental GNAs. A workshop was held in Montana in July 2002, entitled “Good Neighbour Agreements: Exploration of a New Trend”. A second workshop is currently planned, to focus on the challenges of GNA implementation.

### **Preliminary findings**

The Colorado study focused on the process of achieving a signed GNA and recognised the need for further research to assess successful implementation.

However, the study reveals the importance of capacity, opportunity and leverage (or credible threat) in delivering GNAs. It concludes that building and utilizing capacity is central if communities are to engage backed by a credible threat. Large, well-established groups with the capacity to negotiate are best positioned to take advantage of such leverage. However it finds it is still critical to have a focal point such as a permit application or an incident such as an emergency discharge, which establishes an opportunity for negotiation.

### **GNAs in South Africa**

South Africa has attempted to introduce the US GNA concept. A GNA was negotiated in 1996 between Caltex and the Table View community in Cape Town: that GNA collapsed in 1997 (website). Another GNA was negotiated in 1998 between Engen Petroleum Refinery and the South Durban Community Environmental Alliance (SDCEA): this GNA seems to have had some limited success in terms of the reduction of sulphur dioxide emissions (SDCE-DN 2003; Acutt 2002). The GNA has been made legally-binding by attaching it to the pollution permit.

## **2.2 GNAS IN SCOTLAND**

This section presents the limited Scottish experience with GNAs.

### **Dundee Good Neighbour Charter**

The Dundee Good Neighbour Charter (GNC) is an embryonic GNA that exists between Dundee Energy Recycling Ltd (DERL), Dundee City Council and the community of Douglas in Dundee. The Charter was negotiated with the help of Friends of the Earth Scotland. The Charter was signed in May 2000, and represents a non-binding commitment to communication between DERL and the Douglas community. The GNC was reviewed in October 2002 and a limited number of changes were introduced. The text of the GNC is given at Appendix 5.

DERL is a public private partnership (PPP), 40% owned by Dundee City Council. This relationship creates conflicts of interest for Dundee City Council. The council, as principal supplier of municipal and clinical waste to DERL, has undertaken to supply DERL with set annual amounts of waste: in conflict with its public obligation to promote recycling.

The Charter sets out a range of commitments including the following:

- Establishment of Liaison Group and agreed composition of this group.
- Agreement for quarterly meetings with minutes of the meetings to be held in the DERL file at the local libraries, Central library.
- Comprehensive DERL Good Neighbour File to be held in local libraries and at the Central library with information presented in an accessible and understandable form to the community.
- Community members of the Liaison Group to be able to visit the facility by prior arrangement and accompanied by independent experts.
- Accident of emergency procedures to be included in the file where likely to affect local communities.
- Publication of a statement of environmental performance, with technical emissions reports available to the liaison group and reported data made available to the public through the DERL file held in libraries.
- Commitment by DERL to abide by all legal employment practice requirements with a commitment to sympathetically consider employing local staff who meet post requirements
- Commitment by DERL to ensure that local communities are considered when devising routing and timing of waste delivery.



To date, many of the basic undertakings of the GNC have not been fulfilled. For instance, no file with information on the company was ever placed in Dundee Central Library and the files at the Douglas and Broughty Ferry public libraries were not being updated<sup>8</sup>. The reports in the file on emissions breaches were simply copies of technical reports sent to SEPA, reports that are incomprehensible to the average person.

The GNC in effect is not presently “owned” by the community and does not presently seem to provide an effective tool for community empowerment. Interviews with local stakeholder revealed concerns that the Charter did not have a mobilized community behind it, and had been pushed through by the Charter’s “champion”, Councillor George Reagan<sup>9</sup>. The opinion was also expressed that the current community representatives on the liaison committee did not necessarily represent all affected communities or the full range of interests within the community. It was felt that certain communities would like to be represented, but are not. It was also suggested that a broader range of groups could be represented eg DERL workers, local environmental groups, etc. The complexity of the conflict of interests within the community itself is further reflected by contradictory cross-alliances. Environmental and socialist activists have been excluded from the GNC by an alliance between the residents’ representatives, the Council and the company.

DERL management were also interviewed. They regard the GNC as a means of communicating with the community and a vehicle for positive public relations. They would be opposed to a legally binding GNA.

### **Diosynth Good Neighbour Agreement**

Diosynth mixes pharmaceutical powders for onwards transfer to other facilities who make the powders into medications including anti-thrombotic tablets, anti-malarial treatments and the contraceptive pill amongst other things. The GNA between Diosynth Ltd and representatives of the community of Buckhaven was signed on March 18th 2003. Diosynth was represented by Dr Alex Ingram, Managing Director and the community was represented by Thomas Ratcliffe of the Neighbours Liaison Committee.

The residents of the Bird scheme, which is immediately adjacent to the Diosynth works had been unsettled and unhappy at some of the incidents happening at the plant. The culmination of protests was when a fatal fire occurred at the plant caused by a spark igniting fine pharmaceutical powder. A public meeting was called and the residents decided to form a group and to meet with the company.

Some time into the process Friends of the Earth Scotland was called to attend the meetings in order to reassure the residents that the information being put forward by the Company was accurate. The suggestion of a Good Neighbour Agreement was introduced sometime in the summer of 2002 and it took until March 2003 to agree the terms. The text of the agreement is at Appendix 6.

There are no cost implications for the residents involved in the agreement. In contrast there are small additional costs for the company. These include the provision of sampling equipment placed at strategic locations outwith the boundary of the site at locations chosen by the residents. The analysis of the evidence is underwritten by the company with split samples methodology being utilised.

In addition, the liaison group writes a newsletter updating residents on the day to day running of the plant, answering any queries on environmental and other concerns. The cost of producing the

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<sup>8</sup> Minutes of DERL Good Neighbour Liaison Group 7<sup>th</sup> May 2002.

<sup>9</sup> The Charter was discussed with John Evans (DERL), Ken Newton (DERL), Rena Smith (community representative), Doug McLaren (Community Councillor), Colin Forrest (FoE Tayside local group), Richard Whyte (Dundee City Council), George Reagan (Dundee City Council – Councillor).

newsletter is met by the company although the residents hand deliver it as that way they get the chance to converse with neighbours and collect any further comments first hand.

The terms agreed in the GNA are being rolled out. One aspect, the emergency evacuation plan, is on hold because it is part of the COMAH regulations and the Fife Plan was disrupted by the onset of the Gulf War. All sensitive establishments had their presence downplayed because of the threat of terrorism. That part of the process should now have resumed and Diosynth, together with the other COMAH regulated plants in Fife will be submitting their plans to the HSE for approval. Once this has been completed the Plan will be published and the local residents will be contacted by the plant to inform them of the procedures to be followed in any emergency.

## 2.3 EXPERIENCE WITH OTHER NEGOTIATED POLICY INSTRUMENTS

GNAs fall into a category of negotiated agreements, which Borkey and Leveque (1998) define as “*contracts resulting from negotiations between public (national, federal or regional) authorities and industry. ... [T]heir content is not defined unilaterally by either industry or public bodies, but jointly by both. The contracts can be legally binding or non-binding*”. The US GNA model involves the community as a party in its own right to the agreement, rather than as solely represented by a public authority.

Negotiated agreements tend to differ from regulation in that they are (Shaw 2001):

- Voluntary to enter: the parties are not obliged to enter into an agreement, although there may be strong incentives.
- Reciprocal commitments: negotiations impose duties on two or more parties whereas regulations create a one-way relationship – the state prescribes what others may and may not do.
- Attempt to reward positive performance, rather than penalize non-performance.
- Tailored to the situation, and often more complex, whilst regulations are of general application.
- Direct: They may establish a direct relationship between the parties, while regulations are mediated by agencies.

Not all GNAs share all these characteristics of negotiated instruments. Negotiated agreements may offer reduced costs compared with regulation, and move the onus for action to business, which can enhance innovation and flexibility (Shaw 2001). But these advantages can only be obtained with careful design, as there are several obstacles and potential disadvantages (Shaw 2001, Jenkins 1995, and 2002). These include:

- Lack of transparency, especially to interested parties not directly involved in negotiations.
- Lack of democracy and accountability, especially where elected bodies are not involved in negotiations.
- Lack or weakness of sanctions for non-compliance. Dutch covenants have proved hard to enforce, despite their binding nature.
- Lack of credibility with both businesses and communities.
- Potential to slow innovation and retard the development of desirable regulation.

Most negotiated agreements have been initiated by companies concerned (unilateral voluntarism) or by governments or regulators. Both models have raised concerns amongst community stakeholders, but offer some insights into how GNAs could adequately involve communities in Scotland.

### Examples of negotiated agreements

There are few examples of GNAs or GNA-type mechanisms outside of the US, and most negotiated instruments are agreements between public authorities and companies (rather than GNA-type negotiated agreements between communities and companies). The literature suggests no clear evidence that negotiated agreements are more effective at delivering environmental protection than regulation (Shaw 2001, Acutt 2002, Jenkins 2002, Van Duin 2003). However,

there is an increasing trend within the EU to use negotiated environmental agreements between government and industry. Examples from Holland and Germany show that such agreements utilize leverage from the credible threat of regulation.

The German constitution prohibits the government from signing negotiated agreements, so German agreements with industry on the reduction of green house gas emissions are non-binding (Borkey & Leveque 1998). The government undertakes not to introduce new legislation if the voluntary targets are met.

Negotiated agreements for pollution abatement, called covenants, are a key instrument of Dutch environmental policy (Borkey & Leveque 1998). Covenants are legally-binding, and are two-tiered: one is a non-binding contract between the government and branch association, and the second is a legally-binding contract between the government and an individual firm, the Company Environmental Plan, which is also linked to the licensing system. Pollution abatement targets are contained in both the contract between the government and individual firm, and in the licensing permit. The government uses a range of incentives to induce companies to enter into negotiated agreements. Dutch firms that fail to meet the terms of their Company Environmental Plan, for instance, revert to a less flexible, more stringent regulatory regime (Shaw 2001). However more recent reviews suggest that weaknesses in enforcement have limited the environmental effectiveness of these agreements (van Duin, 2003).

There are some examples of negotiated agreements between communities and companies from a number of countries. However little is known of their effectiveness and most offer little contribution to the elimination of environmental injustice, as they are largely company generated. However, some may merit further investigation.

In the Netherlands Shell has devised a “Residential Advisory Board” (RAB). The RAB is an organized form of consultation with the local community and is non-binding. The community and company sit on a committee which discusses and attempts to resolve problems (Shell 2002). RABs are thus company-driven, rather than community-driven. In Alberta, the aboriginal communities of Fort McKay and Shell have developed the Fort McKay/Shell Environmental Agreement to provide for the community’s involvement in environmental monitoring and reclamation programmes. The Fort McKay/Shell Socio-Economic Agreement, which provided for initiatives such as a Business Alliance Agreement and Education Partnership was also developed. Again, this example is company-driven, rather than community-driven.

In 1997, as required by Peruvian legislation, Shell entered into company-driven land-use agreements with the local Amerindian communities in Camisea, the site of a gas-drilling project in the Peruvian rainforest (Kjarby & Ringsing 1998). The site is located in what was set aside as a homeland for uncontacted indigenous peoples in the jungle of Peru. Human rights groups in Peru however have dismissed this example of “community strategy” as ineffective and little more than greenwash (Kjarby & Ringsing 1998).

A concept similar to GNAs exists in the form of pollution control agreements between residents’ groups and enterprises in Japan (Imura 1999). Local residents can either participate as interested parties in agreements concluded between local government and companies, or as the sole party signing on behalf of local community interests. About 10% of the 2,187 pollution control agreements concluded between October 1987 and September 1988 were made between residents’ groups and industries; the rest were made between local government and companies (Imura 1999).

Many negotiated agreements are not strictly voluntary. Although companies may have a choice to enter into them, measures such as the Dutch covenants come with strong procedural incentives to join, and are then binding on the participants. To be effective, negotiated agreements should place enforceable obligations on the parties (Shaw 2001, Lewis & Henkels 1998). Thus effective negotiated agreements tend to be *voluntary to enter* but *binding in implementation*.

## 2.4 EXPERIENCE WITH OTHER VOLUNTARY MEASURES

Borkey and Leveque (1998) define voluntary approaches as: “voluntary commitments of the industry undertaken in order to pursue actions leading to the improvement of the environment.” “Voluntary” in this context means “not legislated for” or “not required by law”, but does not preclude the parties to such agreements from making their commitments legally-binding. Borkey and Leveque divide voluntary approaches into three categories: unilateral commitments by industry (eg the Responsible Care programme of the chemical industry); government-sponsored public voluntary schemes (eg the Eco-Management and Audit System, ISO 14001); and negotiated agreements. Here we seek to draw lessons from the first group.

### Voluntary unilateral codes

Unilateral schemes have been widely criticised, especially for their non-democratic nature (see, for example, Jenkins 1995, 2002), and there is widespread concern over the effectiveness of most voluntary instruments (OECD 2003, Shaw 2001, Acutt 2002, Jenkins 2002, Van Duin 2003).

Several voluntary unilateral company codes exist in Scotland. One such code is the Considerate Constructors Scheme. Launched by the Construction Industry Board, the scheme has a voluntary seven-point code of good practice, which includes guidance on consideration for neighbours, noise levels, cleanliness, safety, etc (see Considerate Constructors Scheme website). Regular consultation with neighbours regarding site activity is encouraged by the code. However, unilateral initiatives are company-led and do not empower communities in the way that GNAs potentially can. Most go no further than providing for consultation or liaison.

US companies have established public panels for discussing environmental and safety concerns, and have advocated these panels as a model for public participation in environmental decision-making. These are similar to community liaison groups in the UK. The “Responsible Care” programme of the Chemical Manufacturers’ Association, for instance, encourages member companies to establish community advisory panels. But panel members are chosen by the company and the agenda is defined by the company: such company-driven panels are by definition incapable of holding companies to account (Lewis & Henkels 1998; Denny Larson, personal communication), and are to be contrasted with community-driven GNAs, which are based on the concept of direct company accountability to the community.

In the UK Community Liaison groups, comprising company and community representatives, can be set up as a result of planning conditions (eg see National Planning Policy Guidance No. 16 on minerals) or as part of voluntary codes of good practice. The aim of liaison groups is to serve as a means of communication between the company and local community. In summary, evidence suggests that liaison groups are of limited benefit to communities.

Research examining how BP’s CSR policy is expressed in its relationship with the local community at Grangemouth focussed on the liaison group between BP and the Grangemouth community. The research concluded that: “*if open and honest dialogue does exist between BP and those in the local community ... then it does so very much on BP’s terms ... the GCLG [Grangemouth Community Liaison Group] is not a functioning live voice for the community; ... it may not always be ‘open and honest’; and ... crucially, control ultimately lies with BP*”. This indicates a disparity between the CSR rhetoric and reality and a failure for the liaison mechanism to empower the community.

## 2.5 DISCUSSION AND CONCLUSIONS FROM EXPERIENCE

At the broad, system level, GNAs can be trust building and can complement the regulatory system. At the case level GNAs are flexible and therefore case-specific. In principle a negotiated GNA could be a far more comprehensive and case-specific solution than the application of general and fragmented laws, as a GNA deals with the conditions and needs of a specific situation and specific parties (Lewis & Henkel 1998). This is potentially beneficial in tackling environmental injustice.

However these strengths mean that unless communities are well resourced they are at a disadvantage in negotiation, and unless the GNA is legally binding, they are at a disadvantage in implementation. Of key importance for communities is having access to the resources, technical expertise and personnel not only to negotiate and draft a GNA, but also to monitor and ensure implementation of the GNA provisions. Thus the most disadvantaged communities are least well placed to use them. To meet the needs of such communities GNAs must be placed in the right enabling context, which is explored later (see chapter 3).

A clear limitation of non-binding GNAs is that communities have no legal right to enforce any of the company commitments. The only recourse that communities would have in the case of non-compliance by the company is to use a range of non-legal tools eg a negative publicity campaign or boycotts, or to provide a credible legal threat eg by threatening to challenge the company's application for or holding of an environmental or planning permit. Without legal recourse GNAs can sometimes be enforced by reputational threat, but in the majority of cases this offers little leverage. Where companies have no direct sales to the public, they are largely secure from reputational threats.

It is clear from the evidence in the US, and the experience with other voluntary initiatives (eg CSR reporting) that the mechanisms that most empower communities are those that have clearly defined rights and duties and are legally enforceable. The various case-studies highlight the difficulty communities face in enforcing even simple commitments when the agreement is not legally binding. While there are limitations to legally enforceable agreements, in terms of environmental justice, it is preferable to provide enforceable rights as part of a process that builds and reinforces trust between communities and companies.

Legally-binding GNAs provide communities with a set of defined and enforceable rights. They also provide companies with a clear set of duties and targets, and a means of proving their commitment to greater accountability and higher environmental standards.

The specific benefits of GNAs depend upon the terms and conditions agreed, but potential advantages for the community include:

- Capacity building through closer dialogue with the company, with increased participation and consultation over decisions and empowerment and capacity building as part of the GNA development process.
- Enhanced participation including access to centralized and locally available data on company's operations; the right to inspect facility with an independent expert and the ability to review and participate in accident preparation plan.
- A process which is flexible and applicable to a variety of situations; and is also process-orientated and innovative, allowing the GNA to be improved and updated.
- Outcomes which can include: Enhanced corporate accountability; improved working conditions and reduced pollution, with environmental targets higher than those imposed by law. GNAs can also address concerns that are beyond the scope of the regulatory system such as traffic movements, the local economy and local recruitment.

But there are also potential disadvantages of GNAs from a local community perspective:

- A GNA does not fundamentally alter or address the imbalance of power between the community and the company. The company remains the more powerful party, which would become evident in the event of a dispute or litigation.

- There are opportunity costs, communities need to dedicate time and resources to monitoring the GNA.
- Without effective safeguards of transparency and verification GNAs may be open to abuse for public relations purposes. This risk is greatest if they take the form of unilateral voluntary measures. In the same way that some unscrupulous companies currently fund so-called 'community organisations', they could potentially manufacture inauthentic GNAs with unrepresentative community members.

To undertake the effort and commitment involved in a GNA, the community need trust in the mechanism. Although we have not been able to undertake large-scale representative opinion sampling, members of community groups interviewed have consistently expressed the view that only legally-binding GNAs offer that trust, and have the potential to empower local communities<sup>10</sup>.

From a corporate perspective GNAs could offer:

- Improved relations with the local community and more positive public relations in general. Enhancing the companies reputation and building trust enables easier operation of facility and makes it easier to open up in other areas. And such a good relationship with the local community provides solid basis upon which to repair any rifts or break down in relations.
- Verifiable improved environmental and social performance with the potential management, marketing and recruitment benefits that offers.
- Increased motivation and recruitment of employees from local communities.
- Reduced risk of being targeted by either the media or an investor campaign if the company is able to demonstrate that it takes its relationship with the local community seriously and is engaged in positive mechanisms to enhance this.

However, GNAs could place additional constraints on the operation and hence on the profitability of the company by:

- Raising the risk that the community might divulge trade/operational secrets.
- Requiring time and resources for negotiation, implementation and monitoring, which may conceivably even outweigh the costs to the company of regulation or economic incentives designed to deliver similar outcomes.

GNAs developed in the US as a way for communities not to have to depend solely upon regulators to inspect and abate industrial pollution. They allowed communities to take direct action on environmental hazards and increase company accountability to the community. But in doing so communities were backed by a suite of laws that strengthened their position. They were also supported by environmental and community organizations that tended to have effective campaigning experience, as well as financial and technical resources, at their disposal. The ability of communities to secure legally-binding GNAs was based on their degree of leverage over the company and the ability to attach the GNA to a planning or pollution control permit, or make the GNA a private law contract. A similar context of community-enabling laws and organizational resources does not exist in Scotland.

Denny Larson, of Citizens for a Better Environment in California, who has been involved in the negotiation of over 25 GNAs in the US and has also visited communities in Scotland, advises Scottish communities to be cautious about GNAs. He highlights the lack of legal leverage that exists for communities over facilities and government, and suggests that communities must be educated and committed to direct action and strong community interventions, that communities and NGOs should explore existing legal rights and court actions that could create leverage, and that Government should pass "citizen right to sue" laws in order to establish leverage in Scotland's new environmental laws.

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<sup>10</sup> Sandy Paul presented two workshops on GNAs as part of a series of workshops on environmental justice in October 2002. The overwhelming opinion of the workshop groups (comprising a range of government, private sector and NGO interests) was that if GNAs were to have any significance at all from a local community point of view, they would have to be legally binding.

We do not argue here that it is solely the role of state-appointed regulators to hold polluters to account for environmental pollution. However, it is incumbent on the state to facilitate citizen empowerment if it wishes them to participate in the system. This implies empowering citizens with adequate resources, legal powers and expertise, and encouraging them to have a role in how business is regulated.

GNA's that are part of the institutional or legal framework are more likely to enjoy widespread recognition and acceptance. There are potential benefits for companies too as legally-binding GNA's help rebuild public trust in both regulators and corporations. Similarly the availability of a trusted tool provides a signalling device which companies can use to overcome concerns about 'greenwash'. Such a signal is largely lacking in the current system (the closest being an independently verified sustainability report). It may be the case for businesses that on an individual basis the benefits of a GNA may not always outweigh the costs involved in participating. However as the number of businesses engaged in the process, and working more closely with communities, increases so too does the scope for achieving real change by raising the benchmark of business behaviour and giving opportunity for increased public trust in business.

In conclusion, lessons learned from the US and Scottish case studies suggest that GNA's can be valuable if they successfully build strong community involvement in and ownership of the process; and if the companies regard them not simply as a communication mechanism, but also as an accountability mechanism. But to deliver effective GNA's, communities need capacity, opportunity and leverage.

## Chapter 3 How GNAs might work in Scotland

The key legal and institutional conditions that have led to successful GNAs in the US do not pertain in Scotland. So a direct, immediate and unmodified transposition of the GNA model as used in the US into the Scottish context is unlikely to be successful. If a successful GNA model is to be developed for Scotland, it has to be done in a fashion that takes into account the legal, social, economic and political landscape of Scotland.

This chapter explores the detail of the Scottish context, contrasting it with that of the US. In particular it outlines existing mechanisms for community participation and corporate accountability, before turning to the scope to enable GNAs through pollution control, planning or private law. The Chapter also addresses concerns that our consultations with business allow us to anticipate.

### 3.1 THE POLICY AND REGULATORY CONTEXT

#### **Public participation in environmental decision-making**

There is a firm and growing commitment on the part of the EU, and of the UK as a member state, to improve public access to environmental information, to increase public participation in environmental decision-making, and to allow access to procedural justice in environmental matters. This commitment is reflected in the Aarhus Convention and in legislation: Freedom of Information (Scotland) Act 2002, Environmental Information Regulations 1992 and the Human Rights Act 1998. Deliberative governance approaches aim to develop greater public trust and involvement in decisions: but there is little experience of how to develop a more open and inclusive form of decision-making or what the impacts of such an approach might be (Gouldson 2003). The UK government is preparing to ratify the Aarhus Convention, although it does not appear to consider that ratification requires any improvement in participation.

#### *Participation in planning processes*

The planning system has potential to increase public participation in environmental regulation because of its requirements that local people be informed and consulted about development proposals and be afforded the opportunity to object to unacceptable developments (Illsley 2002). Some of the planning laws aimed at giving individuals, communities and pressure groups the opportunity to have their say in how their locality is developed include: public consultation regarding the local and structure plans; neighbour notification requirements; and the right to object to new applications.

The Scottish Executive has made a commitment to greater public participation and consultation in the processes of national and local government. A consultation paper on “Getting Involved in Planning” was issued in November 2001 and a subsequent White Paper “Your Place, Your Plan” was published in March 2003. Current proposals for planning reform could create wider opportunities for public involvement. These include Local Planning Forums in the current White Paper on public involvement in planning and Statements of Community Involvement (in the English planning system).

However, there are real limits to how effective public participation in the planning system can be in empowering communities even to represent their interests, never mind to respond to those interests. Research has shown that public access to the planning system is limited by the public’s lack of understanding of the system - despite the good work of Planning Aid for Scotland<sup>11</sup> - and

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<sup>11</sup> Planning Aid for Scotland is a voluntary organization run by town planners who give free professional and impartial advice on planning issues to individuals and community groups. They also provide training in planning matters for community groups. Planning Aid aims to facilitate public participation in the planning system in an informed and empowered way. The English Green Paper on planning has recommended that funding for Planning Aid be increased to enhance assistance provided to communities.



their limited resources and skills to engage with the system ( Illsley 2002). And given this lack of capacity there is a tension between involving the community in planning and the speed of processing applications.

Moreover, while the community might have the formal right to participate, the system is imbalanced in several respects. First, communities rarely have the resources to argue against developers who can hire highly experienced lawyers to represent them at public inquiries. Second, communities do not have the same rights of appeal as developers. Third, developers can threaten to apply for costs against the planning authority: communities can make no such threat. Moreover, if a local authority approves a planning application without conditions, it is not presently required to give reasons for the approval. The proposal in the current Planning White Paper that reasons be given for all approvals would rebalance information but not influence.

### *Participation in the environmental regulatory system*

In most cases operators have to advertise in the local press that they have applied for a permit. However, unlike the planning system, there is no requirement of neighbour notification (Smith, Collar & Poustie 1997). The new Water Framework Directive has an additional level of consultation by requiring the establishment of advisory groups which include community representatives.

There is, or will be, public access to much environmental information held by public bodies under the Environmental Information Regulations 1992, as amended in 1998; the subsequent Directive (2003/4/EC) on public access to environmental information which will be transposed into Scottish law as part of the process of implementing the Aarhus Convention; and the Freedom of Information (Scotland) Act 2002 (not yet in force). This Act establishes the general right of public access to all recorded information held by Scottish public bodies, subject to certain exemptions. In addition, SEPA is establishing a comprehensive online pollution inventory. As an initial step, SEPA has provided online access to the Scottish European Pollutant Emission Register (EPER), as required under the IPPC Directive. The ultimate aim is to provide a more comprehensive set of data in an interactive GIS map form by 2005. The improved format of the pollution inventory will be subject to broad public consultation. Access to information is a necessary, but not sufficient step to enable participation.

### *Dispute resolution*

Arbitration, litigation and statutory appeals form part of the adversarial approach. A number of legal remedies may be available to communities or individuals within the adversarial system eg damages or an interdict for nuisance; damages or specific performance for breach of contract; judicial review. Legal standing is often an issue for communities. Legal aid is not available to communities. Litigation is currently expensive, time consuming and complex, and therefore not an easy option for communities. However, in the US the threat of litigation appears to have been a major motivation for some companies to enter into GNAs.

Mediation is a process whereby an impartial third party, the mediator, helps two parties or more who are in conflict to reach a voluntary and negotiated settlement of their differences. Mediation, in contrast with the adversarial approach, is one of a range of alternative dispute resolution (ADR) mechanisms. It is argued that mediation can save time, money and stress, and appears to lead to settlements in around 65-75% of all cases (Watchman 2002). GNAs could create a framework in which mediation would be more likely than litigation.

### **Corporate accountability**

GNAs also have to be considered in the context of discussions around corporate accountability and corporate social responsibility (CSR). There is a growing public demand that companies take into consideration and account for their social and environmental impacts. Voluntary and regulatory mechanisms are being used and developed to achieve this, including reform of company law, environmental and social reporting and auditing.

### *Company Law Review*

The Company Law Review will lead to a new Companies Bill. The review concluded that companies should be expected to take the interests of stakeholder groups – such as communities – into account because by doing so they could be more profitable in the long term (so-called ‘enlightened shareholder value’). The review considered and rejected the idea the so-called ‘pluralist’ alternative which would have required companies to be accountable to all stakeholders, not just shareholders. The final report of the review includes proposals to require directors to undertake and publish Operating and Financial Reviews (OFR) (clauses 73-82). The OFR process would require the directors of the UK’s top 1,000 companies to report on their company’s impact on the environment and wider community. The Bill may permit directors only to report on environmental and social factors which they regard as potentially affecting the company’s financial position, rather than on all factors which could affect the environment and the wider community.

The CORE coalition<sup>12</sup> backs a more radical private bill designed to promote wider stakeholder accountability and intended to form a platform for amendments to the Companies Bill. It proposes that:

- All companies with a turnover greater than £5 million (ie top 38,000 companies) should assess and publish their environmental and social impacts alongside their financial results in one annual report.
- Companies should take reasonable steps to consult with and respond to affected stakeholders before embarking on major projects. If passed, this could provide a legal footing for the negotiation of GNAs.
- The duties of directors be clearly defined and a clear liability regime be set up for directors who fail to meet their duties. This could provide a possible “credible threat” in getting a GNA negotiated.
- A Standards Board be created to set standards and monitor and ensure the effective implementation of the Bill.

### *Environmental and social reporting*

France, Denmark and Holland require companies to report on social and environmental issues (Gray 2001). There is as yet no legal requirement in the UK for companies to report on their social and environmental performance. The Company Law review has proposed that environmental and social issues (where material) should be included in large companies’ proposed operating and financial reviews. Various voluntary schemes exist for companies to report publicly on their environmental and social performance. The Global Reporting Initiative (GRI) is an international undertaking to develop and disseminate globally applicable sustainability reporting guidelines for voluntary use by organizations reporting on the economic, social and environmental dimensions of their activities, products and services. To render reporting on social and environmental issues mandatory is one method of enhancing an existing mechanism to achieve greater corporate accountability.

Reporting and disclosure is fundamental to any more comprehensive code of practice or accountability mechanisms: in the same way that financial reporting is fundamental to accountability to shareholders (Roberts, 2001). The First Minister, Jack McConnell, has added his voice to the call for greater voluntary environmental reporting by business: “*A thorough and honest appraisal of environmental performance can be the spur to further improvements, and I want to see more Scottish Businesses publish Corporate Responsibility Reports. Openness and accountability to stakeholders, not just shareholders, would be improved by environmental reporting and a concerted effort to reduce emissions and resource use.*” (First Minister’s speech, Dynamic Earth, Edinburgh, 18 Feb 2002) Environmental and social reporting is often used by companies as a means of demonstrating their commitment to and implementation of CSR, but

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<sup>12</sup> The founding members of CORE (the Coalition for Corporate Responsibility) were Amnesty International, Christian Aid, Friends of the Earth, New Economics Foundation and Traidcraft. The coalition is now supported by over fifty organisations, including non-governmental organisations, church groups and trade unions.

without the verification that is provided by audit in the case of financial reporting, it seems unreasonable to expect stakeholders to trust such reports.

This is not to deny that there are companies with proactive, forward-thinking environmental and social policies. However the business case is limited by two key factors: first, most environmental and social impacts are externalities, and there is still a financial pressure on companies to avoid internalising the associated costs, and second, in the absence of formal accountability mechanisms there is no way for consumers or investors to tell the difference between genuine responsible behaviour and 'greenwash'. The theory of asymmetric information<sup>13</sup> tells us that in such circumstances greenwash will drive out responsibility.

Some companies have recognised these problems and acknowledge the need for a legally-binding framework in which to begin to build corporate accountability. The Chief Executive of the Co-operative Bank, Mervyn Pedelty, has been quoted as saying: "*Having carefully considered the implications of mandatory reporting, I sincerely believe legislation is the only way to produce the step-change needed if business is to improve its social responsibility record and restore the public's trust*" (CORE campaign leaflet 2002).

### *The OECD Guidelines for Multinational Enterprises*

In those cases involving multinational companies headquartered in other OECD countries, the OECD guidelines for multinational enterprises may offer a route to establish GNAs. Under the Guidelines agreement the UK is required to run a 'National Contact Point' with whom concerned parties (such as local communities) may raise concerns about the performance of such companies. The Guidelines cover a wide range of issues such as labour and human rights and environmental performance. The NCP has the authority to investigate cases and to facilitate dialogue between the company and the complainant in the hope of resolving the dispute. Such dialogue could feasibly generate a GNA. In this case the opportunity is clear (the potential breach of the Guidelines) and the leverage comes from the threat that the NCP can 'name and shame' the company (although such actions are almost unheard of). However, the capacity of most communities to use such a route is limited.

### *Socially responsible investment*

Ethical and socially responsible investment (SRI) puts companies under pressure to adopt higher environmental standards by either screening out poorly performing companies from investment portfolios, or by engaging with company management to change its behaviour. The profile of SRI was raised by the Pension Funds disclosure regulations of 2000 which required Pension Funds to disclose their stance on ethical and environmental concerns in investment. In theory SRI can represent stakeholder interests (McLaren 2003) but the link is tenuous at present and SRI is not a substitute for GNAs.

### **Citizen enabling legislation**

The US has a suite of general and environmental laws that strengthen the citizen's ability to participate in environmental decision-making (see Table 2). The importance of environmental justice is officially acknowledged at the federal level in the US. The 1994 Executive Order 12898 on environmental justice reinforced the 1964 Civil Rights Act Title (VI) prohibiting discriminatory practices in programmes receiving federal funds and directed all federal agencies to begin to develop policies to reduce environmental inequity. The Environmental Protection Agency (EPA) has an Office of Environmental Justice.

Scotland lacks a comparable legal framework, although certain similar pieces of legislation exist or are in the process of being introduced. Two European Directives that will implement two of the three pillars of the Aarhus Convention were published in 2003: 2003/4/EC on public access to environmental information and 2003/35/EC on public participation in environment decision-making. These are being transposed into Scottish Law. The Strategic Environment Assessment

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<sup>13</sup> Asymmetric information theory suggests that where sellers enjoy privileged information about the quality of a good, buyers are forced to assume that all goods are the lowest quality – as famously demonstrated in a study of the market for second hand cars (Akerlof, 1970).

Directive (2001/42/EC) gives new opportunities for public involvement and provides for public consultation on a range of plans and programmes affecting the environment. The Scottish Executive is bringing forward regulations to implement the Directive on SEA and will be introducing a Bill to deliver these processes under Scottish law.

**Table 2: A comparison of citizen-enabling aspects of the US and UK legal framework**

US	UK
Citizens have the right to sue pollution-control authorities for failure to enforce regulations (eg under the Clean Air Act).	No scope for judicial review
Flexible rules regarding legal standing for communities.	Legal standing for communities limited
Financial assistance is available to communities wishing to litigate.	No community access to legal aid (although individuals may have access)
The Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986 established the Toxics Release Inventory (TRI). This includes records for manufactures' releases to air, land and water and transfers of over 300 toxic chemicals.	EPER and CRI
The National Environmental Policy Act (NEPA) requires that for all federal actions that significantly affect the environment, an environmental assessment or environmental impact assessment should be prepared. Each of these presents opportunities for public comment.	EIA provisions following European law. Strategic Environmental Assessment to be introduced soon.
The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) regulates the cleaning up of some of the worst hazardous sites. It provides for provision of regular information to the public, public comment and also allows for qualifying citizen groups to receive technical assistance grants.	No direct equivalent
The Resource Conservation and Recovery Act (RCRA) governs site clean-ups. It provides for public participation in the permitting process including permit modification and final plan amendments.	No direct equivalent
The Federal Facilities Compliance Act (FFCA) requires an inventory of federal facilities' wastes with provisions for public comment on the final site treatment plan.	No direct equivalent
The Freedom of Information Act (FOIA) makes extensive categories of information open to formal requests.	Freedom of Information provisions following European and UK law
Collaborative environmental planning, a process in which stakeholders share with regulators the tasks of designing and implementing remedies to environmental problems, has been embraced by federal and state agencies (Singleton 2002). Eg Washington State Watershed Planning Act in 1998 set forth a process for local watershed planning by a committee representing local government, the state Department of Ecology and a variety of local interests. The Act also provides funding for local planning processes.	No direct equivalent

Wilson (1998) argues that while some of these mechanisms are open to citizens in the UK, the US has generally gone further to ensure that the workings of government are kept open by appropriate statutory measures, ensuring that citizens are enabled to exercise their rights by providing the necessary resources and technical support. Laws such as the EU Directive on environmental impact assessment and the EU Directive on freedom of access to information on

the environment do exist, but “no equivalent exists in Britain of the technical assistance grants given to qualifying citizen groups under American Superfund legislation: ... in complex planning inquiries in Britain, ... objectors to proposed developments can be ‘outgunned’ not only in terms of time and resources but also in their ability to conduct thorough examination of technical information and agreements” (Wilson 1998).

The situations in the US in which GNAs have arisen have involved disadvantaged but well-motivated communities, supported by community and environmental organizations. For a GNA to work needs capacity: a community that can engage with the issue, feel a sense of ownership of the GNA, and be confident and articulate enough to stand up to a company. That often means a community with a problem, an angry community. It also needs a community that has access to adequate resources and skills. Few communities in Scotland meet these criteria, those most affected by environmental injustice are the most disempowered and least able to articulate their concerns (Dunion & Scandrett 2003). Such communities are largely unfamiliar with activist tools that could help enhance corporate accountability. Neither do they have access to the courts as communities to challenge environmental and planning permit applications made by companies.

### 3.2 INCORPORATION INTO SCOTTISH LEGAL FRAMEWORK

A number of possibilities exist for incorporating GNAs into the legal framework. The most plausible are:

- As legally binding private law contracts
- By attaching them to s75 legal agreements or planning conditions
- By attaching them to pollution licences

These possibilities will require more detailed research. Below we outline the Scottish environmental regulatory framework, and discuss how GNAs might be integrated.

#### **Scottish environmental regulatory framework**

The two main systems that make up the Scottish environmental regulatory framework are the land use planning system and the pollution control system.

The principal environmental regulators are: the Scottish Environment Protection Agency - SEPA (mainly pollution control) and local authorities (mainly land use planning control). Both the planning and pollution control systems use a permit system to control inappropriate development or pollution. All new developments or changes of land use require planning permission from the local planning authority: certain conditions relating to the development may also be imposed by the planning authority. Licensing and monitoring are the main mechanisms used by SEPA for controlling discharges of pollutants to the environment. Authorisations contain conditions on both the nature and quantity of pollutants permitted.

Other regulators include Scottish water authorities and the Health and Safety Executive. Water authorities have a limited remit in the context of the issues that GNAs seek to address, and are not considered further. Although the HSE is responsible for some issues which have been included in some US GNAs, its authority rarely extends beyond the plant, nor does it issue licenses for most processes of concern: it would not therefore seem appropriate to attach GNAs to HSE provisions, even though the authority and sanctions available to the HSE would appear to meet the needs identified above for the legal enforcement of GNAs<sup>14</sup>.

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<sup>14</sup> HSE has some powers outside workplaces eg safety of the gas grid; and issues some relevant licences e.g. for contained use activities involving GMOs. The HSE enjoys powers to halt operations and levy substantial fines.

### 3.3 GNAs AND THE POLLUTION CONTROL SYSTEM

GNAs have been made legally binding in the US and South Africa by attaching them to pollution permits. It would seem worth exploring the possibility of making GNAs legally binding by attaching them to SEPA authorisation permits<sup>15</sup>.

When new applications for authorisation permits are made to SEPA, certain scheduled operations could require that draft GNAs be negotiated in advance with local communities. Such a requirement may necessitate either amending existing legislation or regulations, or issuing new policy guidelines (eg under s31 of the Environment Act 1995). Permits are reviewed periodically, so offering the possibility of adding conditions originally left out, including GNAs.

One legal interpretation suggests that SEPA is only empowered to do what is necessary to secure pollution prevention. This raises the possibility that GNAs attached to pollution permits could be challenged as “not necessary to secure pollution prevention” (Regs 8 & 9, PPC Regs 2000). If legal advice suggests this is a real risk, then the law may need to be clarified to enable GNAs of this form to work. Similarly under the current framework the pollution permit system could not require actions by a third party i.e. the community, therefore certain aspects of GNAs may not be incorporated into the pollution permit system under the current regulations.

However, SEPA is already allowed a certain degree of discretion in the discharge of its duties. Ministers and SEPA also have a duty “*in formulating or considering any proposals relating to any functions of SEPA ... to have regard to the social and economic needs of any area or description of area of Scotland*” (Section 32 (d) of the Environment Act 1995). This provision, and the Sustainable Development Guidance that the Scottish Executive issues to SEPA both suggest scope for SEPA to promote GNAs as a way of protecting the environment and delivering environmental justice.

Even if SEPA could not actively promote GNAs (an interpretation we find unlikely), it could nonetheless adopt a policy of providing base information and facilitating the communication and monitoring of scientific and technical aspects of GNAs agreed under planning provisions or through private contracts. One of SEPA’s responsibilities is to make information on the state of Scotland’s environment available. SEPA’s recent performance and financial management review (PFMR) recommends that SEPA make as much environmental data and information as possible available to the public via its website.

SEPA is required in terms of the IPPC Directive to publish the Scottish data for the Environmental Pollution Emission Register (EPER), which is an inventory of emissions EU-wide of a list of 50 chemicals. The register offers a tool to communities seeking to negotiate GNAs, but more detailed information and support from SEPA would be appreciated by communities.

Communities interviewed in the course of this project have expressed a lack of confidence in SEPA’s ability to act in the public’ best interest. Communities have expressed frustration in their dealings with SEPA, alleging a lack of responsiveness. There is also a perception that SEPA has established a “cosy relationship” with industry. These concerns are also reflected in a petition to the Scottish Parliament raised by the late Alan Clarke on 12<sup>th</sup> May 2003<sup>16</sup>. Concerns have also been raised regarding SEPA’s ability to carry out certain tasks with limited funding, expertise and personnel. These issues would need to be addressed if communities were to trust SEPA to support GNAs effectively, and especially if SEPA were to promote GNAs.

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<sup>15</sup> Ministerial guidance issued under Section 31 of the Environment Act 1995, defines SEPA’s main aim as: “*to provide an efficient and integrated environmental protection system for Scotland*”. SEPA is also required to “*develop a close and responsive relationship with the public, local authorities and other representatives of local communities, and regulated organisations*”. Its main responsibility is the integrated control of pollution. SEPA’s pollution control functions include: local air pollution, waste, integrated pollution control, radioactive substances, water, producer responsibility for packaging waste, and contaminated land.

<sup>16</sup> <http://itc.napier.ac.uk/e-petition-scout/viewtopic.asp?TopicID=11>

Evidence provided during the course of the PFMR confirms that stakeholders believe SEPA could do more to satisfy their expectations. The review suggested that the revised core function of the three Regional Boards be to provide a mechanism that enables the needs, priorities and concerns of local communities and other stakeholders to be taken into account by SEPA.

There is a tendency for land use applications which have environment protection implications to be considered by SEPA after the land use application has been approved by the local authority. The PFMR suggests that it would be worthwhile exploring the parallel consideration of applications to become more standard practice, in line with existing Scottish Executive guidance to planning authorities (Planning and Environmental Protection, PAN 51).

Incorporating GNAs within the pollution licensing systems risks the community losing of ownership of the agreement and the creation of conflicts of interest for the regulator. However, in comparison with local authorities, the duties of SEPA are less likely to generate conflicts of interest with a GNA. Incorporation into the existing framework could potentially reduce community engagement and erode the credibility of GNAs. A further concern relates to the enforcement of GNAs. If the GNA is a condition of a SEPA licence, then enforcement of the GNA rests with SEPA, with the Procurator Fiscal being responsible for any possible prosecution.

### **3.4 LAND USE PLANNING CONTROL AND GNAS**

Local authorities may have a role to play in GNAs beyond the land use planning system – for instance, through their role in regulating statutory nuisance, waste collection and disposal, and air pollution control. However, these are narrow in potential coverage, so we focus below on the role of local authorities in the land use planning control system<sup>17</sup>.

The Royal Commission on Environmental Pollution has recommended that land use planning be acknowledged as an integral and influential part of the broader framework for environmental protection, but also characterised the planning system as having a pro-development bias (RCEP 2002). The Scottish Executive intends to publish a bill to update the planning system. Aspirations of the reform include enhancing public participation and reducing delays in the system.

#### **Local and structure plans**

Local or structure plans might include planning policies designed to encourage the negotiation of GNAs in specific circumstances. Specific planning applications offer more potential as a means for enabling GNAs. The lack of third party right of appeal limits the credibility of the threat that communities can make, and thus limits their ability to stimulate negotiations over a GNA. If the community were able to appeal against the grant of planning permission it is conceivable that developers would perceive more incentive to negotiate. Overall, current and proposed opportunities for public participation in the planning system do not offer the range of entitlement possibilities of GNAs. However, some of the proposed reforms may assist in building capacity and providing leverage for GNAs. In addition, support for Planning Aid and complementary initiatives such as Friends of the Earth Scotland's Citizens Environmental Defence Advocacy project (CEDA) project will help build community capacity to take advantage of opportunities and leverage offered by the planning system to initiate GNAs. The availability of mediation would help build community capacity to engage with companies and the regulatory system. Mediation could also create opportunities for, and help build trust which could facilitate the negotiation of GNAs. However it would not deliver all the preconditions for effective GNAs in all relevant circumstances.

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<sup>17</sup> Local authority functions now include: Planning control - Town and Country Planning (Scotland) Act 1997; Hazardous substances control (planning) – Planning (Hazardous Substances) (Scotland) Act 1997; Statutory nuisance – EPA, Part III; Waste collection and disposal – EPA, Part II; Air pollution control (smoke) – Clean Air Act 1993; Flood prevention and defence – Flood Prevention (Scotland) Act 1961, as amended; Air quality management – EA, Part IV; and Contaminated land – EPA, Part IIA.

## Statements of Community Involvement

Proposed reforms to the English planning system to ensure that communities and developers are engaged in discussions on planning are pertinent. The Planning and Compulsory Purchase Bill envisages the introduction of “Statements of Community Involvement”. These policy statements will be contained in the Local Development Framework, the new single level of plan. Statements of Community Involvement will set out how the local authority will consult the local community on planning policy and how developers who propose significant developments will be expected to consult communities before they submit planning applications.

This amounts to introducing a mandatory pre-submission consultation between the community and developer and potentially a final assessment. In the case of large developments, compliance with the statement and proper community consultation will be a material consideration in determining the application. Local authorities will be able to refuse the application on the grounds of inadequate public consultation<sup>18</sup>.

Such pre-submission consultation is not equivalent to a GNA. Although it enhances community involvement, and potentially offers an opportunity to begin negotiation of a GNA, it does not establish ongoing engagement and dialogue. Such procedures would probably help build community capacity, and may even enhance community leverage. They would therefore help facilitate GNAs but cannot substitute for them.

The experience of GNAs, both in terms of process and content, could serve as a model for local authorities in drawing up their Statements of Community Involvement. The list of typical GNA provisions could provide guidance as to the type of issues that would have to be addressed. The conclusion of a draft GNA could serve as part of the evidence that all potential issues had been discussed and addressed. If the GNA is made legally-binding as a planning agreement, this assures an ongoing relationship between the developer and local community, particularly with the establishment of an oversight committee. This ongoing relationship could be helpful in resolving any future difficulties relating to the development.

The Scottish Executive’s White Paper on public involvement in planning, “Your place, your plan” (March 2003) stresses that the local plan process could be improved by earlier, more effective engagement with local communities and other stakeholders, but does not propose Statements of Community Involvement. The exact nature of proposed local planning forums and the related national consultative group is yet to be defined. In theory, planning forums could be involved in the establishment of GNAs, but they do not appear to offer as much of a facilitating framework as Statements of Community Involvement.

## Planning conditions and Section 75 agreements

Even now, a GNA could be required as a planning condition if the GNA relates to the land or development. But if a planning condition is not appropriate, one theoretically possible – if practically cumbersome – way in which GNAs could be incorporated into the existing planning system is if they were made as Section 75 agreements.

Section 75 of the Town and Country Planning (Scotland) Act 1997 allows the local authority to enter into agreements to restrict or regulate the development or use of land, and incorporate incidental and consequential provisions (including financial ones) that the authority considers are necessary for the purposes of the agreement. Any agreement entered into under Section 75 becomes legally-binding. Section 75 has been used to get the developer to agree to employing local labour, particular landscaping and wildlife management plans. Such planning agreements are entered into voluntarily and are binding upon the land (ie carry to successors in title, protecting the community’s interests if the business is sold). Policy guidance rules that Section 75

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<sup>18</sup> Councils are under pressure to meet revised targets for the time taken to decide applications, with financial incentives for those that do. Is a speedy system compatible with one that requires genuine local consultation? The government aims to achieve both efficiency and community participation objectives by insisting on pre-submission consultation, and calculating the application process time post-submission.



agreements must not be used to let an inherently bad development go ahead. The proposed local planning forums could provide the institutional arena in which to create GNAs via such agreements.

This approach can also be used strategically: a policy could theoretically be inserted in the development plan recommending a presumption against certain types of development (in certain locations) if the developers fail to negotiate a GNA with the community. This approach could be supported by planning guidance.

However, as they are contracts, Section 75 agreements are not subject to judicial review, and thus accountability is weakened. A further potential limitation is that, in terms of current law, they are contracts between the local authority and the developer, risking conflicts of interest. Although certain statutory consultees (eg Scottish Natural Heritage) can be parties to such agreements, the community is not a legally recognized party to the agreement. This raises questions as to whether the local authority could adequately represent local communities in GNAs, given its potentially conflicting roles of making impartial planning decisions and representing the local community. These concerns are heightened by the fact that Section 75 agreements are conventionally negotiated in confidence between the local authority and the developer.

However the Section 75 agreement could theoretically require the developer to negotiate a GNA with the community. The nearest English equivalent - a Section 106 Agreement - although not identical to Section 75, has been used to render agreements negotiated between communities and companies legally binding. For instance, the development of Gatwick Airport was restricted by attaching an agreement reached between the Gatwick Action Group and BAA to a Section 106 Agreement. The parties to the Section 106 agreement were the local authority and BAA, but the community were involved in negotiating the terms. A similar procedure was used at Manchester Airport to restrict further development. Section 75 has been used in Scotland, for example, to make wildlife management schemes legally binding eg Powharnal open cast mining application.

On the other hand, there is a potential benefit to the Agreement being between company and local authority: the responsibility of monitoring and enforcing a GNA could then rest with the local authority, not only with the community, which has limited resources and personnel. GNAs could have greater durability if attached to existing institutions and if the regulator shoulders at least part of the burden of monitoring and enforcement. Another option might be for the local authority to be a party to the GNA, although this might require changes in planning guidance or law.

GNAs could potentially speed up the planning application process by ensuring that potential difficulties between local communities and companies were resolved or at least brought to the surface beforehand. Even though GNA negotiations in advance of planning applications should improve the quality of applications, and ensure that they are more acceptable to communities, we recommend that the existence of a GNA *per se* should not become a material consideration in planning terms. A GNA does not necessarily have any bearing on the planning issues relevant in the case. Moreover, making it material would increase the incentive for developers to abuse the GNA concept.

### 3.5 PRIVATE LAW CONTRACTS

A contract may be defined as “an agreement which creates, or is intended to create, a legal obligation between the parties to it” (Jenks, cited in Marshall 1999). GNAs could take the form of legally-binding contracts between the community and company. In order for this to happen the local community would have to have the requisite contractual capacity to enter into a contract in terms of possessing some form of legal identity.

Alternative routes to private binding GNAs might include unilateral gratuitous promises and consumer protection law. Under Scottish law a person may voluntarily undertake to do

something for the benefit of another person, and if she does so in definite terms, she is obliged to fulfil her undertaking (Marshall 1999). No acceptance of the promise by the promisee is necessary, and there is no need for any return or “consideration” (an English law term) from the promisee for the promise to be binding. A unilateral gratuitous promise cannot be revoked by the promissory. Written evidence of the promise is required for enforcement, unless it was undertaken in the course of business. This would appear to be applicable to the sort of promises made in GNAs, if the community clearly possessed the right to enforce the promise.

However the ability of the company to enforce community commitments under a GNA by such a mechanism is less clear at present – unless the community has a legal identity. Moreover a GNA generated in this way offers little scope for the community to build capacity to engage in effective dialogue with the company, nor to express their own needs and demands. Thus some of the main benefits of GNAs would be lost.

It may also be of interest to look at international developments in consumer law in this regard. In Germany, for instance, consumer law is being explored as a means to enforce promises regarding labour treatment. In Port Arthur, Texas, 500 citizens are currently suing six petrochemical companies including Shell, Huntsman and Chevron. The suit charges the companies and the plant managers with trespass, damaging health and property, and innovatively with fraud – for claiming that their toxic releases are not harmful. In a similar vein, the decision in the Californian case *Kasky v Nike* is potentially relevant. In May 2002, a majority of four California Supreme Court Justices ruled that Nike’s public statements regarding its global labour practices were commercial speech or “advertising” and as such, were required to be truthful representations of their practices. The court’s ruling did not decide whether Nike’s adverts were in fact false or misleading, leaving this issue for the original trial court to decide (from [www.socialfunds.com](http://www.socialfunds.com)).

The implication for GNAs is that public statements made by companies in relation to non-binding GNAs could be regarded as undertakings that have to be at the very least truthful, as they constitute in essence representations about their products and production practices, and implicit contracts with customers regarding those practices. These implicit contracts could – hypothetically - be enforced in Californian courts if the company sells its products there!

Closer to home, the proposed UK Companies Bill could help provide the foundations needed. If provisions regarding consultation with, and accountability to affected communities were incorporated into directors’ duties as a result of amendments to the Companies Bill, they would apply in Scotland, and would provide a useful foundation for GNAs, with broader applicability than planning or pollution control. However these measures alone would not establish a clear legal basis for private contract style GNAs.

At present communities lack legal standing, and this will not necessarily be rectified through measures to ratify the Aarhus convention provisions on access to justice. However certain organisations might enjoy legal standing to be party to a binding GNA on behalf of the community.

- In rural areas, ‘community bodies’ can be registered under the Land Reform Act 2002. Such bodies have a clear constitution and democratic structure, and would appear appropriate to negotiate GNAs. However, most industries of concern are in urban areas, so an extension of this provision would be needed.
- Community councils<sup>19</sup> or tenants associations might also feasibly play a role as GNA partners, although community councils are explicitly precluded from forming trusts.

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<sup>19</sup> Community councils were introduced through the Local Government (Scotland) Act 1973. Their chief role is representative; to consult the local community and to make known to the local authority and other public bodies the views of local people on all matters affecting them. The local authority has a duty to consult community councils on how local services are delivered and other issues affecting their neighbourhoods. Community councils have the right to be consulted on any planning applications in their areas and are also kept informed about licensing applications.

- Local communities might form a community trust or even a limited company and thereby have legal standing, permitting a GNA to be made as a *binding private contract*. This might require amendments to contract law to provide a solid foundation, although the law of gratuitous promises suggests that there is at least one route by which GNAs could be binding.
- Alternatively a local authority might represent the local community in a GNA, although this may involve conflicts of interest for that council.

Further research, and expert legal advice will be needed to identify exactly what legal measures might be required to enable effective private contract GNAs.

### 3.6 HOW MIGHT BUSINESS RESPOND

The research programme offered some limited opportunities to discuss GNAs with some Scottish businesses. This has allowed us to identify some potential concerns regarding the implications of GNAs for businesses and suggest how those concerns might be overcome. This cannot be considered a comprehensive review of these issues, but could help shape any future consultation with business over the design of a mechanism to promote GNAs.

#### Legal burden?

Interviews undertaken with members of the business community suggest that the business community would be uneasy about legally binding GNAs. However, businesses such as Shell say they would accept GNAs if required to do so by law and if all businesses were on a level playing field. Moreover it is clear that businesses in Scotland are unfamiliar with the concept and that business understanding of GNAs is very limited. The suggestions made by businesses to the researcher are perhaps reflective of current preoccupations and prejudices rather than a considered evaluation of a new concept. A wider consultation of business responses would be desirable to help allay misplaced concerns and reveal real potential impacts. Such a consultation would help ensure that misplaced opposition to the concept did not undermine the potential benefits to business.

The unease expressed about legally binding GNAs by those businesses consulted emphasises a current lack of understanding of the wider potential benefits of GNAs in rebuilding trust. Only if the mechanism is trusted by the community, can it be used to improve the business' reputation as a leader or improver in environmental and social performance. If companies can enter into GNAs simply for PR purposes, rather than with a genuine intention to improve their environmental and social performance that trust will not be built.

#### One size fits all

Another concern was that GNAs would be a uniform measure, insensitive to business structures. However we regard this concern as misplaced given that a strength of GNAs is that they are negotiated by the affected business, and therefore will directly reflect their business needs in a way that regulation finds difficult.

But the benefits of GNAs regarding small firms may be as great as for large industrial operations with well-known environmental impacts such as opencast mining, landfill and nuclear plants. Whilst such large facilities can be involved in regulatory capture, small firms are more likely to fall outside the net of the regulators. In both cases GNAs could provide a valuable complement to existing regulation. Environmental GNAs in the US have typically been used across a limited range of companies (mainly refinery/petrochemicals, chemical, mining, pharmaceutical, industrial gas and waste processing) and most seem to have been entered into with larger companies, including multinationals (Kenney et al 2003).

The GNA model is, in principle, a flexible one. In developing a range of Scottish GNA models, it is possible to look at GNAs for businesses that do not fall into the large industrial category. GNAs could be used by both small and large companies, and not just by facilities engaged in industrial activities. For example, a garage could enter into a simple GNA with the local community regarding the environmental impacts of the garage.

### Financial costs

Costs for business are a legitimate concern, although often one over-emphasised by businesses that do not face direct international competition (Turner, 2001). Some of the GNAs in the US have entailed the expenditure of millions of dollars on environmental performance improvements (Kenney et al 2003). However, this implies a failure of regulation to deliver the standards required by law, and such high expenditures would seem unlikely in the Scottish context. Moreover, companies may find financial benefits both from improved resource and waste management, and from marketing if they can demonstrate that they are going beyond the legal minimum by engaging with the local community and following more progressive social and environmental standards.

It might be feared that businesses would regard the introduction of GNAs as an excessive cost, and move or threaten to move their operations to countries with a weaker environmental framework. However this concern was not raised, and the framework of negotiation with the local community means that any real threat to jobs would be taken very seriously in the negotiations. As far as we can determine, no plant has closed or relocated as a result of US GNAs. But to ensure that businesses cannot abuse such a threat, high standards of transparency and reporting are needed.

#### Case study - reflections from Shell

Shell suggested that the European Eco-management and Audit System (EMAS) requirements regarding community communication could fulfil the role of GNAs (meeting with Shell on 15/11/02). However although EMAS regulations require that the company communicate with the community, mainly by ensuring that the environmental statement is made publicly available, the EMAS community information requirements are extremely limited in comparison with the broader accountability demands of GNAs. Shell also suggested that liaison groups already fulfilled the proposed role for GNAs. This research indicates that this is not so, as GNAs offer leverage to communities that liaison groups do not, and allow concerns beyond the scope of EMAS to be expressed and addressed.

Shell is of the opinion that they could easily comply with a GNA, but smaller firms would have difficulties adapting to GNAs. However the inherent flexibility of the GNA mechanism should make it easily scaleable to smaller companies, it is highly unlikely that such smaller companies would raise the same scale or complexity of community concerns as Shell.

### 3.7 CONCLUSIONS

Current provisions in Scotland for public participation remain limited. Initiatives to involve communities in corporate decisions are mainly company-led and offer no independent initiative or power to the community. Community liaison groups, for instance, have some key similarities with GNAs, but extend very little real power to communities. Other mechanisms of accountability are tenuous or indirect and thus unlikely to generate influence over companies. The planning (and to a lesser extent the pollution control) systems offer limited opportunities to comment at particular points in the life cycle of a facility.

We see a *prima facie* case in Scotland for a mechanism that can deliver greater corporate accountability to communities for negative social and environmental impacts as a mechanism to deliver environmental justice. Scottish examples of GNAs so far are very limited. Planning and pollution control law appear to offer potential routes to GNAs. But it would appear that the private legal option would offer more flexibility and create the least conflicts of interest (see also figure 1 below). However the details of the mechanism by which GNAs could be introduced requires further research to establish how best it could work. We turn next to the form a GNA adapted to the Scottish context might take.

## 4. Draft Guidelines for Model GNA Process and Agreement

This section outlines some general considerations relating to the process of negotiating, drafting and implementing a GNA and provides preliminary guidelines on the process of establishing, implementing and monitoring a GNA. It includes a draft template for a simple model GNA and concludes with recommendations as to the role of the state and regulators in GNAs.

### General Considerations

GNAs are flexible enough to be used by a range of types and sizes of companies and communities, with varying mechanisms of enforcement. The draft model process and agreement below only highlights desirable elements of both the process and agreement, rather than prescribing one standard model.

Although we see real benefits to the use of GNAs in particular circumstances in Scotland, it will remain important to assess the specific costs and benefits of GNAs to communities, NGOs, business and regulators, particularly in comparison with other options such as changes in regulatory requirements, or community liaison committees. We also recommend a broader assessment of experience with GNAs once a significant number (10-12) have been implemented.

### 4.1 THE PROCESS

The process breaks down into three basic phases:

#### *Phase 1: Pre-negotiation*

The key elements of this phase are the incident or activities that trigger the need or opportunity for an agreement, identification of the potential parties, and – in many cases - capacity building for the community.

#### *Phase 2: Negotiation and agreement*

The key elements of this phase are establishing dialogue followed by the negotiation and construction of the agreement between the parties. In some cases agreement will not be possible, and in others it may become unnecessary because initial dialogue resolves any concerns.

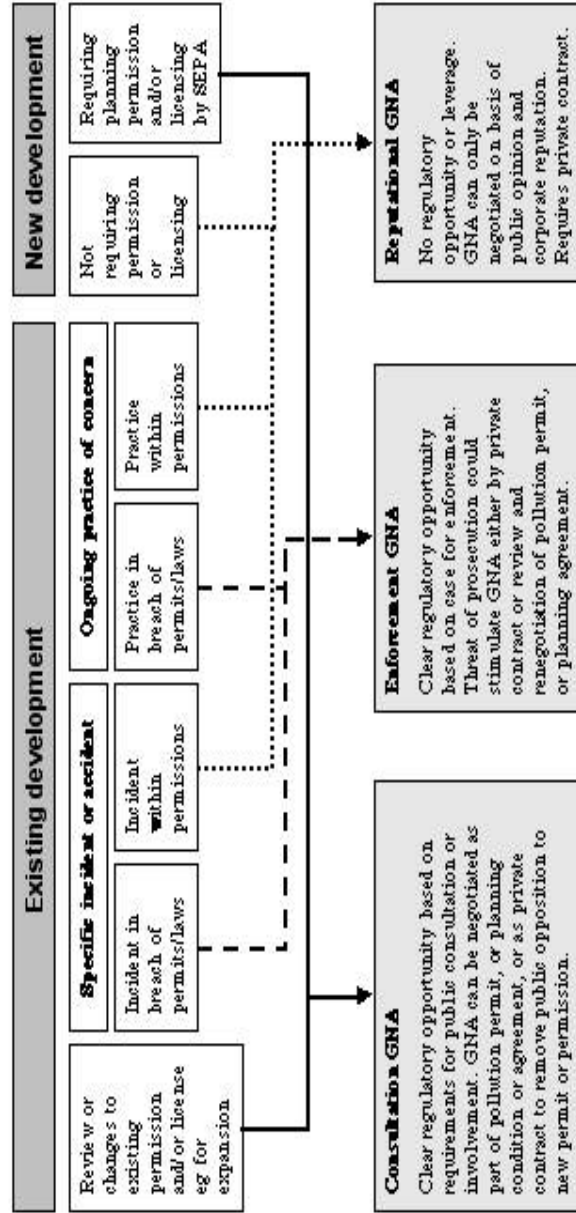
#### *Phase 3: Implementation, monitoring and review*

The key elements of this phase are the practical implementation of the agreed actions, monitoring of their effects, and where necessary, either review or enforcement of the agreement.

### Pre-negotiation

There are several potential routes into a GNA. These different routes could be described as ‘consultation’, ‘enforcement’ and ‘reputation’ (see figure 1). Experience suggests that the most common involve a new development or expansion by an existing company, or a particular incident of concern ( eg an industrial accident or pollution incident). Such events can catalyse communities into action. But US experience suggests that unless the community is already organised, and possibly even campaigning to change the company’s behaviour, the capacity to begin negotiating a GNA is unlikely to be in place.

Figure 1: Practical routes to GNAs



Where a community is active, its activism is likely to have a structure. However, we must recognise that such community groups do not necessarily represent the whole community and its diverse range of interests and interest groups. Structuring a community organisation so it is adequately representative, and - ideally - has legal personality so it can enter into a legally binding agreement takes time and cannot be driven by the company.

Representation of local communities may be achieved through involvement of elected local government representatives, by electing community members on a GNA oversight committee, or more informally through existing community organisations or residents' associations.

A community organisation needs various skills and financial resources in order to identify the need and potential for a GNA and to subsequently negotiate and monitor it effectively. Even basic skills such as the ability to assess and articulate demands are not universal. Indeed it is those communities most in need of GNAs that are most likely to lack such capacities. It is important that community capacity be assessed at this stage. Without the capacity to follow through the process the success of the GNA rests with the company, and the value of true engagement and dialogue is lost.

Depending on the issues of concern, community groups may wish to consult or seek support from one or several of the following groups. Community Council; local authority; community mediation network; Planning Aid; SEPA; Citizens' Advice Bureau; Legal Aid; environmental and other NGOs; or trade unions. The broader implication is that these groups may in turn require improved information on the nature and scope of GNAs to be able to provide useful input and to support capacity building in the community.

US experience suggests that the key step for communities is setting clear aims in advance, and capacity building may need to be directed to support communities to do so.

### **Negotiation and agreement**

Along with the company and the community representatives (who will normally be the principal parties to the GNA), a number of other individuals or groups might be involved in the negotiations, to inform the process and represent other affected interests. These might include trade union representatives, the local authority, regulators, consumers or business partners of the company, investors, environmental and other NGOs with an interest in the aim of the GNA. If they are both involved in the negotiation, and likely enforcement of the GNA, the local authority and regulators should be sensitive to the potential conflicts of interest that may arise between supporting community interests and implementing their duties.

Successful negotiation, like effective dialogue, depends on reliable information and trust-building. GNA negotiations must start with a recognition of the lack of trust (or even state of mistrust) that can exist between the community and company.

Communities are likely to need help in the negotiation process – both technical – and potentially legal - support regarding the content of the GNA, and practical support to facilitate the process. We recommend that the company involved should offer to finance independent consultants or professional mediators to assist the community. The company may also wish to employ consultants to help it negotiate and communicate. Community workers or mediators from the community mediation network may also be involved to support the community or to help them learn the necessary skills to negotiate for themselves.

A professional mediator facilitating negotiations would help resolve the imbalance of power between the local community and the company. To build community trust it may be most appropriate for such facilitation to be state-funded rather than paid directly by the company involved. However a community trust fund – funded by the company but managed by the community would be a practical option in most cases.

Technical advice might be provided by SEPA and other regulators, or in some cases, through access to academic resources at Universities. In the absence of the equivalent of the Dutch

'science shops', financial support from the state or from the company involved is likely to be required. Planning Aid and Citizens Advice Bureaux may be able to offer some relevant support. Policy changes may be necessary for legal advice to be supported by legal aid.

### ***Agreement Options***

This research has indicated that incorporating GNAs into an existing legal framework not only affords communities greater legal protection but will also instill greater community confidence in GNAs and provide the GNA with more durability.

Figure 1 indicates the circumstances in which the different options and mechanisms we currently consider practical may arise. The touchstone for all forms is an agreement that is clear and simple. As the figure implies, we do not see private contracts, planning agreements and pollution licenses as alternative forms of GNAs in all circumstances, but as possible forms of GNAs in specific circumstances.

### **Implementation and evaluation**

Without effective implementation a GNA is meaningless. Experience with GNAs suggests that expecting 100% implementation is unrealistic, but high levels of implementation and compliance can be achieved with the right procedures and mechanisms for implementation, monitoring and review.

The central mechanism is an oversight committee, constitutionally dominated by the community, to which the company reports. Reporting on the GNA's implementation must reach more widely, and good practice suggests a website (independent of the company's site), a newsletter and regular public meetings.

Confidence in the effectiveness of the GNA and the accuracy of the company's reports can be built and reinforced with tours of the facility, provision of pollution monitoring equipment and independent audit and verification of company reports. Technical expertise and funding is critical for implementation monitoring.

Regulators could facilitate monitoring of compliance in their areas of competence, verify company or community monitoring, provide expert technical advice where needed, and if legally enabled, could provide the sanctions needed to ensure enforcement of a GNA.

Mechanisms are needed to ensure that the agreement can be enforced in the event of non-compliance. Experience with Dutch covenants suggests that such sanctions mechanisms must be proportionate. GNAs linked to planning conditions or agreements would be enforced through planning enforcement measures and rely therefore on the relative effectiveness of such enforcement tools. GNAs linked to pollution permits would need to be similarly enforced through the threat of revocation of the permit, or through fines for non-compliance. Whether such measures could be used for GNA provisions beyond pollution is unclear. Moreover, pollution enforcement measures do not currently appear to offer adequate disincentive. Private legal contracts would be enforced through appeal to the courts and could include provisions for fines, which could be paid into a Community Trust Fund. In all cases a duty on the company to inform public and authorities of non-compliance potentially offers a soft initial sanction in the form of a reputational impact.

GNAs will not resolve all differences between a company and community instantly. Disputes can be expected to arise which are not clearly covered by existing provisions, or over whether the provisions have been complied with. Good practice suggests a dispute settlement procedure should be built into the GNA, providing access to mediation or arbitration in such circumstances. Again external resources and funding are likely to be required.

Circumstances change, and GNAs need to be living mechanisms. Good practice suggests provisions for evaluation and review of the GNA, involving all the parties, and the potential for revision of their provisions.



## 4.2 MODEL GNA AGREEMENT/TEMPLATE

It would be impossible to prescribe one ideal model GNA to be adopted under all circumstances, as each GNA scenario will have its own needs and range of resources and solutions. Because one of the values of a GNA is its flexibility and ability to adapt to a site-specific situation, there is a spectrum of possible GNA models. Here we simply sketch our suggestions for the desirable elements of a GNA.

In drafting the GNA, the more detailed and precise the terms, the greater the chances of clarity and implementation. For instance, when it comes to the minutes of the oversight committee, it should be specified whose responsibility it will be to record the minutes, how the minutes will be circulated, to whom the minutes will be circulated, and how the minutes will be made public, and who will bear the costs of preparing and circulating the minutes. Attention to detail can avoid non-implementation due to an absence of defined areas of responsibility and action.

The template components are not intended as specific requirements; rather, they are points that might need to be considered when negotiating a GNA. As can be seen from Appendix 4 (contents of the Stillwater GNA), this is far from comprehensive for all situations, and should be seen as a basis for elaboration in any given circumstances.

## Scottish GNA template

### 1. Purpose, Parties and Definitions

**1.1 Parties to the GNA:** *The name, legal status (eg registered non-profit corporation), and a brief description of what each party does and where. This section should include a statement to the effect that the agreement is binding upon the company's successors in title, partners, subsidiaries, etc.*

**1.2 Background to GNA:** *(Also known as 'recitals') A brief statement of the issues and background that led up to the agreement.*

**1.3 Purpose:** *A clear statement of the main objectives of the GNA. Possible objectives might include one or more of the following:*

- *To minimize the adverse impacts caused by the company on the local communities, economies and environment.*
- *To establish and maintain open lines of communication between the parties to address issues of concern raised by community organizations and concerned or affected local residents.*
- *To provide community organizations with the opportunity to participate in company decisions that may impact local communities, economies or the environment.*
- *To minimize future litigation between community organizations and the company by establishing a dispute resolution mechanism for the use of the parties.*

**1.4 Definitions:** *Certain terms should be defined in this section or in an appendix. Terms relating to the locality, the business activities, community activities may need to be defined here. Terms relating to the definition of the parties are covered in section 1.1.*

### 2. Commitments of the Parties

**2.1 Company commitments:** *A typical Scottish GNA may include provisions including some or all of the following issues. In each case the commitments should be specific and simple to measure, attributable to particular individuals and realistic. Where changes or improvements are included, the commitments should also be time-specific.*

- *Environmental performance: eg targets beyond legal minimum.*
- *Noise and nuisance: eg traffic management or operating hours.*
- *Decommissioning and restoration provisions: eg for subsequent use of the site.*
- *Health and safety performance: eg accident or incident prevention.*
- *Employment Policies: eg relating to the local community or specific disadvantaged groups.*
- *Local Economic Conditions: eg local purchasing.*
- *Resources and training: eg to help the community gain skills relevant to the company.*
- *Information policies: eg regarding accidental releases or changes in operations.*

*Note: Commitments to reporting and information disclosure are also addressed at section 3.2.*

**2.2 Community commitments:** *Any commitments entered into by the community group should be recorded in the GNA also, in similar specific terms. These might include commitments to disseminate information about the company's performance under the GNA to all members of the community. NB: it is not appropriate for such commitments to include a 'gagging clause' preventing the community from speaking out (to regulators, NGOs or the media) about the company's performance or activities although some limits on grounds of commercial confidentiality may be unavoidable*

### **3. Structures and Mechanisms**

**3.1 Oversight Committee (or Liaison Group):** *This clause should cover:*

- *The composition of the group (ideally the community should hold the majority of places),*
- *Processes for election or appointment and removal of members,*
- *The rights, scope and powers of the group: in particular regarding its ability to enforce or amend the GNA.*
- *Rules and procedures including the decision-making process.*
- *Frequency and procedures for meetings including record-keeping.*

**3.2 Access to information and confidentiality:** *This clause should set out the basic provisions for disclosure and reporting of information by the company. It should set out what information will be provided and with what frequency. In doing so, it should recognise the fundamental need for reliable information both regarding performance against the GNA provisions, and of other relevant information about the company and its activities. It should set out the extent to which any of this information is commercially confidential. As noted above it should not include any general 'gagging clause', although it may be reasonable for the company to establish a right to see and comment on any publication (eg press release) the community parties seek to make. It should establish a similar right for community to see and comment on any public statements the company plan to make relating to the GNA of matters covered by it.*

**3.3 Monitoring and verification of company commitments:** *This clause should set out how the company's performance against the provisions will be monitored, and if appropriate, how reports on performance will be verified. If pollution is the concern, monitoring sites should be selected by the community. We recommend that where the company reports on its own performance, this should be independently verified (eg by the relevant regulators)*

**3.4 Community access to site:** *This clause should define what access the community should have to company facilities, under what conditions and with what notice. Community access to the site forms an important element of verification and should not be limited without due cause (eg to ensure compliance with Health and Safety regulations).*

### **4. Non-compliance Provisions**

**4.1 Duty to inform:** *This clause establishes a duty on the company to inform the community, public and authorities of non-compliance with the GNA provisions.*

**4.2 Sanctions for non-compliance:** *This clause should set out how the agreement will be enforced in the event of non-compliance, and what if any penalties the parties might face if they fail to deliver on their commitments under the agreement. Examples might include fines to be paid into a Community Trust fund, compensation for damage or nuisance, or other forms of restitution.*

**4.3 Trigger mechanisms for enforcement:** *This clause should set out the procedures will be used to adjudicate non-compliance (eg agreement of the oversight committee, or advice of a regulator), and a 'complaints' mechanism whereby claims of non-compliance by concerned members of the community could be assessed.*

**4.4 Revision of GNA mechanisms:** *This clause should set out in what circumstances the GNA can be revised, and how it can be reviewed in the event of non-compliance due to unforeseen circumstances (which do not merit enforcement action).*

## **5. Dispute resolution process**

**5.1 Dispute resolution:** *This clause should establish a process for the resolution of disputes between the parties not covered elsewhere in the agreement. We suggest that some form of independent arbitration or mediation be prescribed.*

## **6. Funding**

**6.1 Operating funds:** *This clause should set out responsibilities for funding the operation of the GNA (including the oversight committee, monitoring, reporting and auditing). We recommend that this should be funded by the company.*

**6.2 Community Trust fund:** *Where appropriate, this clause would establish a community trust fund to enable the community to hire independent experts or pay for independent studies (the circumstances in which this would be reasonable might be defined in the dispute settlement procedure).*

**6.3 Escrow Fund and Escrow Agent:** *Where appropriate, the company might be required to set up a fund from which costs of restitution or penalties might be drawn. This clause would define the nature and management of such a fund.*

## **7. Miscellaneous provisions**

**7.1 Controlling Law:** *If appropriate, this clause defines the controlling law under which the agreement is made.*

**7.2 Duration of agreement:** *This clause would define the duration of the agreement. Normally this would be indefinite, or for the lifespan of the facility and any necessary decommissioning or restoration. It may also be relevant to state or restate here that the agreement is binding on successors in title.*

**7.3 Review of agreement:** *This clause would allow for review of the GNA under certain circumstances or at certain intervals.*

## 5. Discussion and Conclusions

*GNA*s can be a useful supplement to effective and stringent environmental regulation in helping deliver environmental justice. They cannot substitute for such regulation. They offer system level benefits for communities in this respect, and for businesses through helping rebuild public trust in business. While it remains appropriate to focus on improving the regulatory framework as a key method of enhancing environmental standards and corporate accountability, the development of *GNA*s could serve to complement and strengthen existing efforts at increasing public participation in the system.

*GNA*s should be seen as a tool to support dialogue and engagement between communities and companies, which:

- complements the existing regulatory framework and other opportunities for communities to participate in environmental decision-making at a wider level
- delivers higher site-specific environmental and social standards and greater corporate accountability to local communities; and
- thereby builds community capacity and trust between communities and companies.

Support for *GNA*s could help the Scottish Executive to balance its commitment to both economic development and environmental protection and environmental justice, and help SEPA to deliver environmental justice. However, *GNA*s alone will not allow communities to gain and assert their rights when they feel unable to engage with the system, and mistrust the motives of the state and business.

*GNA*s can only contribute towards making businesses sustainable. Although they may help resolve local concerns, they do not offer a tool to address issues such as unsustainable use of resources or energy, unsustainable generation of waste, or the impacts of unsustainable consumption. They may enhance business accountability to one or even two stakeholder groups (communities and employees), but leave other stakeholder groups unempowered. Indeed there is even a risk that as a result of a *GNA*, the negative impacts of production may be displaced to more remote locations and even weaker communities.

*The communities most in need of GNA*s are the least able to establish them for themselves as they are likely to lack the relevant resources and skills, and have the least existing leverage over the company. The capacity to negotiate, own and implement *GNA*s is significant – and without it *GNA*s are likely to be ineffective. The poorest and most disadvantaged communities are those which most lack such capacity.

*Communities cannot trigger GNA*s without the capacity for effective engagement. Both theory and practice indicate that this requires leverage, or a “credible threat” (eg of litigation, or the ability to influence or prevent the grant of planning permission through, for instance, TPRA). It is hard to conceive of communities obtaining such leverage in the absence of enforceable rights. Scotland has begun implementing laws that will facilitate greater citizen access to environmental information, creating some of the enabling context that exists in the US. However, Scottish citizens are a long way from having the suite of enabling laws that pertain in the US.

*In the US community-enabling laws and organizational resources have provided both capacity and credible threat, but GNA*s are still of variable value. In Scotland the context is weaker and would enabling reforms such as TPRA, legal standing for community associations and NGOs, etc would strengthen the potential for *GNA*s. There are currently no existing accountability mechanisms within the Scottish context that achieve the same range of purposes as successful *GNA*s.

*GNA*s in the US evolved as a means of empowering local communities under a fairly defined set of citizen enabling laws, laws that do not pertain in Scotland. As the key legal and institutional conditions that have led to successful *GNA*s in the US do not pertain in Scotland, a direct,

immediate and unmodified transposition of the GNA model as used in the US into the Scottish context is unlikely to be successful. If a successful GNA model is to be developed for Scotland, it has to be done in a fashion that takes into account the legal, social, economic and political landscape of Scotland. However, we do not believe that the essence of the GNA concept needs to be substantially adapted to the Scottish context as long as changes to Scottish law that reflect beneficial US laws are introduced. Some such measures are already envisaged, such as a Scottish toxics pollution inventory, and others are more broadly desirable, such as enhanced community access to the courts. With such measures it seems probable that a more enabling environment will be created in which GNAs based on the US model could be effective in Scotland.

***Non-binding GNAs risk public distrust as PR exercises. In particular unilateral voluntary measures by companies have largely proven unhelpful to communities and the environment. Legally-binding GNAs are the only form trusted by communities.*** In the US, even the simplest of non-binding provisions have proven hard to implement. GNAs could be incorporated into the existing legal framework most easily and effectively in the areas of private contract, planning system and pollution control law. Facilitating the creation of an officially recognized, binding GNA that fits the existing Scottish institutional and legal framework, will help deliver the objective of improved public participation in environmental decision-making, thus anticipating one of the aims of the Aarhus convention.

However a legally-binding basis is necessary but not sufficient for effectiveness. Effective GNAs (ones which reduce corporate impacts and enhance company accountability to the community) also require independent monitoring, technical expertise, dispute settlement procedures, etc. US experience indicates that to be trusted the GNA must be seen by both parties as a mechanism of accountability as well as a mechanism of communication.

***In the Scottish context, Section 75 planning agreements, planning conditions and pollution permits all offer mechanisms for legally underpinning GNAs, but an enforceable private contract would generate least conflicts of interest and offer most flexibility*** (to address situations in which planning or pollution permissions were not required at that time) and the easiest scope for the community to be the lead party in the agreement. If SEPA or the local authority were the lead party this reduces community trust, and creates potential conflicts of interest.

GNAs in Scotland could cover a wide range of company types and circumstances, and should not be limited to large companies or those subject to specific regulatory regimes (such as IPPC).

To build a GNA model in Scotland that is based on co-operation and a recognition of responsibilities from the outset, then GNAs should suit companies who are motivated by enlightened self-interest, who see the advantage in being leaders in setting environmental and social standards. Thus GNAs could also apply to companies that are operating within land use and pollution control licensing conditions.

GNAs do not necessarily have to be limited to industrial processes. The principle could be applied to other types of commercial activity as well, where the environmental and social impacts on the community might not be as obvious or as intense. For instance, the developer of a building could enter into a GNA with the community regarding traffic, noise levels, local employment; the owner of a car repair workshop could do the same. GNAs might also be helpful in addressing community concerns that are not always best dealt with by legislation eg odour, smoke, noise and operating incidents such as fires and accidents.

However at present GNAs do not seem to be an appropriate tool to enhance accountability of Scottish companies operating overseas. Such GNAs would have to be company-led, and this review has suggested that such company driven GNAs will not deliver the community benefits sought. Moreover, the research reveals that GNAs require an enabling framework of law and policy – which is unlikely to be present in most developing countries. Nor does the research indicate a role for industry-wide GNAs. Much of the value of GNAs arises from their flexibility and the equal or leading role played by the community in their development. Neither of these

factors apply at sector level, where the least trusted and least effective examples of unilateral voluntary agreements are to be found.

***In order to develop a democratic, effective and robust mechanism, the GNA model should be put to wide consultation with all sectors of society – the state, regulators, business, local communities and NGOs.*** The options outlined in this report are neither definitive nor exhaustive. More detailed research and legal guidance would be necessary to establish the optimum parameters for legally-binding GNAs which meet community needs whilst being acceptable to the companies affected. However, where community interest already exists, there may be a case for pilot studies to help design the new policy framework.

The development of a successful Scottish GNA model would be enhanced through state recognition of the GNA concept, particularly in the absence of an active, widespread and well-resourced environmental justice movement to develop GNAs. While giving the state a role in the development of GNAs could undermine the original grassroots credibility of the mechanism, communities are likely to feel more empowered and entitled if there is a defined process and officially sanctioned mechanism. Similarly companies are likely to have greater confidence in a mechanism that had wide acceptance and is recognized by the state. ***To enable effective GNAs requires state support for capacity building, and leverage and to create opportunity.***

### **Capacity**

Targeted resources to help communities develop the capacity to negotiate and implement GNAs are desirable, alongside generic community capacity building investment. US experience suggests that GNAs can be funded by the company involved. However there is a case for direct state support in at least two respects. First in the capacity building that enables communities to negotiate GNAs. This does not necessarily require new finance, but ensuring that community development funding eg through regeneration initiatives, can be directed to the skills and capacities that communities need to negotiate GNAs. Second in providing state-funded mediation to ensure that any break-down of relations does not also exclude the community from the finances they need to continue effective dialogue.

*We recommend that existing community grants and capacity building initiatives be reviewed to ensure that they can support communities in developing and implementing GNAs.*

### **Leverage**

Leverage for communities is provided by enforceable rights in an enabling legal framework. Both new and extended rights may be required to offer adequate leverage.

GNAs are more likely to be durable if incorporated within the legal framework. This will also give communities a greater sense of entitlement, and give companies a certain and level playing field to operate from. Legislative amendments, if necessary could be introduced as part of the proposed Planning Bill or as a stand-alone Bill to enable private contracts between communities and companies in defined circumstances. Policy guidance for SEPA and planning authorities could enable the development and testing of GNAs using those frameworks.

*We recommend that efforts are directed towards facilitating the incorporation of GNAs into the legal framework, and in particular to exploration and testing of practical options for private binding contract GNAs.*

### **Opportunity**

Opportunity has two dimensions: knowledge about the option of a GNA, and a moment when leverage can be applied to obtain an agreement.

To use them, communities and companies would need to find out that GNAs exist. The ideal way to promote them to communities is through peer recommendation – in other words through

linking communities where GNAs already work with communities where they might be useful. NGOs could play a useful role if public or charitable funding were to be made available to provide an information and networking service. Similarly, companies are more likely to enter into GNAs in good faith if informed by direct experience from other companies.

This report should help provide an objective information base, but to stimulate future GNAs will require a living and updated source of information available on the web, through citizens' advice bureaux, relevant NGOs and community councils. This service cannot be expected to be self-financing. In the longer term the possibility of financing such an information service through contributions from businesses benefiting from GNAs could be explored, although we are sceptical that such a funding arrangement would be trusted by communities in the state of conflict with a company that often precedes a GNA.

*We recommend that knowledge about GNAs is disseminated to public bodies, companies and community organisations, and that public participation in regulatory decisions and reviews is enabled so as to maximise opportunities for communities to apply leverage.*

## **APPENDIX 1: METHODOLOGY**

This project is primarily a scoping exercise, to identify the range of issues and stakeholders that would need to be addressed in order to determine whether GNAs would be an appropriate model for Scotland. However, where possible it draws preliminary conclusions. The report reviews the existing literature on GNAs and related policy issues; reports semi-structured interviews with a wide range of stakeholders from local communities, business, regulators and NGOs; and offers an initial assessment of the relevant aspects of the land-use planning and environmental regulatory systems of Scotland and the US. It must be noted that there is very limited organized information available on GNAs in the US and elsewhere, and a dearth of extant rigorous academic analysis of GNAs.

There are a few grey literature articles written by people involved in US GNAs but we were unable to identify any extant body of rigorous academic analysis of GNAs. This lack of a documented and systematic analysis of GNAs has been confirmed by Denny Larson, of Citizens for a Better Environment (CBE), California, a veteran of some 25 GNAs in the US; and Nicola Acutt, who is carrying out PhD research at the University of East Anglia on voluntary environmental policy instruments. Unfortunately several people in the US-GNA field have either persistently ignored requests for information or indicated that they are not in a position to be of help without remuneration.

A GNA evaluation project is ongoing at the University of Colorado, but has yet to deliver outcomes. There is also very limited comparative analysis of the US and UK environmental regulatory systems, and no material was found that directly compared the Scottish and US environmental regulatory systems. This extremely limited range of available research and literature is one of the restricting parameters that this research has had to work with. For this reason, and because of the nature of the research questions, the data used is qualitative rather than quantitative.

All of SEPA's databases were searched, as well as the catalogues of the University of Edinburgh and the National Library of Scotland. Searches using various internet search engines were carried out. Enquiries were made to a variety of Law Schools at US Universities. The researcher also used a number of public opportunities to solicit and gauge response to the GNA concept: by conducting two workshops on GNAs at a day on environmental justice in October 2002; by holding a focus group session with the Forth Valley Friends of the Earth local group; by speaking on GNAs at a workshop on corporate social responsibility held by Agenda in 2002; by participating in a panel discussion on environmental risk and corporate social responsibility at the University of Aberdeen in March 2003; and by speaking at a Friends of the Earth Scotland conference on corporate accountability in May 2003. These events involved a range of community and business representatives. Business comments were also gathered in a dialogue with Shell, facilitated by Agenda.



## **APPENDIX 2: PEOPLE & ORGANIZATIONS INTERVIEWED AND/OR CONTACTED**

Sandford Lewis, US attorney, founder of GNA concept  
Denny Larson, Refinery Reform Campaign, California  
Bob Hinckley, US corporate lawyer  
CorpWatch  
FoE (US)  
Klaus-Peter Kemper – Planner, Germany  
Robbert van Duin – Environmental Consultant, Holland  
Neinke Gravesteijn – Directorate-General for Environmental Protection, Holland  
Nicola Acutt - PhD researcher, University of East Anglia  
Ewan Malcolm, Scottish Mediation Network  
David Leslie, Planning Aid  
Roger Sidaway, mediator  
Sheila McKay, Scottish Centre for Non-violence  
Prof Colin Reid – Law Faculty, University of Dundee  
Barbara Illsley – Town Planning, University of Dundee  
Elizabeth Baird – Planning Dept, Scottish Executive  
John Gunstone – Planning Dept, Scottish Executive  
Ian Glenn, Development Planning Manager, East Lothian  
Niall Urquhart – Principal Planner, Clackmannanshire  
Paul Zachowski - Principal Planner, East Lothian  
Chris Alcorn - Principal Planner, West Lothian  
Ian Ross – Planning Dept, Dundee City Council  
Hugh Melvin – Minerals Officer, East Ayrshire Council  
Ronan Doyle, SEPA  
Paul Young, SEPA  
Peter Singleton, SEPA  
Vanessa Kind, SEPA  
Dermot Grimson, Shell  
Vicky Tierney, Shell  
Brian Shaad, FoE (EWNI)  
Simon McRae, FoE (EWNI)  
Stuart Duffin, West Lothian Chamber of Commerce  
Corporate Watch  
Osbert Lancaster, CHE  
Kyla Brand, Agenda  
Marine Harvest  
Denis Robinson, Ethicon  
Martin Downing, WALM Consulting  
John Evans, interim MD, DERL  
Ken Newton, PR consultant, DERL  
Rena Smith, community representative  
Doug McLaren, Community Councillor, Broughty Ferry  
Tayside Recyclers  
Colin Forrest, FoE Tayside local group  
Richard Whyte, Neighbourhood Development Officer, Dundee City Council  
George Reagan, Councillor for Douglas, Dundee City Council  
Eurig Scandrett, FoE Scotland  
Jackie Mass, librarian, Douglas public library  
Derek Kiddie, DERL  
Andy Robinson, Clydesdale Action Group  
Carol Macdonald, Diosynth  
Andy Gouldson, LSE, Perception of risk in Grangemouth and Teeside project



### APPENDIX 3: US CASE STUDY GNAS

<b>Parties:</b>	Bowie Resources Ltd (mining company) - Western Slope Environmental Resource Council (WSERC - non-profit organization).
<b>State/ Date</b>	Colorado, 2000.
<b>Nature of Dispute and Leverage:</b>	Citizen concerns over impact of plans for increased production by three mines in area. BRL applied for a new federal coal lease to expand mining operations – citizens appealed against environmental impact statement – this sparked GNA negotiations.
<b>Purpose:</b>	To mitigate potential impacts on the local community resulting from a proposed increase in coal production by several local mines.
<b>Type:</b>	Legally-binding contract.
<b>Provisions:</b>	Addresses issues relating to truck and rail traffic, noise, local water supplies. Dispute resolution procedures.
<b>Costs:</b>	Community: \$15,000 pa - mainly staff time. Company: Unknown running costs. \$500,000 for rail mitigation trust.
<b>Implementation:</b>	Commitments honoured - rated successful by WSERC.
<b>Lessons learned:</b>	Ask for funding to pay someone to monitor; transfer of implementation responsibilities when staff change can be problematic; be clear about why choosing GNA as a tool; be sure the GNA will deliver more than alternate tools (eg lawsuits); and have bottom lines and stick to them.

<b>Parties:</b>	Chevron Refinery - West County Toxics Coalition, Citizens for a Better Environment.
<b>State/Date</b>	California, 1992.
<b>Nature of Dispute and Leverage:</b>	Citizens concerned about public health, environmental impacts, potential accidents. Chevron cited for environmental law violations and accidents. Permit appeals by community triggered GNA negotiations – Chevron applied for permits for construction projects and process changes to make cleaner fuels.
<b>Purpose:</b>	To reduce/prevent pollution (Clean Air Act violations) and invest in local economy
<b>Type:</b>	Legally-binding contract, negotiated as part of permit process. Remains in effect if company sold.
<b>Provisions:</b>	Addresses issues relating to pollution elimination, local economic commitments, emergency response and health care commitments
<b>Costs:</b>	Information not available. Company did not provide funds to community to ensure continued participation in implementation.
<b>Implementation:</b>	Almost 100% of commitments honoured. WCTC had difficulties in monitoring implementation.
<b>Lessons learned:</b>	Community empowerment and education as a result of GNA; Concerns about ability of community group to monitor implementation; GNAs do not solve all problems.

<b>Parties:</b>	Rhone-Poulenc — Texans United Education Fund (non-profit public interest organisation)
<b>State/Date:</b>	Texas, 1992.
<b>Nature of Dispute and Leverage:</b>	Community concerns about odours, noise, traffic, toxic releases/sills and illnesses. Community galvanized by accidental release of sulphur dioxide in 1992 which resulted in hospitalisation of 27 people. Community opposed modification of permit issues by Texas Water Commission.

<b>Purpose:</b>	Facilitate community input into environmental and safety auditing and decision-making at the plant.
<b>Type:</b>	Legally binding document incorporated into the incinerator permit.
<b>Provisions:</b>	
<b>Costs:</b>	Information not available
<b>Implementation:</b>	Most commitments honoured, difficult to keep community groups together and involved.
<b>Lessons learned:</b>	Speed up process, be clearer about what community wants, make agreement easier to understand and less legalistic, be tough, keep government agencies out of process.

<b>Parties:</b>	Rohm & Haas — Ohio Citizen Action, Environmental Community Organization (non-profit citizen groups).
<b>State/Date:</b>	Ohio, 2001.
<b>Nature of Dispute and Leverage:</b>	Citizen concerns about odours, toxic releases of methyl chloride, emergency response issues, truck parking. Citizen Audit of company's air pollution record triggered company agreeing to meeting with community.
<b>Purpose:</b>	To improve air quality and reduce noise pollution.
<b>Type:</b>	Non-binding, informal agreement to continue working on issues.
<b>Provisions:</b>	Eliminate odours & truck parking, reduce/eliminate toxic releases of chloromethane, establish emergency response plan.
<b>Costs:</b>	OCA - \$3,000 on negotiation process, \$1,500 on implementation. R&H - \$10,000 on facilitator, will spend \$2 million on implementation costs. No funding to community groups for monitoring GNA.
<b>Implementation:</b>	Most commitments honoured to date. Independent facilitator hired by R&H to oversee monthly meetings. Engineer from plant participated as main plant representative. No state or federal regulatory agencies participated in the meetings.
<b>Lessons learned:</b>	Get signed agreement; greater involvement of plant manager and employees; good working relationships among participants; canvassing is an effective tool for leverage.

<b>Parties:</b>	Seneca-Babcock Industries — Seneca-Babcock Environmental Subcommittee, Buffalo Common Council. GNAs signed with three companies: PVS Chemicals, BOC Gases & Natural Environmental, Inc.
<b>State/Date:</b>	New York, 1993-1997.
<b>Nature of Dispute and Leverage:</b>	Problems range from foul odours to accidental releases of toxic chemicals. A sulphur dioxide release in 1991 galvanized local residents into forming SBESC. Following a diesel fuel spill into Buffalo River in 1993 four companies were pressed to honour commitments of Chemical Manufacturers Association Responsible Care Programme by meeting with local residents and signing GNAs.
<b>Purpose:</b>	To reduce use, release and storage of toxic chemicals to protect the health of workers, the community, and the environment.
<b>Type:</b>	Written agreements, but not legally-binding. Natural Environmental, Inc (waste processing facility) – GNA signed as settlement of permit challenges by SBESC.
<b>Provisions:</b>	Natural Environmental, Inc: Traffic, noise, operations, local advertising of jobs provisions. PVS Chemicals (sulphuric acid plant): Pollution prevention, environmental assessment, emergency response plan provisions. BOC Gases: Emergency information data provisions. Buffalo Color, PVS and Allied Signal: to install automated dial-up system to notify residents of toxic releases.

<b>Costs:</b>	SBESC – under \$1,000. Companies – unknown. No funding from companies for community.
<b>Implementation:</b>	About half of commitments have been honoured. Problems arose when companies used stalling tactics to avoid compliance with GNAs.
<b>Lessons learned:</b>	Speed up process; produce legally-binding GNA; increased knowledge; meeting people; emergency notification system; hire someone to monitor company and report back to group

<b>Parties:</b>	Shell Oil — Concerned Citizens of Norco.
<b>State/Date:</b>	Louisiana. 2002
<b>Nature of Dispute and Leverage:</b>	African-American community of Diamond was sandwiched between the Shell Chemical facility and Shell/Motiva refinery. Residents developed cancers, respiratory problems. Two residents killed in explosion in 1970s. Catalyst was aggressive organizing and media campaign – including threat to publicize dispute at World Summit on Sustainable Development in Jo'burg in Aug 2002.
<b>Purpose:</b>	Relocation of the residents from the Diamond community immediately adjacent to the refinery in Norco.
<b>Type:</b>	Legally-binding buy-out.
<b>Provisions:</b>	Shell offered to purchase and relocate property owners or provide \$25,000 home improvement loans
<b>Costs:</b>	CCN - \$5,000 (facilitator, conference calls) plus NGO staff time. Shell - \$3 million. No funding from companies for community.
<b>Implementation:</b>	100% implementation anticipated re: buy-outs
<b>Lessons learned:</b>	Wishes residents had got higher prices for homes; achieved credibility with Shell and can use this credibility in other battles; more training for negotiating team needed; get what you want in a closed time frame to avoid having to monitor company in future.

<b>Parties:</b>	Stillwater Mining — Northern Plains Resource Council, Stillwater Protective Association, Cottonwood Resource Council.
<b>State/Date Signed:</b>	Montana. 2000
<b>Nature of Dispute and Leverage:</b>	SMC wished to expand palladium mining operations, for which state expansion and discharge permits were required. SPA filed intent to sue Montana Department of Environmental Quality because of approval of inadequate environmental impact statement. SMC sensitive to negative publicity, as owned by green funds.
<b>Purpose:</b>	To ensure that SMC would protect local watersheds from environmental degradation due to mining activities and mitigate the impacts of the influx of mine workers on the local communities.
<b>Type:</b>	Legally-binding – including all future purchasers of SMC.
<b>Provisions:</b>	Company commitments re: pollution prevention and remediation, traffic mitigation, investments in local infrastructure, regular environmental audits and monitoring, community access to company environmental data, financial support of community groups to ensure their continued participation in GNA-related activities. Community commitments re: dismissal of pending lawsuits, no further lawsuits, ending negative publicity, confidentiality agreement.
<b>Costs:</b>	NPRC \$63,000 on consultants and 3,000 hours of staff time. SMC - \$4 million per year to implement. Pays NPRC, SPA & CRC \$135,000 to cover monitoring costs
<b>Implementation:</b>	90% of commitments honoured
<b>Lessons learned:</b>	Brought respect for community; concerns about ability to maintain commitment to GNA; GNA means hard work and long-term

<b>Parties:</b>	Sun Oil — Community/Labor Refinery Tracking Committee
<b>State/Date Signed:</b>	Pennsylvania. 1997
<b>Nature of Dispute and Leverage:</b>	Public health concerns, nuisance and quality of life issues, impacts on the environment. After refinery emitted illegally high levels of sulphur dioxide, C/LRTC sent notice of intent to sue under the citizens suit provisions of the Clean Air Act
<b>Purpose:</b>	Settlement of lawsuit
<b>Type:</b>	Legally-binding. GNA is a Consent Decree negotiated as settlement for lawsuit brought by C/LRTC against Sun for Clean Air Act violations
<b>Provisions:</b>	Sun agreed: to invest over \$5 million in air pollution controls; to pay \$0.5 million in pollution penalties; to provide more information to residents on refinery activities; City have right to conduct site visits and inspect monitoring records; Parties agreed to establish Operating Committee to carry out certain provisions of the Consent Decree; Dispute resolution procedures.
<b>Costs:</b>	C/LRTC – none. Pro bono organizing support from Clean Water Action. As part of agreement, Sun paid C/LRTC’s legal costs - \$75,000 plus \$4,500 per quarter until Sun’s obligations met. Sun - \$5.5 million on implementation. No funding from company for community participation in GNA.
<b>Implementation:</b>	80% of commitments honoured
<b>Lessons learned:</b>	Would have liked GNA to have lasted beyond the life of the Consent Decree

<b>Parties:</b>	Syntex Chemicals — Boulder Residents for the Elimination of Air Toxics and Hazardous Emissions (BREATHE) & City of Boulder.
<b>State/Date Signed:</b>	Colorado. 1995.
<b>Nature of Dispute and Leverage:</b>	Syntex had highest air emissions in the state. When Syntex applied for a permit to modify facility. City refused to issue building permit until issue of toxic emissions was resolved.
<b>Purpose:</b>	To mitigate health hazards associated with the release of hazardous air emissions from existing operations and future expansions at the facility
<b>Type:</b>	Legally-binding contract.
<b>Provisions:</b>	Syntex agreed to: install a thermal oxidizer; testing and monitoring requirements; fugitive emission plan; independent facility review. City and BREATHE agreed to: not require Syntex to go through use review process; drop insistence on limiting emissions due to future expansions
<b>Costs:</b>	BREATHE - \$8-10,000, mostly on consultants. Implementation costs – time of unpaid volunteers. City – staff time. Syntex – unknown. No funding from company for community participation in GNA
<b>Implementation:</b>	70-80% of commitments honoured. Provisions can be enforced through civil action
<b>Lessons learned:</b>	BREATHE’s lack of technical expertise made it difficult to ascertain if company complied with auditing and testing requirements. Wary that GNA can be used as PR tool by company instead of as way to reduce pollution; keep negotiation process in public eye; focus more on building of community group to prevent burnout and dissolution; anticipate possible break-up of group and build in contingencies.

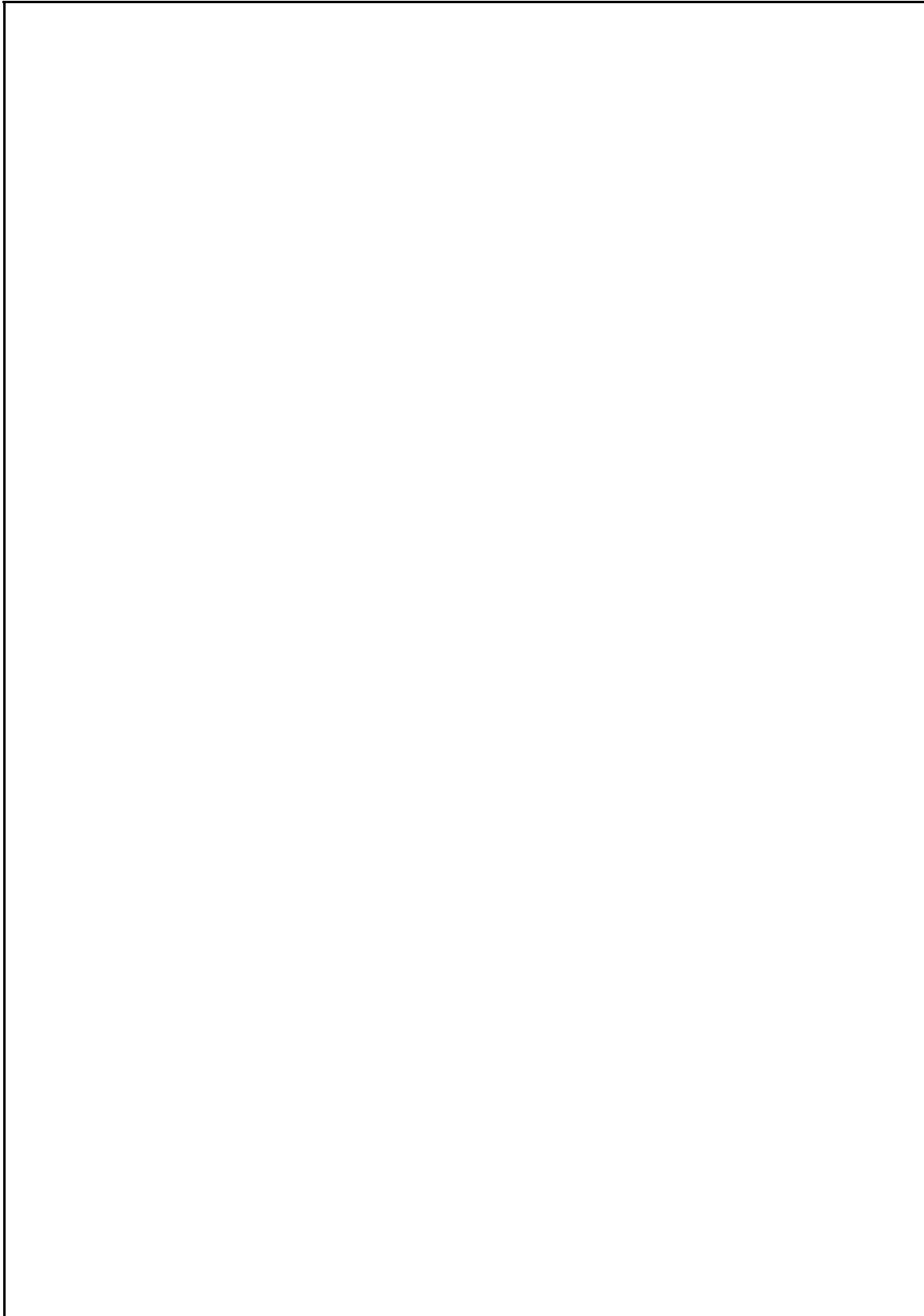
## **APPENDIX 4: STILLWATER MINING / NORTHERN PLAINS RESOURCE COUNCIL GOOD NEIGHBOUR AGREEMENT**

Stillwater Mining Company and the Northern Plains Resource Council, Cottonwood Resource Council and the Stillwater Protective Association signed a Good Neighbour Agreement in May 2000. The unprecedented agreement provides for a popular bus program, which transports hundreds of miners to and from the mine, reducing traffic on country roads, along with water quality protections and citizen oversight of mining operations. The agreement is administered by members of Northern Plains and its local affiliates – the Cottonwood Resource Council in Sweet Grass County and the Stillwater Protective Association in Stillwater County. The complexity and depth of the agreement is illustrated by its Table of Contents (reproduced below).

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**APPENDIX 5: DERL GNA**





## **APPENDIX 6: DIOSYNTH GNA**

This agreement is a charter for effective communication between the Company ( Diosynth Ltd) and the Community of Buckhaven, Fife.

All businesses exist to operate profitably. This creates wealth for the Local Community, in terms of employment, quality of life and social well-being. This imperative, however, must be balanced by issues concerned with safety and environmental performance.

The Agreement aims to provide the Community with an active role in achieving that balance, in a spirit of mutual interest.

### **Liaison Group**

Diosynth agrees to the establishment of a Liaison Group which will be made up of:

- 3 representatives from Diosynth Ltd
- 3 community representatives from Buckhaven
- 2 elected members
- 2 community advisors

Minutes of Meetings between the Company and the Liaison Group will be made public.

The Liaison Group will meet quarterly with provision for additional meetings if necessary.

Minutes will be circulated to all attendees and copies will be posted on Notice Boards within agreed areas in the town.

### **Newsletter**

A newsletter will be issued twice per year to all households within the town. This will include all recent and future developments of the Company. The Newsletter will be distributed by the members of the Liaison Group.

### **Community Access to Information and Visits to the Facility**

Information will be presented in an accessible and understandable form by the Company to lay members of the community.

The Liaison Group is welcome to visit the facility by prior arrangement. Other groups wishing to visit the site may apply via the Liaison Group. A member of the Liaison Group is welcome to attend environmental audits of the site.

### **Accident Emergency Plans**

Plans are discussed regularly with the Fife Council's Emergency Planning Group and any information requested by the Liaison Group will be provided by either party. When emergency procedures are enacted, whether during practice or for real, then the Liaison Group should be involved in the communication to the Community.

### **Environmental Performance**

A statement of Environmental Performance will be agreed and publicised in lay terms by both the company and the Liaison Group.

Technical Reports can be made available if requested.

Where targets are not achieved, a full explanation will be provided and any measures to be taken will be discussed in full.

Environmental monitoring will be established outside the perimeter fence in agreed designated areas.

**Employment Policies**

Whilst adopting an equal opportunities policy, Diosynth Ltd will give sympathetic consideration to employing local staff who meet the requirements of any post.

**Local Economic Conditions**

Any matters of mutual interest will be discussed with the Liaison Group. The Company gives sympathetic consideration to local procurement of services and goods.

**Changes to Operating Conditions**

The Liaison Group may discuss any change to legislation that relates to emissions from the facility, together with information on any new major raw material or product that comes to the site.

**Support in the Local Community**

It is the policy of the business to give support financially to some groups who are involved in worthwhile projects that bring a benefit to the community.

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