

Will civil penalties trump criminal sanctions?

A radical shift in environmental enforcement is in the making. Regulators such as the Environment Agency may soon be given a wide and flexible range of civil sanctioning powers. *Peter Kellett* reports.

Environmental laws have long been made and enforced on the basis that the most effective and appropriate sanctions are criminal ones. Offenders, where detected, have faced warnings, cautions or prosecution in the criminal courts. That approach may now change, with offenders facing a wide range of alternative civil, rather than criminal, sanctions.

This radical shift arose under the reborn better regulation agenda stimulated in large part by a key report by Philip Hampton: *Reducing Administrative Burdens: Effective Inspection and Enforcement* (HM Treasury March 2005, see www.berr.gov.uk/files/file22988.pdf).

That report in turn led to a review by Richard Macrory CBE of what could be done to improve compliance among UK businesses. Although the majority of UK businesses complied with regulations, many did not. The Macrory Final Report recommended that regulators be given access to a more modern and flexible range of sanctions that were proportionate to the risks faced: "My vision for the penalties system is a step change from where we are today". (*Regulatory Justice: Making Sanctions Effective. Final Report, November 2006*, see www.berr.gov.uk/files/file44593.pdf).

The Government accepted the Macrory recommendations in full and took many of them forward in the Regulatory Enforcement and Sanctions Act 2008 (the 2008 Act). Part 3 of the 2008 Act contains a framework for the creation and application of civil sanctions for a wide range of regulatory offences. It also creates a new route for dispute resolution, as appeals against the imposition of civil sanctions must be made to a recently created tribunal.

The Department for Environment, Food and Rural Affairs (Defra) and the Welsh Assembly Government (WAG), in England and Wales, have taken forward together the Fairer and Better Environmental Enforcement Project. That project held a consultation, which closed on 14 October 2009, on proposals

for a "more transparent, proportionate, consistent and effective environmental enforcement". The proposals suggest that the introduction of regulator-imposed 2008 Act civil sanctions will help create "a better graduated system of enforcement". The consultation also contained outline proposals to strengthen criminal court sentencing powers for the most serious cases, which would continue to be prosecuted (see www.defra.gov.uk/corporate/consult/env-enforcement).

A range of other environmental civil sanction mechanisms have been or continue to be created, in parallel, under the EU Emissions Trading Scheme, the Carbon Reduction Commitment and for hazardous waste. This article focuses on civil sanctions under the 2008 Act.

Who is affected?

The consultation proposed that a wide range of civil sanctioning powers should be given first to the Environment Agency, Natural England and the Countryside Council for Wales.

The recent consultation suggested that civil sanctions would be applied across over 170 separate Environment Agency enforced offences (out of about 500 such offences) ranging from transfrontier shipment of waste to producer responsibility to land drainage to permitting offences. The Government proposes to introduce the majority of these changes in April 2010. However, for offences relating to the proposed Environmental Permitting Regulations 2010, the intention is to introduce sanctions at a later common commencement date (ie April or October).

For Natural England and the Countryside Council for Wales enforced offences, the consultation suggested that civil sanctions would be applied to a range of almost 60 offences, including a number under habitats legislation and the Wildlife and Countryside Act.

It is therefore likely that many readers will be affected by these changes, if their companies

fail to comply with environmental regulation. In due course, the 2008 Act may be applied to other regulatory breaches outside of the environmental field, but, for now, the environment appears to be going first.

What do you need to understand about civil sanctions?

Civil sanctions are a parallel set of sanctions that will sit alongside criminal sanctions. Once an offence has been committed, it will still need to be investigated to the criminal standard of proof for both criminal and civil sanctions (before serving a civil sanction, regulators must be "satisfied beyond reasonable doubt" that an offence has been committed). If regulators consider that a sanction is warranted, they must then choose between the civil and the criminal sanction path. Once a path is chosen, with limited exceptions, regulators cannot subsequently revisit that initial choice of path.

The 2008 Act allows ministers to give regulators access to six different new civil sanctions (see below). However, only a sub-set of these six possible civil sanctions will be made available for each offence. Clear guidance will be needed to ensure that business and regulators understand what the possible enforcement responses are when an offence has been committed. These will range from simply providing advice and guidance, to applying one or more of the six available civil penalties. The six new sanctions can perhaps be more easily thought of visually as the following (courtesy of the Environment Agency) aims to illustrate (below).

Some of the civil penalties can be applied in combination with each other (eg restoration notices and variable monetary penalties), but others (eg enforcement undertakings) cannot be for the same offence.

A regulatory decision to impose a civil sanction can be appealed. All appeals against civil sanctions will go to a tribunal. The tribunal for environmental appeals will be a general regulatory appeal chamber run by the Tribunal Service, an executive agency of the Ministry of Justice. That tribunal seems likely to become a specialist environmental court with specialist staff and may well generate decisions of widespread interest.

As with criminal sanctions currently, all civil penalties will be paid into central funds, not to the regulator. This should avoid the creation of perverse incentives for regulators to serve penalty notices to recoup their expenses or fund enforcement activity.

Civil sanctions are just as complex as the criminal ones they will sit alongside. The Government hopes that they will be applied to produce better outcomes for businesses, the environment and people.

What are the new civil sanctions?

Some of the key points about each of the six new civil sanctions are set out below.

Fixed monetary penalties (FMP)

These allow a regulator to impose a monetary penalty for a fixed amount. The Government envisages that FMPs will be made available for clear-cut instances of offending that do not involve the creation of significant environmental harm or risk of

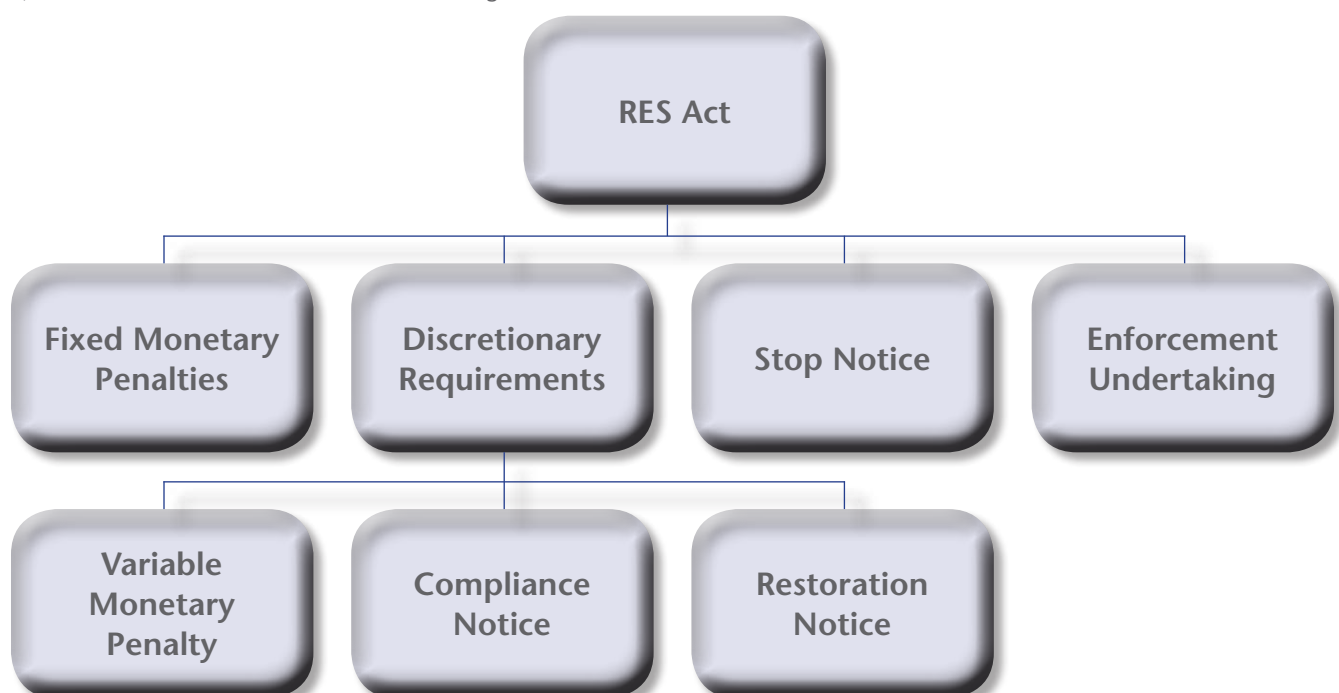
harm. This might include failures to provide monitoring data or other information when required. Regulators must first serve a notice of intent and take account of any representations received before deciding whether to proceed and impose an FMP.

FMPs would be set at £100 for individuals, including sole traders, and £300 for companies. Payment would be required within 28 days of a regulator's final notice imposing the sanction. Early payments of such sanctions attract a reduction by half (within 28 days) and, conversely, late payments attract an increase by half (those made beyond 56 days).

Discretionary requirements

These allow regulators to impose one or more of the following sanctions.

- Variable monetary penalties (VMP). These can vary in amount and must be determined by the regulator following a model that is contained in Defra/WAG guidance. The Government envisages that these sanctions would apply for moderately serious offences where the regulator decides that prosecution is not in the public interest. Prosecution would remain the normal enforcement response for more serious offences. VMPs might be used, for example, for many packaging waste offences that are currently normally prosecuted. The impact assessment accompanying the recent consultation anticipated that the Environment Agency would take perhaps 20% fewer prosecutions following the introduction of civil sanctions.



Environmental enforcement



The key question is: what level of penalty might result from particular facts? The answer is not yet clear. The Government's model requires regulators to follow three steps.

- o The regulator estimates the financial benefit of non-compliance (eg what fees and charges were avoided)

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- o a deterrent element, where appropriate. A starting sum for this element is chosen from one of three starting points (restoration costs or financial benefit or the maximum criminal fine in the Magistrates Court for the offence). That starting sum is increased by an assessment of various aggravating factors by up to four times (eg a history of previous breaches increases the deterrent sum) and then decreased by an assessment of various mitigating factors (eg voluntary reporting of the non-compliance reduces the deterrent sum)

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- o costs incurred by the recipient of the VMP (eg costs putting right the harm caused).

Regulators will be required to consult on how they would use this model to calculate a VMP (eg how will they apply mitigating factors to reduce the deterrent element of a VMP). Much attention will be paid to this methodology, perhaps more than any other civil sanction.

Only once a regulator has adopted a detailed methodology will it be possible to estimate the likely level of penalty flowing from a particular set of facts. There is little doubt a number of appeals will follow the imposition of VMPs, at least in the early years.

- **Compliance notices.** These require specified steps to be taken within a period to ensure that a breach does not

continue or recur. They can perhaps be thought of as similar to enforcement notes that already exist in regimes that require permits, such as environmental permitting. A compliance notice can be issued with a VMP or a Restoration or Stop Notice (see below) but not with an FMP. Regulators must first serve a notice of intent and consider any representations received before imposing a compliance notice.

- **Restoration notices.** These require specified steps to be taken within a period to ensure the position is restored, if possible, to what it would have been had no offence been committed. Similar safeguards exist for the service of restoration notices.
- **Stop notices.** These require a person to cease an activity that is causing serious harm or represents a significant risk of causing serious harm. They are intended to be used infrequently and can be used with any other sanction other than an FMP. The service of a stop notice effectively puts a person out of business, so, in addition to a high threshold test, there is a requirement to pay compensation where regulators either withdraw a notice or a person successfully appeals against it. Stop notices will not be suspended automatically on appeal. Instead, it is proposed that the Appeal Tribunal fast tracks urgent applications against suspensions pending a full appeal hearing against the notice. Given the risk of paying compensation, both operators and regulators will no doubt want such applications and appeals to be held promptly.
- **Enforcement undertakings (EUs).** They are perhaps the most innovative form of new civil sanction. EUs are voluntary undertakings that enable a person, who regulators reasonably suspect of offending (rather than being satisfied beyond

reasonable doubt that an offence has been committed), to give an undertaking to a regulator to make amends for non-compliance and its effects. Regulators are not bound to accept EUs and may instead choose to impose other civil sanctions or to prosecute. If regulators do accept an EU, then they cannot impose another civil sanction or prosecute. EUs would allow offenders to make amends relatively rapidly for an offence. They may, in consequence, prove to be a useful and effective sanction.

What happens next?

Regulators are currently being assessed to see whether they are judged to be Hampton compliant. The consultation made clear that civil sanction powers will not be awarded to the Environment Agency or Natural England unless the Better Regulation Executive considers that they are.

If regulators are found to be Hampton compliant, then legislation is likely to be laid in Parliament and the Assembly to bring civil sanctions powers into effect from April 2010. The Government aims to give guidance to regulators on how they should apply civil sanctions.

Regulators are required to consult under the 2008 Act on how they would implement civil sanctions. Regulators are unlikely to consult before the spring of 2010. They will need to reassure businesses and the public that, if they are given these new powers, they will act responsibly. Two areas of considerable interest will be how regulators intend to:

- change their enforcement and prosecution policies to allow for the use of new civil sanctions powers
- calculate variable monetary penalties.

The 2008 Act requires a review of the operation of civil sanctions to be conducted within three years. This is perhaps as well, as there has never been a more radical shift in environmental enforcement than that which is currently proposed. The new system may be more "transparent, proportionate, consistent and effective", but an early review will allow any necessary changes, as a result of appeal outcomes or experience, to be made. ■

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The views in this article are personal and the fee has been donated to the charity the UK Environmental Law Association Peter.Kellett@environment-agency.gov.uk

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