Fairer and Better Environmental Enforcement team
5A Ergon House
Horseferry Road
London SW1P 2AL

13th October 2009

Dear Sir/Madam,

We attach to this letter our responses to each of the questions set out in the consultation document. However, we wish to make a broader response to a number of the issues and questions. In particular, we want to draw attention to the following three matters:

- In respect of the questions under Section 4 as to whether UKELA supports the introduction of civil sanctions.

- In respect of the questions regarding Section 5 (purpose and key features of the new civil sanctions enabled by the RES Act) – in particular as to the approach to calculating the VMPs (question 7).

- In respect of Section 7 – ensuring fair process in use of civil sanctions, particularly in respect of the functioning of the appeal process (see questions 26 and 30).

UKELA has consistently supported the background to improving the forms of sanctions available to ensure regulatory justice. In that regard it has been positive in response to both the Macrory Report of November 2006 and the Regulatory Enforcement and Sanctions Bill, when that was consulted upon. However, that support for the aim of fairer and better environmental enforcement is contingent upon a scheme of implementation which is designed to treat different regulatory contraventions in a manner which is proportionate to seriousness.

The assessment of seriousness is a multi-faceted and difficult question. UKELA remains concerned that the draft non-statutory guidance remains unclear as to how and when a particular case would be identified as suitable for a civil sanction. In particular, it is plain that DEFRA's intention is that the cases at the serious end of the spectrum of offending

would continue to be dealt with by the criminal route. Particularly with respect to VMPs, it necessarily follows that they will not be imposed to deal with cases of a more serious nature.

VMPs

UKELA is of the clear view that the proposal for calculating VMPs is flawed and inappropriate. Firstly, the stepwise process set out at 2.28 of the draft guidance is too rigid to be effective. Moreover, it is of a complexity which will cause real difficulty for both regulated and regulators.

The first step in the proposed process is for the regulator to estimate the financial benefit from non-compliance. UKELA can well appreciate the policy imperative which is sought to be given effect. UKELA is entirely in support of the objective of removing any financial benefit from any environmental breach. This acts to deter offending and maintains public confidence. However, the draft guidance suggests that in all cases such a benefit may be calculated in a precise way. We do not consider that this is reasonably feasible or proportionate in the large bulk of environmental cases. It is plainly possible to be sure of a financial benefit where fees have been avoided. Good examples include offences under the Producer Responsibility Regulations or in respect of fly tipping where the proper cost of disposal is avoided. However, save in those particular cases, the exercise of calculating financial benefits, or costs saved, is one which requires a wide range of expertise and a good deal of estimation. UKELA is of the view that:

(i) The number of cases in which there is a significant financial benefit, save in the examples referred to above, is relatively low.

(ii) The resources required and the potential for significant dispute is unlikely to be proportionate to the objective.

(iii) The approach must be one of seeking to establish the financial benefit to a degree that the regulator can be sure that it is correct. In those circumstances, the difficulties at (i) and (ii) above are compounded[1].

As we explain below, we consider that the question of financial benefit may be addressed in a broader and more effective way.

[1] In the criminal jurisdiction evidence which goes to establish financial benefit would, in the normal course, need to be sufficiently probative such that the tribunal is sure. UKELA sees no reasons why the test should be different in respect of civil sanctions because (i) the general scheme of the Act is to require the prosecutor to prove matters beyond reasonable doubt; and (ii) to proceed on any other basis exposes the civil sanctions regime to the risk of non-compliance with Article 6, ECHR.

In respect of the deterrent component, which is the second step set out at paragraph 2.28 of the draft guidance, UKELA considers that the use of particular starting sums is an inappropriate approach. Generally, the inappropriateness of the approach can be seen from the way in which seriousness is approached in the criminal jurisdiction. Seriousness is understood to be a combination of culpability and harm. Evidently, there are cases in which there is very little culpability but the harm is high. Similarly, truly blameworthy conduct can result in no harm or very little harm. It is therefore inappropriate to start simply with a measure of harm, as might be the case for example if calculations were based on restoration costs. Moreover, it is entirely inappropriate to commence the setting of the deterrent component by reference to the maximum fine which is available for the particular offence. This approach is arbitrary.

In fact, the approach to setting a variable monetary penalty may be easily adapted from normal sentencing principles. Indeed, to fail to do so will mean that the guidance fails to draw the regulator's attention to important principles. For example, if the maximum penalty in respect of the summary jurisdiction is to be used as some form of measure, it is important to be able to form a judgment as to how the offence is to be framed. Firstly, it is necessary to decide which particular offence to charge – some regulatory offences attract modest penalties to a maximum of £5,000, other offences attract exemplary maxima from £20,000 to £50,000. Use of a maximum figure, without judgment as to which offence to charge or where in the scale of seriousness the particular breach falls leads to an arbitrary result. Secondly, it is important to take account of totality. It is usually the case that one particular breach gives rise to several offences. The decision as to which offence to use as a basis for calculating the monetary penalty is a decision which requires a judgment.

Hence, UKELA is of the view that the general approach to be taken to setting a VMP ought to be along the following lines. Firstly, the regulator should set out the material facts of the breach. The regulator should then undertake an assessment of the features of the breach which are aggravating and mitigating. Those aggravating and mitigating features are generally well known but they need not to be limited to those which are presently frequently referred to in the criminal jurisdiction. The regulator should then pay particular regard to any financial benefit or cost saving which is apparent on the facts of the offence. We note that this particular feature is to be found in related legislation under the Town and Country Planning Act 1990 in respect of criminal penalties for the breach of a planning enforcement notice[2]. In this way we consider that the policy imperative of removing gain can be given proper effect without the unduly technical approach which is advocated in the draft guidance. Fourthly, the regulator should then assess the way in which the breach was dealt

[2] Section 179(9)

with by the regulated person and the characteristics of that person, be that corporate or personal. In particular, regard would be had to the compliance record, the approach taken to dealings with the regulator and the overall financial standing of the regulated person.

The draft guidance seeks transparency and clarity in approach. This may be achieved by a proper and adequate record of the reasons and reasonings which explain how and why the VMP has been settled upon. This approach gives the regulated person a proper opportunity to understand how the VMP is calculated and whether it is appropriate to challenge it or to accept it. However, the key benefit of such an approach is that it maintains the flexibility to deal with each case on its own merits. In UKELA's view it is quite impossible to treat any case by reference to only one characteristic such as the extent of environmental harm, or the nature of the particular event.

So far as question 8 refers to upper or lower limits, we can see the force in there being no limit so far as the recovery of benefit is concerned. On occasion, this may be quite high. However, we do foresee difficulty in maintaining a credible civil penalties regime if the outcome in terms of the deterrent component is one which is higher than would be handed down for a more serious offence which stays within the criminal jurisdiction. That outcome is difficult to deal with in any mechanistic way. However, it remains a good point and there is no reason why the guidance should not permit the regulator to have regard to the general framework of penalties which are handed down in matters of regulatory crime in the criminal jurisdiction.

APPEAL PROVISIONS

UKELA considers that the appeal provision should permit the regulated person to have a full hearing on the offence which is subject of the billed sanction. The hearing ought not to be a "review". The effect of the grounds of appeal should be to expressly permit the regulated person to require the regulator to prove the offence against them. In other words, a ground of appeal should be "*the offence was not committed*".

So far as costs are concerned, UKELA has considered the point and is of the view that the tribunal's costs regime would be inappropriate in that cases before the tribunal normally result in the parties bearing their own costs. UKELA considers that the usual costs rule should apply, namely that costs follow the event. In UKELA's view it would be inappropriate for a person who has successfully appealed a civil sanction to have to bear the cost of that successful appeal. Likewise, it would be a useful disciplining factor that any regulated person who mounted an unsuccessful appeal should have to pay the Environment Agency's costs. In our view, the simple approach that costs follow the event, with the

tribunal always remaining with a discretion as to costs, gives the effect to both access to environmental justice and puts into effect the polluter pays principle.

We are grateful for the opportunities we have had to discuss with Defra the implementation of the Regulatory Enforcement and Sanctions Act 2008 prior to the launch of this consultation. Please let us know if there is anything we can do to assist Defra in further developing the proposals. For example, we would be happy to meet to talk through any of the issues raised in this letter and our attached consultation response, should this be helpful.

Yours faithfully,

Richard Kimblin
Convenor of UKELA's Environmental Litigation Working Party
rk@no5.com