UKELA's Environmental Litigation Working Party

Response to Defra's 'Fairer and Better Environmental Enforcement' Consultation on proposals to improve environmental enforcement

INTRODUCTION

The UK Environmental Law Association (UKELA) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA's current priorities include:

- Informing and actively influencing the broad law and policy debate on climate change including the measures to reduce greenhouse gas emissions and manage their impacts at the international, EU and domestic level

- Helping deliver more effective and efficient environmental regulation including enforcement at the EU and UK level, not lower standards nor less regulation unless the same or better outcomes will be achieved

UKELA works on a UK basis and seeks to ensure that best legislation and practice are achieved across the devolved jurisdictions.

UKELA prepares its responses to consultations with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared by the environmental litigation working party.

The environmental litigation working party has taken an active interest in the evolution of proposals to introduce civil sanctions, having responded to past Defra, BRE and BERR consultations on the issue. In 2009, we have held a workshop to consider issues connected with implementation of the Regulatory Enforcement and Sanctions Act 2008, raised these issues in our moot competition, participated in a Defra workshop in Reading in March and discussed the early proposals with Defra at a meeting in June.

In considering the present consultation document with a view to preparing this response we have explored issues that have been raised in the course of our past activities as well as new points connected to the specific proposals. We have sought views from all environmental litigation working party members and consulted other working parties concerned with specific areas of law affected by these proposals, in particular waste, water and nature conservation. We held a

seminar at UCL to discuss the proposals, with a panel of speakers consisting of Peter Johnson from Defra, Professor Richard Macrory and James Kennedy from Freshfields. Some 60 people attended the seminar. The working party then met to review our response in the light of issues raised during that discussion.

RESPONSE TO THE CONSULTATION QUESTIONS

We set out below our responses to the specific questions raised in the consultation document. These answers should be read together with the covering letter which makes a broader response to a number of important issues and questions.

Section 4 – The proposals, pages 21 - 33

Question 1: *Which of Options 1, 2 and 3 do you prefer:*

(a) Do you favour the status quo (Option 1), meaning that no action should be taken to introduce civil sanctions or strengthen criminal sentencing?
(b) Do you support the introduction of civil sanctions as proposed without complementary measures to strengthen criminal sentencing (Option 2)?
(c) Do you support the introduction of civil sanctions and complementary measures to strengthen criminal sentencing as proposed (Option 3)?

Broadly, we prefer Option 3. Our support is, however, subject to our comments about the details of the proposals below and in our covering letter, in particular our concern that the resulting regime should treat different regulatory breaches in a manner which is proportionate to seriousness.

Question 2*: Do you agree that the draft statutory instruments give appropriate legislative effect to the proposals presented in the Consultation Document? If not, which elements do you consider are not best framed for this purpose and why?*

Yes – subject to the following point. We consider that the specific reference to voluntary reporting of non-compliance in Article 11(3)(c) may be problematic. We are unclear why voluntary reporting has been singled out as an example to mention expressly. The express reference may cast doubt on the apparent generality of the matters to be addressed in guidance referred to in Article 11(3)(c).

Question 3: *Do you agree with the approach that has been used to select which civil sanctions should apply to offences? If not what alternative approach would you suggest?*

UKELA notes that one of the key rationales behind the concept of the new civil sanctions was the idea of flexibility and giving the regulator an option of imposing an alternative sanction where a prosecution, for a number of good reasons, may

not be the most appropriate option. Bearing that point in mind, the statement that "*civil sanctions would not be appropriate for fault-based offences where a regulator only deals with those cases that should be prosecuted in the public interest, having regard to the factors set out in section 3 of the draft Government Guidance"* seems to have rather missed this point. We provide a specific example of this below in our response to Question 4.

The other area of concerns to UKELA is the applicability of variable monetary penalties (VMPs). The strong impression we get from reading this section is that VMPs, whilst they are to be made available for a wide range of offences, are in general to be used in those cases where the seriousness of the offence falls short of warranting prosecution and by implication the punishment should be less than would be applied under a prosecution. This is an approach which we support but does not appear to us to be borne out in the subsequent treatment of VMPs in the Consultation document and in particular the calculation methodology that applies. This calculation methodology is quite likely to result in higher penalties than would apply under the criminal prosecution route. We refer to our covering letter (pages 2-4) for further amplification of this point.

Question 4: *Do you agree that the offences and applicable sanctions set out in full in Annex 4 (and to be included in the necessary statutory instruments) are consistent with the approach used?*

UKELA notes the statement on page 26 of the consultation that "*Civil sanctions would not be appropriate for fault-based offences where a regulator only deals with those cases that should be prosecuted in the public interest, having regard to the factors set out in section 3 of the draft Government Guidance. Civil sanctions will therefore not be available for offences of illegal waste disposal (fly-tipping) that are enforced by the EA; EA deals only with "big, bad, and nasty" fly-tipping cases."* This is reflected in the table 'Environment Agency mapping of civil sanctions to offences' which indicates that the only civil sanction proposed to be available for offences under section 33(6) of the Environmental Protection Act 1990 is a stop notice in relation to a breach of section 33(1)(a).

This approach fails to appreciate the full scope of the offences contained within section 33 EPA 1990. UKELA agrees that prosecution under section 33 is the only appropriate sanction for fly-tipping, but Defra should note that fly-tipping is at the more serious end of the spectrum of Section 33 offences. Section 33 also covers, for example, breaches of environmental permits for legitimate waste management operations. Such lower level section 33 offences commonly include the receipt of a load at a licensed site that contains non-conforming wastes which are not immediately visible from inspection but which emerge at a later stage and/or have been

deliberately concealed. Other examples may be where there are arguments about sampling methodologies as to whether waste is hazardous or non-hazardous, where many grey areas exist.

Given that a number of the offences contained in section 33 are strict liability offences, failure to apply civil sanctions other than stop notices would mean that criminal sanctions would be the only available sanction for a minor or technical breach of a condition attached to an environmental permit (as is currently the case). This is the type of offence for which civil penalties are ideally suited; it would be inappropriate that criminal sanctions should remain the only available sanction for them if civil sanctions are introduced as proposed.

It may be the case that other section 33 offences have been omitted partly on the basis that the offences should be included in the scheme at the same time as local authorities get powers under the Regulatory Enforcement and Sanctions Act. As that is some time away we consider that the effectiveness of the new system would be undermined if these offences were not included from the outset because waste offences constitute approximately 50% of the prosecutions undertaken by the Environment Agency.

UKELA also notes that the duty of care offences contained in section 34 EPA 1990 are not included in the Environment Agency table (or in Schedule 5 of the draft Order). Is this an oversight, or is it also intended that criminal sanctions should remain the only available sanction for these offences? We consider civil sanctions would be ideally suited to enforcing breaches of the waste duty of care.

Conversely, UKELA queries why variable monetary penalties should be available in respect of offences under section 110 Environment Act 1995 given that the offences all involve an element of dishonesty.

Section 5 – Purpose and Key Features of the new Civil Sanctions enabled by the RES Act, pages 34 - 48

Question 6: *Do you support the introduction of Variable Monetary Penalties as an alternative to prosecution?*

Yes – subject to comments below.

Question 7: *Do you agree with the proposed method for calculating Variable Monetary Penalties? If not, do you have an alternative approach that is both transparent and related to the facts and scale of the offence committed?*

We consider the proposed methodology to be flawed and inappropriate for the reasons given in the covering letter to this consultation response. We have set out in that letter an alternative approach that is transparent and better related to the facts and scale of the offence committed.

***Question 8**: Do you agree that there should be no upper or lower limit for a Variable Monetary Penalties for "either way" offences (ie offences that may be heard in the Crown court as well as by magistrates)? If not, is there any evidence or rationale for stipulating a specific upper or lower limit?*

See our comments at page 7 of the covering letter.

***Question 9**: Do you agree that a regulator should have the power to require a person to provide information the regulator needs to determine any financial benefit from non-compliance as part of assessing the amount of a VMP?*

Yes.

***Question 10**: Do you support the introduction of Enforcement Undertakings?*

Yes.

***Question 11**: Do you agree with the way in which Enforcement Undertakings would operate?*

Yes.

***Question 12**: Do you support the introduction of Fixed Monetary Penalties?*

Yes.

***Question 13**: Do you agree with the proposed level of Fixed Monetary Penalty for individuals and business? If not, what level would you prefer and what evidence exists to support that level?*

Yes.

***Question 14**: Do you agree with the proposed discount for discharge and early payments and penalty for late payments of Fixed Monetary Penalties?*

Yes.

***Question 15**: Do you support the introduction of enforcement notices to fill gaps in the regulators' present enforcement powers?*

We welcome the introduction of enforcement notices for a wider range of environmental breaches. We regard such sanctions as having significant benefits for environmental protection which are absent from penalties, namely:

i. They are often served before any environmental harm has occurred, and so are preventative;

ii. They generally are not accompanied by litigation and so do not disrupt the regulator/regulated relationship;

iii. They create a record of enforcement activity which is highly relevant to any subsequent enforcement decision making and consideration of any penalty.

We welcome the policy at paragraph 2.27 of the draft guidance to the Environment Agency that compliance with the law, restoration of harm, and compensation to affected parties should take priority over financial penalties.

Question 16*: Do you agree with the proposal to make Restoration Notices and Compliance Notices available for appropriate offences where no similar notice currently exists?*

In general, yes – see comments on question 15. We do however have concerns about the precise way in which restoration notices would be used.

The consultation document and annexes appear to propose using restoration notices to require works similar to those that can be required by remediation notices under the Environmental Damage Regulations 2009. This includes works akin to complementary and possibly also compensatory remediation (see paragraphs 2.22-2.24 of Annex 5a draft guidance). We are concerned that there is a lack of clarity and detail as to this kind of use of notices, compared to the detailed provisions and guidance under the Environmental Damage Regulations. We are also concerned that use of restoration notices in this way might not be lawful.

Paragraph 5.70 of the consultation document suggests restoration notices may be used to require creation of a similar habitat on a different site, where a protected habitat has been destroyed. The same point is made at paragraph 2.22 of the draft guidance. Whilst this seems a good idea in environmental terms, we query whether it is within the RESA powers. s42(3)(c) defines discretionary requirement as including 'a requirement to take such steps as a regulator may specify, within such period as it may specify, *to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed*.' Schedule 2, para 1(c) of the draft Order adopts the same drafting. Creating a similar habitat elsewhere seems to be a different concept (or at the very least a rather unnatural stretch of 'so far as possible'), in

the same way that ‘primary remediation’ and ‘complementary remediation’ are two distinct concepts under the Environmental Damage (Prevention and Remediation) Regs 2009 [Sched 4, paras 4(2) and 4(3)]. We note that the drafting of the Environmental Damage Regs is strikingly similar – with complementary remediation available ‘to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources or impaired services to the state that would have existed if the damage had not occurred’ [Schedule 4, paragraph 4(3)].

Question 17*: Do you support the introduction of Stop Notices?*

Yes.

Question 18*: Do you agree that a Stop Notice should not be automatically suspended on appeal?*

Yes.

Question 19*: Do you agree with the principles on which compensation for a Stop Notice will be considered (set out in Annex 1, and schedule 3, paragraph 5 of the draft Order, Annex 2)?*

In general yes although in relation to 12.97 of Annex 1, we do not see why legal or expert costs should be regarded as **exceptional costs**. In our view these are reasonable losses suffered by the person and should be compensated as such.

Question 20*: Do you support the introduction of Non-Compliance Penalties?*

Yes.

Question 21*: Which of the proposed methods for calculating a Non-Compliance Penalty do you prefer?*

We prefer Option 2, on the basis that it would provide certainty to those regulated and be simpler to enforce than Option 1. We regard option 1 as problematic due to difficulties in many cases calculating the costs of complying with a notice or undertaking, and uncertainties and the potential for disputes about the percentage applied.

Question 22*: Do you agree with the proposed approach (set out in section 3 of the draft guidance) to identifying the kinds of case that should normally result in prosecution instead of a civil sanction?*

We have set out in our covering letter concerns as to a lack of clarity on this point in the guidance.

UKELA recognizes that setting a threshold at which a particular case takes a particular route is essentially a policy question. Determining whether that threshold is met is a matter of judgment based on the information available to the decision maker. Hence the criteria must, necessarily, be broadly framed. If the regulator embraces the principles upon which the civil penalties regime is based, then there is no reason why the criteria should not work effectively.

UKELA considers section 3 of the draft guidance to give the impression that regulators will need to choose between either issuing civil sanctions or prosecuting. It does not bring out the fact that there will be cases where both may be available and appropriate, for example where prosecutions might be accompanied by stop notices, works notices under the Water Resources Act, or civil action under the Environmental Damage Regulations. It would help those affected by these proposals to gain a sense of the overall enforcement picture if these points were addressed in the guidance.

Section 6 – Strengthening the Role of the Criminal Courts, pages 49 - 52

Question 23*: Do you agree with the initial proposals for strengthening the role of the criminal courts in sentencing environmental cases?*

We agree in principle with strengthening the role of criminal courts, and therefore support the provision of more effective sanctions that can better address environmental damage and offending.

Section 7 – Ensuring Fair Process in use of Civil Sanctions, pages 53 - 56

Introductory comments
UKELA is particularly concerned to ensure that the safeguards available via the tribunal are no less than those which would be available via the criminal route. The Tribunal will have to adjudicate on matters which are presently in the province of the criminal courts, both as to whether an “offence” is made out and as to penalty. UKELA is concerned to ensure that the process affords similar protection of rights and fair process as the criminal jurisdiction.

Question 25: *Do you agree with the proposed 28 day period within which a person may make representations and objections to the intended imposition of civil sanctions?*

Yes.

Question 26*: Do you support the proposed grounds of appeal against the imposition of a civil sanction? If not, what further grounds would you like to see and why?*

As noted in our covering letter, UKELA considers that the appeal provision should permit the regulated person to have a full hearing on the offence which is the subject of the billed sanction. The hearing ought not to be a "review", as would be the effect of the proposed grounds of appeal in the draft Order. Those narrow grounds would not enable the regulated person to appeal a case on the basis that the regulator had failed to adduce sufficient evidence to make out its case (albeit there had been no factual or legal errors).

UKELA considers that 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, an additional ground of appeal should be "*the offence was not committed*". This would be consistent with the provision at Article 10(2)(a) of the draft Order that the burden of proof on appeal is on the regulator and that the regulator must prove the commission of the offence beyond reasonable doubt. This would also be more consistent with the wide appeal grounds available in relation to existing enforcement/restoration provisions, for example works notices issued under section 161A Water Resources Act 1991 and liability to remediate under the Environmental Damage Regulations 2009.

Question 27*: Do you agree that if a civil sanction is appealed the regulator should carry the burden of proving its case?*

Yes. We support the proposed provision at Article 10(2)(a) of the draft Order that the burden of proof is on the regulator and that the regulator must prove the commission of the offence beyond reasonable doubt. This is consistent with our view above that the appeal provisions should permit the regulated person to have a full hearing on the offence. Without such clarification it might be argued that the regulator simply has to prove on the balance of probabilities that at the time of issuing the notice the regulator was satisfied beyond reasonable doubt that the person had committed a relevant offence – a subjective test.

Question 28*: Do you agree that all proposed notices and penalties (except stop notices) should be suspended until the appeal is heard?*

Yes.

Question 29*: (on behalf of the Tribunals Service) Do you consider that a Tribunal may sometimes need to hear an appeal against a Stop Notice on a fast track? If so, in what circumstances?*

Yes.

Question 30*: (on behalf of the Tribunal Procedure Committee) Do you consider that the draft General Regulatory Chamber Rules will suit the handling of appeals against civil sanctions imposed for environmental offences?*

As noted in our covering letter, UKELA considers that the tribunal's costs regime would be inappropriate in that cases before the tribunal normally result in the parties bearing their own costs. We are of the view that costs should follow the event – in other words, the unsuccessful party should pay the successful party's costs. 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, as would be the case if the tribunal's current costs regime were to apply. 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 of costs following 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.

Question 31*: Do you consider that a substantial proportion of appeals in environment cases would have the potential to be decided on the parties' written submissions alone?*

As noted in relation to question 26 and in our covering letter, UKELA considers that the appeal provision should permit the regulated person to have a full hearing on the offence which is the subject of the billed sanction. As to whether in fact most parties will agree that appeals should be decided on the basis of written representation, this will depend on the nature and quantity of cases appealed. For example, we would expect a tendency for parties appealing VMPs imposing significant penalties to seek hearings both on the issue of liability and quantum.

Section 9 – Guidance

Question 32*: Do you agree the draft government guidance provides regulators with an appropriate clear, high level, cross-environment framework within which to develop their own guidance as required by the draft Order? If not which elements conflict with this and what would you propose as an alternative?*

We consider that the parts of the draft DEFRA guidance dealing with the approach to calculating VMPs and decisions about whether to prosecute or issue a civil sanction are unclear and/or inappropriate for the reasons given in answer to questions 7 and 22. We have set out proposed alternative approaches in our answers to those questions.

Section 10 – Transitional arrangements, page 59

Question 33*: Do you agree that EA should not generally take on civil sanctions powers for the time being in relation to enforcement under regulations where they share enforcement responsibility with another regulator, eg regulations on the Control of Major Accident Hazards and on the Registration, Evaluation, Authorisation, and Restriction of Chemicals?*

Yes. In due course consideration should be given to what types of civil sanctions might apply to the relevant offences under these regimes, and at that stage these ought to be included in the table that we see at Annex 4b.