



Rt Hon. Michael Fallon MP
Minister of State for Business and Enterprise
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET

20 December 2012

Dear Minister,

Announcement on the Use of Civil Sanction Powers, 8 November 2012

I am writing in my capacity as chair of the United Kingdom Environmental Law Association (UKELA) specialist working party on environmental litigation. UKELA is the UK forum that 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.

We had the benefit of hearing about the new policy on the use of civil sanctions from The Rt. Hon. Oliver Letwin MP on the day it was announced, in his keynote address to a conference on environmental enforcement and sanctions that UKELA organised jointly with Professor Richard Macrory of University College London. **UKELA has some concerns about this policy, which it believes will significantly restrict the scope for civil sanctions to be used to deal with environmental offending in future and risks creating a complicated, two-tier system for enforcement. Further, Mr Letwin's comments at the conference about the underlying reasoning indicated to us that the policy might be based on some misconceptions about the way the present civil sanctions system works.** Some of Mr Letwin's concerns had been addressed by other speakers, but unfortunately he was not present to hear them.

I have set out our key concerns in the Annex to this letter. **We would be happy to meet with you, Departmental policy officials and Mr Letwin to discuss the matter further.**

Yours sincerely,

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UKELA Environmental Litigation Working Party Convenor
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cc Rt Hon. Oliver Letwin MP, Minister of State, Cabinet Office

UK Environmental Law Association: making the law work for a better environment

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Annex: UKELA's key concerns about the policy

- 1. The decision to limit the civil sanctions that will be available in future to deal with offending by small and medium enterprises appears to be based on a misconception about the nature of the Tribunal procedure for hearing appeals.** At the conference, Mr Letwin expressed a fear that, absent the restriction, regulators might unfairly target sanctions on 'the small guys' who cannot call on an 'army of lawyers' to challenge them in the Environmental Tribunal. However, as Judge Nick Warren, President of the General Regulatory Chamber, explained in his presentation that preceded the Minister's keynote address, the Tribunal's approach and procedures are designed to be as user-friendly and unintimidating as possible, in order to enable individuals to represent themselves without lawyers. There are no costs orders, so an unsuccessful appellant would not normally be liable to pay their opponent's legal costs.
- 2. The decision to limit the civil sanctions that will be available in future appears to be based on a misconception about the extent to which enforcement officers are accountable for decisions about whether to impose sanctions.** Mr Letwin expressed his concern about regulators unfairly targeting sanctions on 'the small guys' as a risk in relation to the behaviour of a few over-zealous enforcement officers, rather than as a problem with enforcement by regulators at large. However, in a conference session that morning Dan Wiley, Environment Agency Legal Adviser, explained that a director-led National Panel considers every case where a civil sanction is proposed, and must authorise the sanction before it can be imposed. This is intended to ensure consistency across England and Wales, which is also promoted through training given to officers.
- 3. The decision to limit the civil sanctions that will be available in future would add further complexity to environmental regulation at a time when this is in serious need of simplification.** UKELA's report on The State of Environmental Law in 2011-2012 (available at www.ukela.org/Aim5) highlights the need for regulatory simplification, and recommends work investigating the scope for streamlining enforcement powers in particular (paragraph 4.8). The Government's own policy initiatives such as the Red Tape Challenge also recognise the importance of regulatory simplification, but far from simplifying and streamlining things, the decision to limit future civil sanctions would add complexity, as the sanctions that are available to deal with a particular breach will depend on whether it is covered by old or new civil sanctions legislation and, if new, the size of the business. Businesses themselves will need a high degree of knowledge and engagement with the regulations to understand their potential liabilities.
- 4. Limiting the future availability of variable monetary penalties, fixed monetary penalties and restoration notices to companies with 250 or more employees would massively restrict their use.** SMEs make up a significant proportion of the businesses that are regulated under environmental permits, an important area of environmental regulation not yet covered by civil sanctions Orders. A significant amount of enforcement activity is presently directed at these smaller companies. At a time when the Government is

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trying to reduce the regulatory burden on SMEs, it seems illogical that the only enforcement action available to regulators against SMEs should be a criminal prosecution. The 250 employee threshold also fails to take into account different business models and could therefore give rise to inconsistencies. For example, a number of large companies with high turnover and profitability (even some FTSE 250 companies) operate outsourced business models and employ fewer than 250 employees, while some SMEs operate in labour-intensive sectors and employ more than 250 employees.

- 5. The decision to limit the civil sanctions that will be available in future appears to reflect a sense that businesses dislike the civil sanctions system, whereas in fact it received broad support from industry in the consultations about introducing the new system for environmental offending.** UKELA representatives were present at a number of stakeholder meetings at which it was apparent that many businesses were attracted by the potential for the new system to allow more proportionate sanctions that could better ensure a 'level playing field' than the current, prosecution-orientated system.

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