



Guidance on the use of Enforcement Undertakings for offences under the Environmental Permitting Regulations

About UKELA

The UK Environmental Law Association 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 prepares advice on proposals of governments and regulators covering a range of environmental law topics, with the help of its specialist working parties. These comments have been prepared with the help of the environmental working party.

Comments

The Environment Agency will shortly have the power to accept enforcement undertakings to deal with environmental permitting offences. The legislation (SI 2015/324) that makes the necessary amendments to the Environmental Permitting Regulations 2010 is due to come into force on 6th April 2015. New Schedule 23A to the Environmental Permitting Regulations requires the Environment Agency to: publish guidance about its use of enforcement undertakings; revise it where appropriate; consult appropriate persons first; and have regard to the guidance in exercising its functions (paragraph 9).

Guidance already exists on the use of enforcement undertakings generally: namely the Enforcement and Sanctions Guidance, and on the attachment to the form of undertaking.

UKELA considers that that guidance should be revised (or fresh guidance issued) in order to provide clarification on the relationship between enforcement undertakings and other civil sanctions that can be issued to deal with environmental permitting offences such as enforcement notices, that are not creatures of the Regulatory

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Enforcement and Sanctions Act 2008 (the 'RES Act'). New Schedule 23A is silent on this issue. This contrasts with the position for enforcement undertakings accepted as an alternative to one of the RES Act sanctions. In such cases, acceptance of an enforcement undertaking is a bar to the regulator serving a fixed monetary penalty, variable monetary penalty, compliance notice or restoration notice: see for example Schedule 4 to the Environmental Civil Sanctions (England) Order 2010.

UKELA expects businesses to be far more likely to offer enforcement undertakings to deal with environmental permitting offences if the Environment Agency has a policy of treating an accepted undertaking as a bar to it serving other kinds of (non RES Act) civil sanction. Absent a clear policy on this issue, take up of enforcement undertakings in this area is likely to be low due to uncertainty as to whether acceptance of and compliance with the undertaking would be the end of the matter.

UKELA also considers it timely to revisit the existing guidance more generally, given that the introduction of enforcement undertakings for environmental offences could lead to a significant increase in their use. Such a review would be an opportunity to take stock of past experience with enforcement undertakings. In particular, UKELA considers that revised guidance could usefully:

- **address the approach to what counts as 'harm' and equivalent benefit in the fourth limb of what an enforcement undertaking can offer**, namely 'where restoration of the harm arising from the offence is not possible, action that will secure equivalent benefit or improvement to the environment': para 2(d) of Schedule 4 to the Environmental Civil Sanctions Order 2010; and para 2(d) of new Schedule 23A to the Environmental Permitting Regulations 2010. This is a particular issue as regards the practice of making payments in relation to packaging waste offences based on costs avoided, but where the breach caused no apparent 'harm'.

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- **address the practical aspects of assessing and quantifying harm so the enforcement undertakings can be properly scoped and valued.** Uncertainty on this issue could have the potential to be exploited as a barrier to the effective implementation of the enforcement and sanctioning tools available; as can often be the case, for example, in the setting and enforcement of remediation requirements associated with contaminated land.
- **guide on the level of harm for which an enforcement undertaking would be an acceptable alternative to, say, a prosecution.** Application of a clear and transparent categorisation of level of harm test when assessing whether an enforcement undertaking can be accepted to deal with an offence would help allay public concerns that the appropriate enforcement action has been applied.
- **identify principles for determining where funds should go to, in the case of undertakings under the fourth limb that involve making payments to ‘secure equivalent benefit or improvement to the environment’.** Guidance on this issue would help improve transparency and public confidence in the process. A mechanism for ensuring that such funds are responsibly invested in achieving desirable, long-term environmental outcomes should be considered in detail.

UKELA would welcome an opportunity to discuss these points further with the Environment Agency.

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