

## UKELA LITIGATION WORKING PARTY POSITION PAPER ON ENVIRONMENTAL CIVIL PENALTIES

**Summary:** *There is increasing public dissatisfaction with the effectiveness of environmental regulation and the relatively low levels of criminal fines imposed for environmental offences. The over-reliance on criminal prosecution for strict liability offences seems to be causing systemic problems. A recent report by the Centre for Law and the Environment at UCL recommended the introduction of environmental civil penalties as a more flexible alternative sanction, which would allow the regulator to better target its resources and more effectively recover the costs of environmental damage caused. The Government appear likely to consider the introduction of such civil penalties in future legislation, though agreement needs to be reached on the preferred model. This paper provides a response on behalf of UKELA to the possible model proposed by DEFRA last year.*

The Government has been looking at how to improve environmental justice in the UK generally, and in particular, how to better tackle environmental crime. UK environmental regulation is currently heavily underpinned by the use or threat of criminal sanctions, even though criminal prosecution is often too rigid an approach for all but the most serious offences. It focuses on achieving punishment rather than prevention, and the application of strict liability often leads to the imposition of unwarranted criminal blame for a pollution incident which has been caused by an oversight rather than an intentional act. Research has shown that this is leading to the trivialisation of environmental offences, the imposition of inadequate criminal fines, and reluctance by regulators to pursue more difficult cases. According to the Environment Agency, environmental criminal fines are steadily increasing, but are still not high enough to persuade some less responsible polluters that it makes more financial sense to avoid polluting than to avoid compliance.

One of the proposals by the Centre for Law and the Environment at UCL is to introduce 'environmental civil penalties' as a more flexible and proportionate mechanism for dealing with regulatory breaches which are either hard to prove, or where there has been a genuine mistake by an industrial operator which does not really deserve to be branded as criminal behaviour. Under this proposal, regulators would only have to prove a breach of regulations on the balance of probabilities, rather than beyond reasonable doubt, and the penalties could be imposed at the discretion of the regulator for an amount which better reflects the financial profits gained from non-compliance and the costs of the damage done. Such penalties would be an alternative to, rather than a replacement for criminal prosecution, so providing more flexibility than the fixed penalties (used for example in speeding offences), whilst being harder hitting than enforcement notices. Other countries such as the US and Germany have used environmental civil penalties for some time, and a number of UK regulatory agencies have successfully used civil penalties in other sectors, including in the regulation of financial services. The 'key messages' of the UCL report are at Appendix 1.

UCL suggested an initial model in which the Environment Agency would apply civil penalties for a core set of less serious regulatory 'offences', including the unintentional breach of an IPPC licence or the intentional 'fly-tipping' of waste. The penalties would be set to recognise the gravity of the breach, the financial means of

the party involved, and its behaviour in rectifying the damage caused. Civil procedures would be followed and a suitable appeal mechanism would be provided (such as the Environmental Tribunal also proposed by UCL). If successful, the new system could be extended to other areas of environmental regulation.

There is growing political support for better environmental enforcement, and in its recent report on environmental crime, the Environmental Audit Committee recommended further exploration of alternative compliance methods including civil penalties. The Solicitor General, Harriet Harman, indicated that the Government was considering bringing forward an Environmental Justice Bill in the new Parliament, which would allow the Environment Agency to impose civil penalties for 'routine' pollution offences according to a tariff (based on turnover for companies or a fixed sum for individuals). There was also talk of a commitment being given in Labour's election manifesto, though there is only reference to a "further crack-down on environmental crime", and polluters being given the opportunity to invest in remediation projects instead of paying fines (an idea also drawn from the US civil enforcement system).

In the meantime, the influence of non-criminal penalties in new legislation can already be seen, including in the regulation of climate change agreements and the water industry. The new Clean Neighbourhoods and Environment Act 2005 allows local authorities to impose fixed penalties for a range of low-level environmental crime such as abandoned vehicles. Civil penalties may also be used by the Government in transposing the EC Environmental Liability Directive, which will require businesses to take action to prevent (as well as to remediate) environmental damage. The proposal has also been the subject of detailed articles in recent issues of the Journal of Planning and Environmental Law and Environmental Law and Management.

On the back of the UCL research, DEFRA has indicated that it will consider applying civil penalties in forthcoming environmental legislation. At the Environmental Justice Conference held in November 2004, DEFRA confirmed that DEFRA Ministers see civil penalties as "one of the areas with the greatest potential in the short term for improving the enforcement of environmental law". In the presentation [at Appendix 2] DEFRA confirm that "everyone seems to agree that Civil Penalties are a good thing" and that "the Report on Civil Penalties has prompted what one might characterise as heated agreement". It is suggested that the 'key disagreement' may be in defining the problem to which civil penalties are claimed as a solution. In order to facilitate further internal consideration of the use of civil penalties, DEFRA proposed a possible model to engender debate which is similar to the UCL model, though with certain differences relating for instance to the setting of maximum level of penalties. This 'straw man' model is summarised as follows:

1. The civil penalties would be designed to address relatively low-level breaches of environmental regulation;
2. with the level of penalty fixed by the regulator, applying a standard tariff, but with discretion to vary the penalty up or down to reflect means, culpability and repeated breaches;

3. with the level of penalty capped by the legislation;
4. with a right of appeal to the Secretary of State against the regulator's decision;
5. with the Secretary of State's decision on appeal being amenable to judicial review, but not otherwise susceptible to court challenge;
6. and with directors being liable to civil penalties where the breach is due to their connivance or neglect.

By way of commentary on the above:

1. A decision certainly needs to be made regarding which offences civil penalties should be used for initially, and there may well be merit in the scope being restricted to relatively low-level offences whilst the new system beds down. However, one of the key benefits of civil penalties is their flexibility as an alternative but additional sanction in order to plug what seems like an obvious gap in the current armoury of UK environmental regulators compared with other countries. It should therefore be possible to apply them both to high-level offences as well as low level offences if the particular circumstances surrounding the regulatory breach merit such an approach (e.g. where procedural/evidential difficulties are likely to prevent the successful bringing of a criminal prosecution where substantial environmental damage has been caused). To restrict the use of civil penalties only to such low-level offences would substantially constrain the anticipated systemic benefits in addressing the over-reliance on criminal prosecution. If parties know that civil penalties will only be used for low level offences, they will not be disincentivised from avoiding compliance with more significant regulatory controls.
2. This flexible, discretionary approach ties follows the approach recommended by UCL and appears entirely sensible given the nature and purpose of civil penalties, in particular in light of their use abroad and in the UK financial sector. Reference to turnover in setting the penalties would provide the mechanism for linking the level of penalty with the profit gained from non-compliance, so enhancing the deterrent effect.
3. It would of course be necessary to set a legislative cap on the penalties to allow for legal certainty and to avoid unfairness. However, without allowing the penalties to be set at amounts which are greater than the equivalent criminal fine, one of the main benefits of civil penalties would be lost, and the deterrent effect undermined. It is important that civil penalties are not seen as a soft option for avoiding a criminal conviction, but instead as an alternative approach that may better deal with the particular circumstances, by removing the criminal condemnation whilst allowing for more effective recovery of the actual costs of the environmental damage.
4. A right of appeal is also essential to ensure fairness and the transparency of the system. The UK financial regulators have their own tribunals to deal with such appeals, and as recommended by UCL, the proposed Environmental Tribunal would be an obvious candidate for environmental civil penalties. Indeed, the two

proposals are mutually supportive. Alternatively, a suitable internal appeal mechanism within the regulatory body could be provided, with a right of further appeal on the merits (including the amount of the penalty) being allowed to another body, such as the Secretary of State or the Magistrates Courts. The former might better reflect the civil nature of sanction, though the review of the amount of the penalty might be problematic.

5. Given the comments above, a limited right of statutory appeal to the High Court would be important.
6. The extension of the use of penalties to individual directors ties in with current practice and appears sensible, though the maximum level should perhaps be set at a different level to reflect different means.

***Conclusion and recommendations:*** *Given the likely benefits of introducing environmental civil penalties, and the positive response from DEFRA, UKELA should confirm its support for the principle of the UCL proposal subject to providing ongoing detailed comment on the proposed model. In order to help move forward the consideration of civil penalties within Government, and to influence the model applied, UKELA should respond to DEFRA's proposed model based on the commentary provided above.*

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## APPENDIX 1

**Report on 'Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach', Michael Woods and Professor Richard Macrory, Centre for Law and the Environment, UCL, 2003**

### **The Key Messages**

#### **Context:**

The Centre for Law and the Environment, UCL, has undertaken this study for DEFRA, in order to examine the possible merits of introducing the use of civil penalties in environmental regulation.

#### **Difficulties with criminal prosecution:**

Environmental regulation in the United Kingdom is currently underpinned by the use or threat of criminal sanctions. Yet criminal prosecution is too rigid an approach to be used for all but the most serious offences. It focuses on achieving punishment rather than prevention, and requires more stringent procedural safeguards, which undermine regulatory efficiency. The application of strict liability for many breaches of environmental regulation can also seem inappropriate by imposing unwarranted criminal blame. This is leading to systemic problems involving the trivialisation of environmental offences and the imposition of inadequate fines, and may also give rise to reluctance on the part of regulatory agencies to pursue more difficult cases.

#### **Current beneficial use of civil penalties:**

The study has found that there is increasing recognition of the benefits of employing civil penalties as part of any effective system of regulation. In other countries, environmental regulatory agencies have the power to impose civil penalties for breaches of environmental regulation, as an additional tool to criminal enforcement, which can then be reserved for intentional non-compliance with the law. A number of UK regulatory agencies in areas other than the environment are also making successful use of civil penalties.

#### **A flexible alternative sanction:**

Civil penalties can be imposed at the discretion of a regulatory agency for an amount which reflects the circumstances of the regulatory breach, including any financial profits gained from such breach. They can be used as an alternative rather than a replacement for criminal prosecution, but without the same degree of moral condemnation or administrative burden as the latter. Civil penalties can also provide greater flexibility in application than fixed penalties, whilst being harder hitting than enforcement notices by recapturing the costs of damage caused to the environment.

#### **The human rights angle:**

Both European and UK courts have reviewed the need to retain criminal type safeguards for civil penalty procedures from a human rights perspective. The case law suggests that provided the procedural safeguards are proportionate to the nature of the 'offence' being dealt with, civil penalty procedures can be compliant with Article 6 of the European Convention on Human Rights, without necessitating the full rigour of criminal procedures.

### **Civil penalties in modern environmental regulation:**

A more modern approach to environmental regulation recommends greater flexibility in the use of enforcement sanctions, so that the level of enforcement fits the seriousness of the regulatory breach. Whilst environmental regulatory agencies in this country do currently employ a range of enforcement mechanisms, the addition of civil penalties could enhance their ability to meet the increasing pressures from the public and the European Community to achieve greater efficiency in protecting the environment.

### **A model for an environmental civil penalty system:**

A possible initial model for a system of environmental civil penalties in England and Wales would be to authorise the Environment Agency to apply penalties for a core range of less serious regulatory 'offences', including for example, the unintentional breach of a licence for an industrial process or the intentional 'fly-tipping' of waste. These penalties could be set in order to recognise the particular gravity of the breach, as well as the financial means of the party involved. Civil procedures would be followed, including use of the civil standard of proof. A suitable appeal mechanism would need to be available to review the exercise of the regulator's discretion. Following evaluation of the new system, it could potentially be extended to other areas of environmental regulation and other regulatory agencies.

### **Recommendation:**

In its recent paper, 'Delivering for the Environment - a 21st Century Approach to Regulation', the Environment Agency suggested that: "Modern regulation aims to find the right balance - a proportionate, risk based response, that will drive environmental improvements, reward good performance, but still provide the ultimate reassurance that tough action will be taken on those who fail to meet acceptable standards". The type of civil penalties considered in this report could play a significant role in achieving this goal, by improving compliance in many areas of environmental regulation in a manner that both commands public confidence and is more intelligible to those being regulated.

*(The UCL reports 'Environmental Civil Penalties: A More Proportionate Response to Regulatory Breach' and 'Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal' are available at [www.ucl.ac.uk/laws/environment/research/index.shtml?research\\_2](http://www.ucl.ac.uk/laws/environment/research/index.shtml?research_2))*

