

EEF response to DEFRA Consultation on Fairer and Better Environmental Enforcement

EEF, the manufacturer's organisation, represents the interests of 6,000 engineering, manufacturing and technology based businesses who employ over 1 million people, as well as supporting 20,000 associates. We broadly support the government's aims to create a fairer, more effective and more proportionate enforcement regime and welcome this opportunity to comment on its proposals.

EEF advocates risk-based regulation envisaged by Sir Philip Hampton in his report to government. We are also supportive of Professor Richard Macrory's recommendations for more proportionate regulatory enforcement and sanctions.

Whilst recognising that the government's proposal for six new civil sanction powers attempts to build on these recommendations there has been, nonetheless, widespread concern amongst manufacturers that the powers were unnecessary and would do little more than introduce a 'parking ticket mentality' amongst regulators, which could irreversibly damage the relationship between regulator and operator.

The importance of the relationship between environmental inspector and regulated business can not be underestimated. For many this is their only environmental contact and so the relationship is critical. The regulator must ensure that the introduction of new powers does not in any way damage that relationship and makes every effort to work together to improve environmental awareness and action.

Since indicating an appetite to take forward the powers made available to regulators in the Regulatory Enforcement and Sanctions (RES) Act 2008, government and its environmental enforcement bodies have played down their use, which did little to alleviate industry concerns. However, more recently DEFRA's Fairer and Better Environmental Enforcement (FBEE) project has actively engaged on this issue and has done a successful job in addressing a number of manufacturer concerns. With certain assurances provided recently, and reiterated by the Environment Agency, we have decided to support the aims to create a fairer, more effective and more proportionate enforcement regime. As a result we have limited our response to the key areas we support and which must remain central to FBEE development, as well as outlining those areas which require further consideration/action and remain a concern to manufacturers.

Key areas of assurance are that:

1. New sanctions will not lead to an escalation of enforcement. Regulators normal response in responding to cases of non-compliance will remain in offering advice and guidance. Civil sanctions will only be invoked where consistent non-compliances have been monitored.

2. To use a compliance notice, restoration notice, variable monetary penalty or a fixed monetary penalty, regulators need to be 'satisfied beyond reasonable doubt' that an operator is guilty of non-compliance before issuing a civil sanction.
3. Appeals against civil sanctions can be made to the General Regulatory Chamber of the First-Tier Tribunal. In addition to Tribunal Judiciary, a tribunal may include non-legal members with suitable expertise and experience in the issues in an appeal.
4. All fines will go to a central government fund and not be made available to the regulators who impose the penalties. It is right that regulators should recover reasonable costs but there should not be a perverse incentive for regulators to issue fines.
5. Sanctions are not extended, in the first instance, to include Environmental Permitting Regulations (EPR), and that the use of sanctions is phased in progressively over time to ensure that they are applied proportionately and consistently.
6. The new civil powers are restricted to the Environment Agency and Natural England, and will only be extended to local authorities after a formal review of the system.

Outstanding areas of concern are that:

1. The consultation recommends that a review of the civil sanctions should be undertaken after three years to assess the regime's success and failures. We question whether this period is too long and should be reduced to two years to ensure problems can be identified and acted upon. If this proposal were not widely supported we recommend that DEFRA establish a 'relevant' stakeholder group, meeting at least annually, so that affected groups could comment on their experience so far.
2. The public can not readily distinguish between a civil penalty and a criminal prosecution. As a result the relative perception of a 'non-compliance' is indeterminable and can impact an organisation negatively however serious. It is, therefore, imperative that publicity that regulators give to sanctions is carefully targeted and not misused. We are concerned that regulators could politicise this power by seeking 'active publicity' against large reputable companies for comparatively minor infractions. Proportionate effective targeting is critical and should be clearly outlined in guidance to regulators.
3. We are concerned that imposing an "upper limit" on variable monetary penalties (VMP) of 10% of business turnover may encourage regulators to work towards this limit and would undermine the government's objective of a graduated response to enforcement. Determining fines

should be based on sound evidence and the regulator must always be able to justify their decision. If the government does adopt an upper limit it should be no higher than the maximum fine available in a magistrate's court.

4. Enforcement undertakings (EUs) are likely to be widely used by operators and regulators. However, EUs should not be open-ended commitments. Responsibilities and action must be clearly defined. A letter of accepted compliance must be issued by the regulator as soon as the necessary restoration has been completed.
5. The proposals state that "...regulators will normally investigate to the standard expected of any criminal investigation." The use of the word "normally" is of considerable concern to manufacturers. We believe that if the test of prosecution is 'beyond reasonable doubt', the investigation process for civil sanctions must be equally stringent. EEF therefore recommends that the word 'normally' be deleted, thus avoiding future confusion and potential disputes.

Whilst reiterating our support for the aims of the FBEE project and the proposals put forward, it should be noted that the consultative process for developing and introducing these six new civil sanctions was not logical and should not be considered good regulatory management. The process is being deliberately rushed ahead of parliamentary elections next year. As a result the focus of the debate has been on whether the set of powers being proposed are appropriate and effective, when in fact the debate should have begun with whether they are needed at all. Before government sought to introduce these civil powers a review of existing regulatory powers should have been examined, consulted upon and reviewed. Instead, we are now in a position where new civil sanctions are being eagerly introduced ahead of a strengthening of existing criminal sanctions later next year. We would call on government to introduce both sets of sanctions concurrently to avoid any confusion.

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