

New Powers for Environmental Regulators

April 2010

The Environment Agency (EA) and Natural England (NE) will have a range of new civil sanctions at their disposal from 6 April 2010.

These new civil sanctions increase the options available to these regulators when determining the enforcement response to a number of existing environmental offences. Business leaders, in house legal teams, environmental managers and environmental consultants will all need to understand the new sanctioning regime and the impact that the new regime may have on their operations.

In particular, organisations need to be aware of the following features:

- There is a statutory requirement to publish the use of civil sanctions which may have an impact on reputation;
- The fines imposed by regulators may be higher than the fine that would be handed down by a Court;
- There are tight timescales for appeals and it may be necessary to move quickly to respond to a civil sanction;
- Enforcement Undertakings provide an opportunity to avoid regulatory action and to resolve issues in a non-contentious way.

What are the new civil sanctions?

The Regulatory Enforcement and Sanctions Act 2008 (RESA) created four new types of civil sanction:

- Fixed monetary penalties (FMPs) for low-level or minor breaches;
- Discretionary requirements for mid to high-level breaches which include variable monetary penalties (VMPs), compliance notices (CNs) and restoration notices (RNs);
- Stop Notices (SNs) to prevent a business from continuing an activity until it comes into compliance; and
- Enforcement Undertakings, voluntary agreements to take steps to remedy a breach.

Some civil penalties can be applied in combination with each other (e.g. RNs and VMPs) but others (e.g. Emus) cannot.

Which offences are covered by the new regime?

RESA provides a framework for all regulators to obtain these additional powers, and the EA and NE will be the first to do so. The civil sanctions are only available for specific environmental offences and a selection of some of the key offences is set out in the table below.

Some of the most common offences, such as water pollution offences (section 85 of the Water Resources Act 1991) and waste duty of care offences (section 34 of the Environmental Protection Act 1990) are not included in the list at all. For other offences, the range of civil sanctions is limited. For example, for the offence of unlawfully depositing controlled waste (section 33 of the Environmental Protection Act 1990), the only additional civil sanction is the Stop Notice.

Disclaimer: This briefing is not intended to be a complete coverage of the law in this area. Legal advice should always be taken in any particular case.

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In due course, environmental permitting offences under the Environmental Permitting (England and Wales) Regulations 2010 will be included in the new civil sanctions regime.

The table sets out a range of common environmental offences and the new sanctions that can be applied for each.

Legislation	FMP	VMP	CN	RN	SN	EU
Environmental Protection Act 1990 Section 33 (6) (unlawful deposit, treatment or disposal of waste)	No	No	No	No	Yes	No
Water Resources Act 1991 Section 24 (4) (a) (breach of water abstraction licence)	Yes	Yes	Yes	Yes	Yes	Yes
Hazardous Waste (England and Wales) Regulations 2005 Regulation 19 (mixing hazardous waste without a permit)	Yes	Yes	Yes	Yes	Yes	Yes
Producer Responsibility Obligations (Packaging Waste) Regulations 2007 Regulation 40 (1) (a) (duty to register)	Yes	Yes	No	No	No	Yes
Regulation 40 (1) (b) (obligation to recover and recycle packaging waste)	No	Yes	No	No	No	Yes
Regulation 40 (1) (c) (obligation to provide a certificate of compliance for recovery and recycling obligations)	Yes	No	No	No	No	No

What are the key features of the new regime?

Fixed Monetary Penalties (FMPs)

These are designed to provide a quick enforcement response for low-level, minor breaches and are already familiar to environmental lawyers (on the spot fines for littering is one example). The level of fine is £300, with a 50% reduction for early payment and a 50% additional penalty for late payment.

Variable Monetary Penalties (VMPs)

VMPs are intended for more serious offences where, although the regulator considers that a prosecution is not in the public interest, the regulator still considers that a substantial financial deterrent is required. The regulator has a discretion as to the amount of the penalty to impose (currently subject to a cap of £250,000). For the majority of environmental prosecutions the fines imposed by the Courts are significantly lower than £250,000, and therefore a major concern about VMPs is that the fines imposed by the regulators could significantly exceed the anticipated level of fine following a prosecution.

The basis of the calculation of the level of fine has been the subject of much debate. Under the new rules, the regulator must apply a three-step process to work out the penalty: first, it must estimate the financial benefit of the breach (normally the costs avoided, such as costs saved in a waste packaging offence by failing to register);

secondly, it must add a "deterrent component"; and thirdly, it must deduct any other costs incurred (i.e. the costs of any actions taken voluntarily in response to the offence).

The deterrent component requires a regulator to choose a starting sum (either by reference to the restoration costs, financial benefit (again) or the maximum criminal fine a magistrates' court could impose for the offence). The regulator can choose the starting sum according to which one "... *characterises the offence* ..." and then adjust it, based on aggravating and mitigating factors.

Enforcement Undertakings (EUs)

EUs are voluntary agreements by individuals or businesses to take steps to remedy a breach or compensate for its consequences and can be offered at any time, although the regulator is not bound to accept an EU and may instead choose to impose another civil sanction or indeed to prosecute. Regulators will be unlikely to accept an EU unless there is a clear recognition of any failings or harm and the regulator will usually look for director or board level commitment to restoration and further compliance. The EU will set out the actions to be taken and the proposed timetable for action.

The importance of EUs is that, if a regulator accepts an EU, then it cannot impose another civil sanction or prosecute for the original breach. As such, EUs provide a welcome degree of flexibility for those who have committed an offence and want to work with the regulator to remedy the problems, although it should be appreciated that any failure to comply with the terms of an EU may itself result in a criminal prosecution and therefore EUs will have to be drafted very carefully so that the business is clear on its commitments under the EU.

Can I appeal?

Yes, all civil sanctions can be appealed to the General Regulatory Chamber of the First-tier Tribunal, but the time limits for appeal are strict. The First-tier Tribunal has the power to award costs against a party, but they will only be awarded against a party who has acted unreasonably in bringing, defending or conducting the proceedings.

Some key issues to think about

- Are these new civil sanctions truly civil in nature or are they criminal penalties in all but name? If they are criminal, then article 6 (2) of the European Convention of Human Rights provides those subjected to a sanction with a right to a fair trial, and this may give rise to some interesting legal disputes.
- Regulators must choose between civil and criminal sanctions, and once a route is chosen, with limited exceptions, regulators cannot subsequently change paths. Businesses will want to influence this decision early on.
- Regulators are required to publish details of all enforcement action taken using civil sanctions (including FMPs and the terms of any EUs), most likely on their websites, and so civil sanctions may result in negative publicity.
- Because FMPs only apply to minor offences there may be a temptation to pay the fine and take advantage of the reduction for early payments to avoid the costs and loss of business time dealing with the matter in greater detail. However, although the fines themselves are minor, the business will still have a record of non-compliance and the non-compliance will also be publicised, and therefore businesses should consider reputational risk and its own compliance record before accepting the FMP.
- There is a strong possibility that VMPs (with their cap at £250,000 for more serious offences) may result in higher average fines than those that are commonly handed down by the criminal courts. Currently the magistrates' courts, which deal with the majority of environmental offences, apply fines up to maximum levels of

£5,000, £20,000 or £50,000 depending on the offence. The EA has been vocal in its opinion that fines handed down by the courts are too low, and it may use VMPs as an opportunity to create a precedent for higher fines in the courts.

- The precise terms of EUs will need to be considered very carefully because it is a criminal offence not to comply with the conditions of an EU.
- The timescales for appeal are tight and if the window of opportunity is missed there is no further remedy. Businesses, especially large organisations, will need to put in place robust reporting structures so that matters are escalated to the appropriate level in the organisation to deal with the issue before the time for appeal expires.
- Businesses will need to have in place appropriate teams to respond to these issues, both internally through its compliance, risk, legal and EHS functions and also externally, with advisors, consultants and external counsel who truly understand the new sanctions, so that the business can make informed decisions in the short time available.
- Businesses may also consider providing training for its staff so that the employees on the ground understand the implications of these new sanctions and take the appropriate action if the need arises.

What are the next steps?

RESA requires regulators to consult on revised enforcement policies and guidance on the use of sanctions. The EA launched its own public consultation on 15 February 2010 and this closes on **7 May 2010**. NE's own consultation will follow that. The secondary legislation¹ is currently before Parliament and is due to come into force on **6 April 2010**.

Burges Salmon's Environmental Law unit has specialists in environmental litigation and regulatory compliance. Our team has been following the civil sanctions agenda since its inception. We have put together a training programme to explain the operation of this new regime and we will be happy to tailor this to your organisation, for example we can deliver it over the telephone, by webinar or in person. If you would like to learn more about our training programme, about RESA, or about our capability in general, please contact one of the partners below.



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¹ The Environmental Civil Sanctions (England) Order 2010 and The Environmental Sanctions (Miscellaneous Amendments) (England) Regulations 2010.