HEALTH AND SAFETY EXECUTIVE

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Senior Management Team

2 September 2009

HSE's Response to DEFRA's Consultation on Civil Sanctions for Environmental Offences

A Paper by Ron Griffiths
Advisor: Bernadette Cadman

Cleared by David Ashton
On 20 August 2009

Issue

1 HSE's response to DEFRA's consultation on introducing civil penalties as alternatives to prosecution for environmental offences.

Timing

2 For the Board meeting on 23 September.

Recommendation

3 SMT clear the attached draft Board paper (below the line) recommending that the Chair sends the draft covering letter (annex 2) and responses to the detailed questionnaire (annex 3) as HSE's response to DEFRA's consultation.

Background and argument

4 See attached Board paper and annexes.

5 .Further work with DEFRA is required to agree systems for the use of these sanctions for pesticide offences that HSEHse also enforce and to explore any future proposal for legislation, eg COMAH and REACH, where HSE is a joint competent authority.

Consultation

6 Within HSE consultees include operational, policy and scientific groups and Legal Advisors Office (LAO). This paper has been shared with the Local Authorities Co-ordinators of Regulatory Services (LACORS). (A full list is given at annex 4).

Presentation

7 Further interest is expected in this topic following DEFRA's adoption of these civil sanctions. Stakeholders have called on HSE to adopt similar penalties and LACORS has expressed keen interest in HSE acquiring these options however at their July 2009 Policy Forum meeting the general view from environmental health professionals present was more powers were not needed and what field staff wanted was to be able to use their current powers more effectively.

Costs and Benefits

8 DEFRA's consultation documents include detailed impact assessments. Similar assessments would have to be undertaken by HSE if it decided to propose to adopt these sanctions for health and safety offences.

9 Further work looking at using these options for HSE enforcing FEPA s.16(12) using civil sanctions in the future will be a new workstream that would be costed and any proposals subject to detailed cost-benefit and impact assessments.

Financial/Resource Implications for HSE

10 No additional costs are anticipated at this stage as responding to this consultation and the development of HSE's own policy on this topic already forms part of current work plans.

Environmental implications

1 These are covered in detail in DEFRA's proposals for the environmental regulatory regime.

Action

12 That the SMT agree that the paper goes forward to the Board's meeting on 23 September 2009, requesting that the Chair sends the draft letter at annex 2 to this paper together with the detailed responses to the questionnaire as HSE's response to DEFRA's consultation.

Health and Safety Executive Board			Paper No: HSE/09/
Meeting Date:	23 September 2009	**FOI Status:**	
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HSE's Response to DEFRA's Consultation on Civil Sanctions for Environmental Offences

A Paper by Ron Griffiths

Advisor: Bernadette Cadman

Purpose of the paper

1. To invite the Board to agree HSE's response to DEFRA's consultative document proposing the introduction of civil sanctions as alternatives to prosecution for certain environmental offence, as in the attached draft letter (annex 2) covering HSE's detailed responses to DEFRA's questionnaire (annex 3).

Background

2. DEFRA's consultation document contains detailed proposals to adopt civil sanctions as alternatives to prosecuting (see annex 1) for certain environmental offences enforced by the Environment Agency (EA), Natural England (NE) and the Countryside Council for Wales (CCW). These are options offered under the Regulatory Enforcement and Sanctions Act 2008 (RES Act) following from Professor Macrory's review of regulatory enforcement sanctioning.
3. The purpose of the RES options was to make available an extended tool kit for regulators to achieve effective, modern, flexible, targeted sanctioning regimes that were no longer over-reliant on criminal prosecution.

Argument

4. These proposals directly affect HSE's interests in that:-

- while not making any proposals to include legislation where HSE is a joint competent authority, ie COMAH and REACH, now, do say that DEFRA plans to explore this in the future (see paras 8 – 10 below); and
- they cover offences involving pesticides under the Food and Environment Proctection Act 1985 (FEPA) (see paras 11 – 19) that HSE also enforce.

5. HSE considered adopting similar options for health and safety offences, but has consistently said that they are not needed (see HSC 06/30). There are no gaps in HSE's and local authorities' enforcement tool kits and thus health and safety law is effectively enforced by existing criminal sanctions without being driven to excessive use of prosecution.
6. However, HSE decided to monitor the situation and review its decision in light of new information and lessons learnt from other regulators. HSE acknowledges that other regulators' experience running such systems may identify uses and advantages that could be applied in the health and safety regime. In addition, local authorities' experience of civil sanctions in areas such as public nuisance,

vandalism, etc , may show how these extra tools could benefit HSE and other health and safety regulators.

7. DEFRA seeks to introduce these options to give their regulating bodies more flexibility to respond in a proportionate way to the seriousness of non-compliance. The offences for which these alternatives are proposed cover a wide-range of legislation some of which provide for enforcement notices akin to prohibition and improvement notices in the health and safety regime, but for many offences, the regulator only has the option of prosecuting or warning.

Areas Where HSE is Joint Competent Authority

8. There are no plans to apply these options where EA and HSE are joint competent authorities for high hazard sites under the Control of Major Accident Hazard Regulations 1999 (COMAH) and the regulation of hazardous chemicals through REACH (Registration, Evaluation, Authorization, and Restriction of Chemicals). HSE (and EA, jointly the COMAH Competent Authority in England and Wales) believe it would be totally inappropriate to apply civil sanctions under the COMAH Regulations.
9. DEFRA proposes further consideration of this. HSE will wish to be involved in these considerations whilst maintaining its current position. HSE's and the EA's roles acting as part of the joint COMAH Competent Authority are to protect people and the environment from high hazard, albeit low frequency, events under COMAH and users' and consumers' health and safety under REACH. This is a much higher magnitude of risk than the risks to the environment covered by the other legislation for which DEFRA proposes these sanctions in their current proposals.
10. Under REACH, HSE is responsible both as UK Competent Authority for registration of manufactured/imported chemicals, and as the GB health and safety regulator for other 'downstream' aspects of the regime. DEFRA have previously highlighted the key 'registration' duty as a possible area for use of administrative penalties as this is a 'paperwork' duty and is fixed liability (registration has either happened or not). However, registration is the key to REACH – without it the downstream duties cannot function, and to apply a different penalty regime here would not be appropriate.

Pesticide Offences under FEPA

11. A consistent approach will need to be developed in the enforcement of FEPA offences included in this proposal, relating to the use, storage, advertisement, sale and supply of pesticides. Further HSE has concerns over using civil sanctions for the Schedule 2 FEPA offences of obstruction and giving false statements and information.
12. Civil sanctions are proposed for NE and CCW that enforce offences relating to the safe use of pesticides under s.16 (12) and schedule 2 of the Food and Environment Protection Act 1985 (FEPA). HSE also enforces these provisions.
13. We do not consider it appropriate for HSE (including CRD (York)) to enforce offences under FEPA s.16(12) and Schedule 2 by civil sanctions because they are already effectively enforced using existing enforcement notice and prosecution tools. The benefit of adopting alternative sanctions such as fixed penalty notices for some compliance matters eg the storage of an unapproved

pesticide, is likely to be far outweighed by the mechanism and machinery necessary to implement the sanction. A FMP (£100 for individuals and £300 for corporate bodies) for example, requires the setting up of an internal appeals process in addition to handling any appeals made subsequently to an independent, formal tribunal.

14. In addition, the standard of proof necessary for these sanctions will be that of the criminal system, ie "beyond reasonable doubt." Therefore any anticipated resource saving, we feel, will not be great and not justify the small benefit gained. In addition, Schedule 2 offences relate to obstruction of the regulatory process, matters that we feel should remain within the province of the criminal sanctioning system. Issues of consistency of enforcement between HSE and NE and CCW may arise. Therefore, we ask DEFRA to move the proposals for FEPA offences into their transitional arrangements, along with COMAH and REACH, the matter to be examined in the future, but with no present commitment.
15. HSE and LAs enforce these provisions through an agency agreement with the Ministers responsible for pesticide regulation under the UK system set out in FEPA. The agreement is drafted in very broad terms giving the then HSC the duty to perform the Ministers' functions of enforcement under s.19(1) of FEPA and registration and administration of pesticide approvals under s.16(7) subject to the limits of demarcation between HSE and local authorities for enforcement of HSWA.
16. The vires for FEPA enforcement is complex, involving various agency agreements and memoranda of understanding between the Pesticide Ministers and HSE and, the Ministers and DEFRA and, Natural England and Countryside Council for Wales. Arrangements for the enforcement of the environmental provisions (protection of wild and cultivated plants and wild and companion animals) are shared between NE and CCW, and HSE (including CRD York) and local authorities. The detail is still to be agreed between HSE CRD, FOD and NE and CCW, but it is planned that FOD will provide the enforcement role, and NE and CCW will undertake investigation. This arrangement is set out in a memorandum of understanding between NE and CCW, and HSE CRD.
17. NE and CCW will undertake some enforcement activities such as the service of FEPA Notices under s.19. NE and CCW must undertake their own consultation exercise before adopting these penalties and HSE's policy team has established contacts to ensure HSE's involvement to bring about a consistent approach both within the regulators and between HSE and NE and CCW.
18. The exact legal position of the mechanism by which HSE acts as FEPA enforcer for environmental issues needs clarification. In particular to check that the relationship is not one of HSE effectively being NE and CCW's agent as in that case, HSE may gain the power to adopt these proposed sanctions through the current draft statutory instrument.
19. These pesticide offences relate, in the main, to environmental matters, such as poor storage conditions or storing unapproved pesticides, although there can be a strong element of risks to human health depending on the product. HSE's CRD York initially saw a use for these tools for offences that relate to environmental matters and the destruction of plants and animals although anticipate that much work will have to be undertaken to develop a workable, efficacious system. On further reflection, given the necessity of enforcement officer issuing notices of intent, establishing an internal initial challenge procedure

and then a formal appeals system through the tribunals services, they do not seek to obtain these powers.

Action

20. That the Chair sends the draft letter at annex 2 to this paper together with the detailed responses to the questionnaire (annex 3) as HSE's response to DEFRA's consultation.

Paper clearance

21. Cleared by SMT on 2 September 2009.

Annex 1

HSE's Response to DEFRA's Consultation on Civil Sanctions for Environmental Offences

Summary of DEFRA's Proposals for Civil Sanctions

(The following summarises DEFRA's proposals and opinions set out in their consultation documents and not HSE's Position).

The full text of DEFRA's proposals and copies of their consultation documents, draft legislation, impact assessments, etc can be found at http://www.defra.gov.uk/corporate/consult/env-enforcement/

1. DEFRA proposes three options:

   - Do nothing – maintain existing system of environmental enforcement
   - Introduce civil sanctions
   - Introduce civil sanctions and strengthen Court sentencing options

Option 1 (no action) is not favoured by DEFRA as it would allow problems identified to persist ie regulators would continue to have to rely too heavily on prosecution cases. DEFRA feel such issues deserve a proportionate sanction however for some there is none under the current system and so these offences would continue not being appropriately addressed by the regulator ("compliance deficit"). Thus environmental regulators would lose opportunity to strengthen the criminal courts' capacity to sentence consistently and proportionately in environmental cases. There would be no overall framework for consistent environmental enforcement, or provision of public information and so gaps in enforcement powers would remain.

Desired outcomes would not be secured: better targeting of enforcement resources; potential benefits of environmental legislation covered by the proposals not fully realised and regulation is undermined; current level of damage incidents and risks remain unnecessarily high. The net benefits identified for Option 3 (Impact Assessment table F) or Option 2 (table D) would not be gained.

Option 2 (Civil Sanctions only) aims for greater fairness in enforcement when the breach is not sufficiently aggravated to justify criminal prosecution. Civil sanctions would be used instead of current enforcement in suitable cases as well as where a sanction is deserved but there is no available proportionate sanction. The draft government guidance sets out factors that would normally point to prosecution still being the appropriate response to an offence, rather than civil sanctions. The expected change to current methods of enforcement is as follows:

Enforcing agency	Prosecution	Cautions	Warning letters
Environment Agency	- 20%	- 50%	- 6%

Natural England		- 50%	- 60%

Option 3 (Civil sanctions + strengthening the powers of the courts) involves strengthening the role of the criminal courts as well as introducing civil sanctions. Tougher criminal sanctions punishing the worst offences, which would still be prosecuted; civil sanctions aimed at minimum deterrence, prioritising compliance, restoration of environmental harm, and restitution to local communities ahead of monetary penalties. The important role of regulator advice and guidance would be retained. Option 3 is the preferred option in the interests of a better graduated, more proportionate and effective overall enforcement system.

Civil sanctions under consideration

2. There are six main civil sanctions under consideration, enabled by the Regulatory Enforcement and Sanctions Act 2008, which builds on the Macrory report:

1) Fixed monetary penalties (FMP)
2) Variable monetary penalties (VMP)
3) Enforcement undertaking (EU)
4) Restoration notice (RN)
5) Compliance notice (CN)
6) Stop notice (SN)

Introducing VMPs and Enforcement Undertakings would bring a radical change to the enforcement system. The other powers are useful to fill important gaps.

3. In addition,

- A person will be able to appeal against a civil sanction to the independent and impartial First Tier Tribunal (except Enforcement Undertakings – offered voluntarily)
- A Regulatory Cost Recovery Notice (RCRN) can be imposed at the same time as a VMP, RN, CN or SN. This allows the regulator to recover investigation, legal and admin costs incurred in imposing the sanctions for all the above; ie not for fixed monetary penalties and enforcement undertakings.

How civil sanctions will work

1) Fixed monetary penalty (FMP)

A FMP is a low level fine (£100 for individuals and £300 for other bodies) fixed by legislation for specified **minor offences** eg failure to record information. They will be used to enforce less serious offences, usually where a dutyholder had not complied

following advice or guidance. The regulator must be satisfied **beyond reasonable doubt** that an offence has been committed.

FMPs are not to be used for ‘fault-based’ offences eg where liability for an offence depends on knowing or negligent disregard for the law.

No other sanctions may be used alongside a FMP and the offender cannot be prosecuted for the original offence.

A prompt payment discount of 50% is offered if the recipient pays within the period for representations following the notice of intent (NOI). Similar discount applies if (and only if) the person makes valid/reasonable representations during the 28 day period but regulator still decides to impose the penalty.

Issuing a FMP:

(i) Regulator issues a Notice of Intent (NOI) to impose a FMP giving the grounds for the notice, amount to be paid, and rights of representation.

(ii) After 28 days the regulator decides to impose the FMP, it serves a final notice with details of right of appeal.

(iii) Representation and appeal: The dutyholder can pay once the NOI is issued. Payments within the 28 day period attract a 50% discount. If they wait until the final notice is issued, the fine cannot be reduced but they have a further 28 days to pay the full sum. The dutyholder may make representations at either the NOI stage, or the final notice stage. If none are made, or not upheld, the dutyholder may make an appeal to an independent tribunal once the regulator has confirmed the penalty is imposed by issuing a final notice. A tribunal may confirm or quash the penalty.

(iv) Late payment or no payment: late payment ie beyond 56 days from when the NOI was issued attracts a 50% addition. If the penalty is unpaid, action is taken in civil courts for recovery.

2) Variable monetary penalty (VMP)

A VMP is a proportionate monetary penalty for **moderately serious offences** where prosecution is not in the public interest. The regulator must be satisfied **beyond reasonable doubt** that an offence has been committed.

Prosecution would normally remain appropriate where factors such as intent, recklessness or failing to comply with notices are relevant.

Their objective is to remove any financial benefit obtained by the offender and deter future non compliance.

The dutyholder cannot be prosecuted for the original offence should they fail to comply with the VMP.

VMPs can be combined with compliance notices and restoration notices, or stop notices.

The level of penalty is calculated by the regulator. In summary only cases, the fine cannot exceed the maximum in the magistrates' courts. There is no limit for triable either way offences. The consultation proposes a model that would ensure a VMP is proportionate to the facts of the case, and proposes that there should not be a cap on VMPs for either way offences.

The regulator calculates the level of VMP imposed by

- Estimating the financial benefit of eg costs saved because of non-compliance, fees not incurred, saving in staff time
- Adding a deterrent component of a starting sum multiplied by a factor weighted to reflect any unacceptable aspects to the person's approach to compliance
- Deducting certain costs incurred by dutyholder (eg compliance, restoration)
- Overall penalty can be reduced if dutyholder offers to compensate individuals, communities or organisations adversely affected (a third-party undertaking (TPU))

Regulators will have the power to require information from the dutyholder so that the VMP can be determined.

The proposed model for determining a VMP is designed to deliver a proportionate penalty, based on the facts of the case. The proposals therefore do not include any discount for early payment of a VMP, nor any late payment penalty. The recipient can make representation about their ability to pay which may reduce the VMP proposed. The regulator has flexibility in setting the payment period and no late payment penalties are chargeable.

Issuing a VMP:

(i) the regulator issues a NOI with grounds for proposing the VMP, amount to be paid and rights of dutyholder to object.
(ii) The recipient can "appeal" / make representations to the regulator at this stage.
(iii) After 28 days the regulator confirms the VMP by serving a final notice.

Representation and appeal: The dutyholder can make representation when the NOI is issued. They can offer a third party undertaking (TPU) which the regulator may take in to account. If the regulator finalises the NoI there is then a further appeal route to an independent tribunal.

Costs: the regulator can recover costs of investigation etc via a **Regulatory cost recovery notice (RCRN).**

Late payment or no payment:

When a dutyholder refuses to pay, the mechanism for recovery is through the civil courts together with payment of costs.

Where a VMP is combined with a third party undertaking (TPU), and the TPU is not delivered upon, the regulator can impose a non compliance penalty (NCP). This also applies where the VMP is combined with either a compliance or restoration notice.

3) Enforcement undertaking (EU)

An enforcement undertaking is a voluntary agreement to take steps that make amends for non-compliance and its effects. The dutyholder offers the EU and the regulator decides to accept the EU, or not.

- No other civil sanction may be imposed if a regulator accepts an EU and the dutyholder complies with it.
- The dutyholder cannot be convicted of the **original** offence.
- If any part of the EU is not complied with, the regulator can impose an alternative civil sanction or prosecute for failure to comply with the EU.

Agreeing an EU

(i) The dutyholder proposes the EU.
(ii) The enforcer decides whether to accept it or not.
(iii) If agreed and the dutyholder complies the action is completed.
(iv) The dutyholder may apply for a completion certificate. The regulator may issue a certificate and if they do not, the dutyholder can appeal to a tribunal.

4) Restoration Notice (RN)

A restoration notice is a written notice that requires the dutyholder to take steps within a stated period to restore harm caused by the non-compliance so far as possible. The regulator must be satisfied beyond reasonable doubt that an offence has been committed.

RNs can be used in conjunction with VMPs and CNs, or Stop Notices.

Issuing a RN:

(i) The regulator issues a Notice of Intent (NOI). The NoI must contain details of all sanctions proposed, namely, a VMP and/or CN if intended for the same offence.
(ii) After 28 days the regulator serves a final notice that imposes the sanction

Representation and appeal

The dutyholder may make representation before the NOI period of 28 days expires or, after the RN is issued, may appeal to an independent tribunal. The RN is suspended until the appeal is heard.

Costs: The regulator can recover costs of investigation etc via a Regulatory Costs Recovery Notice (RCRN).

Failure to comply: Failure to comply with a RN may result in prosecution or the serving of a non compliance penalty.

5) Compliance notice (CN)

A compliance notice requires the dutyholder to take action to comply with the law within a specified period. The regulator must be satisfied beyond reasonable doubt that an offence has been committed.

CNs may be combined with a VMP and RN.

Issuing a CN:

As for RN above.

Representation and appeal

As for RN above

Costs: The regulator can recover costs of investigation etc via a RCRN.

Failure to comply:

A dutyholder may be prosecuted for the original offence or issued with a non compliance penalty.

6) Stop notice (SN)

A stop notice is a written notice requiring a dutyholder to cease an activity that is causing serious harm or presenting a significant risk of causing serious harm. Or to prevent a planned activity that would do so.

SN may be issued at the same time as a NOI for a VMP, RN or CN, or separately.

Issuing a SN:

(i) The regulator serves the SN. No NOI is required for the SN.
(ii) Once served, the person should cease carrying out the process until compliance is achieved.
(iii) The regulator must issue a completion certificate once they are satisfied the dutyholder is compliant. The dutyholder may also apply for a completion certificate.

Representation and appeal:

The dutyholder may appeal to an independent tribunal.

The SN remains in force pending appeal, unless the Tribunal decides otherwise following an application from recipient.
Right of appeal against a decision to issue a completion certificate.

Costs: the regulator can recover costs of investigation etc via a cost recovery notice.

Failure to comply: a dutyholder would normally be prosecuted for failure to comply with the notice.

Compensation may be payable to the dutyholder if the loss was incurred as a result of a SN served that is subsequently withdrawn because it was flawed or is successfully appealed.

Non Compliance Penalty and Regulatory Cost Recovery Notices

A non compliance penalty may be served where the dutyholder has not met the terms of the RN, CN or TPU. (Non-compliance with a RN or CN cannot be met with prosecution for the original offence if the notice has been imposed together with a VMP – the non-compliance penalty is then the only sanction). The penalty under a non compliance notice is based on a percentage of the costs the operator would incur in fulfilling the remaining elements of the RN, CN or TPU up to a maximum of 100%. The dutyholder may appeal to an independent tribunal. Unpaid notices will be pursued via the civil courts.

The dutyholder has 28 days to pay.

A regulatory costs recovery notice (RCRN) requires a person to pay the investigation, legal and administrative costs of a regulator in imposing a VMP, RC, CN or SN. The recovery notice cannot be used for costs associated with fixed monetary penalties or EUs. The notice must be served at the same time as other sanctions. An appeal may be brought against both the decision to impose the notice and the amount of the costs. Unpaid costs are pursued through the civil courts.

Additional court powers

The con doc includes initial proposals to strengthen the role of the courts in sanctioning the worst cases, which would continue to come before them. These propsoals would be the subject of a further consultation, and would need primary legislation:

- To order restoration of the environment or require alternative forms of restoration where the harm cannot be restored
- Enable magistrates to remove the offender's financial benefit, which the Crown court may already do, under the Proceeds of Crime Act 2002
- Publicity Orders - To order the offender to publicise their offence and sanctions imposed
- To order the offender to pay the regulator's costs or estimated costs of restoration
- Enable magistrates to require an offender to pay compensation up to £50,000.

Enforcement policy

Draft government guidance to regulators sets out a framework of principles and approaches that have been developed in discussion with regulators. Regulators will have regard to this when they consult on and publish their own enforcement policies and guidance, as required under the RES Act.

Annex 2

HSE's Response to DEFRA's Consultation on Civil Sanctions for Environmental Offences

Draft Covering Letter

DEFRA
Fairer and Better Environmental Enforcement Team
5A, Ergon House
Horseferry Road
LONDON
SW1P6148

Thank you for the opportunity to respond to your consultation on introducing alternative, civil administrative sanctions for certain offences under environmental law. We welcome the progress you have made and ask to be kept informed of developments with the proposals' implementation, use and future evaluations to inform our own development of policy in this area.

HSE would wish to be involved in any consideration of future proposals for offences under legislation for which we are competent authorities, either jointly as for the Control of Major Accident Hazards Regulations 1999 (COMAH), or in with delegated powers as with the Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH).

HSE believes you are right not to make available, at this time, the alternative sanctions for offences under legislation for which the EA and HSE share enforcement responsibility.

Specifically, we believe it would not be appropriate to establish a penalty system under REACH. This could undermine criminal enforcement of the core duties on registrants to generate information for use of others, and would point to a difficulty in establishing appropriate penalties of an 'effective, proportionate and dissuasive' nature, as required by the Regulation, that do not involve criminal sanction.

We also believe it would be wholly inappropriate to introduce civil sanctions for offences under COMAH. These Regulations aim to control the most severe industrial chemical hazards and reduce the risk of a major accident to people and the environment, and it is important that the available enforcement sanctions match the seriousness of the matters they seek to address. HSE cannot conceive of circumstances where we would wish to apply a civil sanction to a breach of COMAH. Equally, it would be inappropriate to have different enforcement sanctions available to different parts of the Competent Authority, the single body that enforces the Regulations.

For the main part, the offences that you specify are dissimilar to offences under health and safety law. The legislation that HSE and our local authority colleagues enforce aims to control risks to human health and safety at a higher order of magnitude than the majority of those dealt with in the legislation that this consultation covers.

You do propose that these tools are introduced for offences under the Food and Environment Protection Act 1985 (as amended) (FEPA). HSE Inspectors along with local authority (both environmental health and trading standards functions) colleagues enforce these provisions on pesticide issues. The FEPA provisions cover not only the approved safe supply, storage, sale, advertisement and use of pesticides, but also damage to the environment. HSE enforces environmental damage to plants and wild and companion animals, with Natural England and the Countryside Council for Wales

NE and CCW carry out the investigation and refer their findings to HSE. They will also do some enforcement as part of this work. We do not see an advantage to introducing these alternatives for the substantive offences under FEPA s.16(12). FEPA provides for enforcement notices that HSE Inspectors have used to good effect. The lengthy and costly process of imposing alternative sanctions and the substantial appeals machinery that must accompany this for what, in the case of fixed monetary penalties (FMPs) will be a £100 or at most £300 fine, is disproportionate we feel. These matters are already dealt with effectively making use of the flexibility of the FEPA notices to deal with the risks to the environment and prosecution where appropriate.

Further, we also note that the fixed and variable monetary penalty (FMP and VMP) sanctions will be made available for offences under FEPA schedule 2, paragraph 10 (c) and VMPs will be available for paragraph 10 (a) and (b) offences. These offences include the deliberate obstruction of an enforcement officer, ignoring their directions and knowingly or recklessly making a false statement. These are very serious matters that undermine the functioning of the inspection, investigation and enforcement process. We therefore feel that such offences should remain as criminal matters so that they are regarded by dutyholders with the seriousness they deserve.

Your current proposal plans to introduce these options for NE and CCW leaving HSE and local authority Inspectors, who will be working alongside NE's and CCW's investigators, often on the same cases, without these tools. This inconsistency between regulators is not desirable and so we ask instead that the proposals for FEPA are included in your transitional arrangements to be explored together in the future.

We agree that the proposals should include strengthening the powers of the courts so that your stated aim of achieving a response that is proportionate to the seriousness of the offender's wrong-doing can be achieved. As you are aware penalties for health and safety offences have recently been increased with Parliament passing the Health and Safety (Offences) Act 2008. The Act applies to breaches from 16 January 2009 and we are still waiting to see the impact that this will have on levels of penalties.

We would like to continue to be involved in the development and running of your system and hope that HSE can work with DEFRA in exploring the implementation and administration of such systems.

Annex 3

HSE's Response to DEFRA's Consultation on Civil Sanctions for Environmental Offences

Responses to DEFRA's Specific Questions

Question 1

Which of Options 1, 2 and 3 do you prefer:

(a) Do you favour the status quo (Option 1), meaning that no action should be taken to introduce civil sanctions or strengthen criminal sentencing?
(b) Do you support the introduction of civil sanctions as proposed without complementary measures to strengthen criminal sentencing (Option 2)?
(c) Do you support the introduction of civil sanctions and complementary measures to strengthen criminal sentencing as proposed (Option 3)?

HSE favours option 3.

To achieve your stated aims for the legislation you propose to include in this system, the courts will need greater powers to ensure that a consistent similar sanctioning system is achieved that can realise your aim of prioritising the restoration of the damaged environment and its users.

HSE welcomes these proposals from DEFRA that address specific concerns for the enforcement of environmental offences. We will watch with interest their implementation and hope that we may be kept informed of their evaluation so we can see the lessons there are should it be judged appropriate to introduce these in the health and safety enforcement regime.

HSE's point of view is that using its existing tool kit of enforcement options, achieves a flexible approach that allows a full range of appropriate sanctions to achieve its aims of a proportionate response to the breach based on level of risk that will prevent further harm and hold failing dutyholders to account.

It therefore does not see an application for health and safety offences including those where HSE and environmental regulators are joint competent authorities, eg for COMAH and REACH. It wishes to see how your proposed system works to assess their utility for environmental offences that HSE enforces, for example the safe use, etc of pesticides. In these overlapping areas though great care will be needed to ensure consistency in the use of these options both within the regulatory authorities and between ourselves and environmental regulators, particularly where our enforcement officers work side-by-side or together on the same cases.

Question 2

Do you agree that the draft statutory instruments give appropriate legislative effect to the proposals presented in the Consultation Document? If not, which elements do you consider are not best framed for this purpose and why?

No specific, detailed comments.

Question 3

Do you agree with the approach that has been used to select which civil sanctions should apply to offences? If not what alternative approach would you suggest?

The tools chosen represent the full suite of options put forward by Professor Macrory and translated into the RES Act.

Question 4

Do you agree that the offences and applicable sanctions set out in full in Annex 4 (and to be included in the necessary statutory instruments) are consistent with the approach used?

We note that it is proposed to introduce civil sanctions for (among many other things) breaches of offences in section 16 of and Schedule 2 to the Food and Environment Protection Act 1985 (FEPA). Since 2008, these offences have been enforced by HSE on behalf of the Secretary of State, under an agreement made under section 13 of the Health and Safety at Work etc. Act 1974. However the proposal seems to imply that these offences are enforced by Natural England or Countryside Council for Wales (which they are not). HSE would support civil sanctions for section 16 of FEPA, when enforced by HSE, but not the Schedule 2 offences (see below). We would want to be sure that the civil sanctions fit well with other existing enforcement powers under FEPA.

Question 5

Does the draft Impact Assessment capture all the relevant costs and benefits involved with each policy option? If not what additional or alternative evidence could be used to improve the Assessment?

We have no comments to offer.

Section 5 – Purpose and Key Features of the new Civil Sanctions enabled by the RES Act, pages 34 - 48

Question 6

Do you support the introduction of Variable Monetary Penalties as an alternative to prosecution?

As we understand it, your argument is that VMPs provide an alternative route to sanctioning to enable an efficient use of public resources and differentiate the more serious offenders on the grounds of the dutyholder's intent and other factors. For example those without intent to deliberately flout the law are sanctioned using this alternative method, thereby avoiding the stigma of publicly receiving a criminal

conviction. HSE does not believe that prosecution should just be reserved for the most egregious offences alone.

Issues such as where the dutyholder has deliberately or recklessly disregarded the law should be dealt with by the criminal courts. We note that this is coinsistent with your view given on page 29 of annex 5 of your consultative document, that factors such as intent, recklessness or neglect would normally suggest a criminal prosecution.

The Schedule 2 FEPA offences that you include cover knowingly or recklessly providing false statements, obstruction and disregarding the directions of an enforcement officer. Such matters cut right to the very heart of the ability of law enforcement agencies to ensure compliance with the law. We therefore feel that these matters, particularly as they involve a deliberate or reckless intent on the part of the wrong-doer, should remain within the sphere of the criminal justice system.

The standard of proof is that of the criminal courts, ie beyond reasonable doubt, therefore the resource required to investigate these offences will be the same as for prosecution under the criminal sanctioning regime. We wonder therefore if this will streamline the system to the extent that you envisage.

Question 7

Do you agree with the proposed method for calculating Variable Monetary Penalties? If not, do you have an alternative approach that is both transparent and related to the facts and scale of the offence committed?

Your method seems clear and transparent however, we foresee that a great deal of work must be done with the Sentencing Guidelines Council (SGC) to ensure that there is not disparity between levels of VMPs and criminal sanctions imposed by a court of law.

There is confusion over whether there will be a discount for prompt payment as indicated in annex 5 to the consultation document, but contradicted in annex 1.

Question 8

Do you agree that there should be no upper or lower limit for a Variable Monetary Penalties for “either way” offences (ie offences that may be heard in the Crown court as well as by magistrates)? If not, is there any evidence or rationale for stipulating a specific upper or lower limit?

It is not the upper limit that is important, but ensuring fairness between fines imposed by the criminal courts and by the regulator by way of a VMP.

Question 9

Do you agree that a regulator should have the power to require a person to provide information the regulator needs to determine any financial benefit from non-compliance as part of assessing the amount of a VMP?

Yes. Without this power the VMP can seem arbitrary and the process of achieving justice slowed as many will inevitably result in later appeals with the dutyholder seeking to reduce the level due to financial hardship.

Question 10

Do you support the introduction of Enforcement Undertakings?

This formalizes that which, we feel, our Inspectors already do when they investigate matters that are not in the public interest to take to prosecution. Your enforcement officers doubtless take the same approach. Formalizing this is a sensible way forward to voluntarily bring the dutyholder to the minimum compliance standards and perhaps beyond this. We wait to see how far the element of compensating the "victim" can be achieved as this will require expertise in loss adjusting.

In addition how realistic do you feel it is that dutyholders will offer these unprompted? There may be a danger that enforcement officers have to lead dutyholders into this option and hence open up concerns about inducements.

Question 11

Do you agree with the way in which Enforcement Undertakings would operate?

Please see our response to question 10 above. For this to work sufficient information must be gathered to 1) satisfy the regulator that no criminal sanctions will be pursued – as the requirements to caution under the Police and Criminal Evidence Act 1984 (PACE) may bar meaningful dialogue and 2) that the dutyholder is in a position to offer restoration.

Question 12

Do you support the introduction of Fixed Monetary Penalties?

We confine our response to the issue that is most directly relevant to our role and duties, namely the enforcement of FEPA offences. Again we note that a fixed monetary penalty (FMP) is offered for FEPA schedule 2, paragraph 10 (c) offences – knowingly or recklessly making a false statement or intentionally failing to disclose any material. Your draft guidance (annex 5) for regulators at p 29 states clearly that you judge the enforcement expectation for offences commissioned intentionally or recklessly or that involve obstruction, to be dealt with through the criminal sanctioning system. Although under FEPA s. 21(5) these offences are summary only this does not detract from their seriousness. We would reiterate the seriousness of such matters and the need for a clear message that such offences undermine the workings of effective regulation.

We do not see that FMPs for the substantive offences of breaches of substantive pesticides controls under section 16(12) of FEPA would be effective. The standard

of proof remains that of the criminal courts – beyond reasonable doubt. Therefore the resource in collecting, storing and presenting evidence remains the same as for the current arrangements. The normal penalty level will be £100 for individuals and £300 for corporate bodies, before the 50% discount is taken into consideration. The necessary mechanism of serving a notice of intent, allowing 28 days for representations to challenge the notice and then the handling of formal appeals, we feel will not be justified. Further, the main advantage of enforcement officers taking immediate interventions at limited demand on their own time, is lost. Therefore we do not feel that the system you propose will generate any advantages over the current arrangements of serving FEPA enforcement notices and , where appropriate, prosecuting.

Question 13

Do you agree with the proposed level of Fixed Monetary Penalty for individuals and business? If not, what level would you prefer and what evidence exists to support that level?

Again we will confine our response to the offences that our Inspectors also enforce, namely FEPA. The fine is £100 for individuals and £300 for any other body. The offences for which an FMP can be used are wide under FEPA s.16(12) including the sale, storage and use of an unapproved product. An FMP would not be appropriate for many of these offences. A good deal of work will be necessary to model the use of FMPs along with the other options to ensure that they are consistently used is a proportionate way and we look forward to becoming involved in future consultations over this.

Question 14

Do you agree with the proposed discount for discharge and early payments and penalty for late payments of Fixed Monetary Penalties?

We agree that in this context, the discount will apply both the prompt payment in the NOI period and, if with good reason an NOI has been challenged, timely payment after the final notice has been served.

Question 15

Do you support the introduction of enforcement notices to fill gaps in the regulators' present enforcement powers?

Again, for the FEPA offences, the power to serve an enforcement notice to prohibit activities and require compliance are already available under the provisions of s.19(6) as amended, and so we do not understand why the options of compliance and stop notices are offered for s.16(12) FEPA offences. We note however that FEPA notices cannot be formally appealed. This is surprising in view of the requirements of the Human Rights act. Perhaps the introduction of civil sanctions would provide an opportunity to remedy this.

Question 16

Do you agree with the proposal to make Restoration Notices and Compliance Notices available for appropriate offences where no similar notice currently exists?

We agree that this is sensible, we assume that the suite will also include stop notices. Enforcement notices are a vital as part of any modern regulator's tool kit. We look forward to hearing of future work to fairly assess what needs to be done to achieve restoration and ensure that the level of compensation is equitable if a third Party Undertaking is offered as part of the RN.

Please see above as FEPA notices are already available under s.19(6) and yet these alternative notices are offered in this proposal.

Question 17

Do you support the introduction of Stop Notices?

Yes. These notices, akin to prohibition notices under ss. 22 of HSWA, are vital to prevent further or potential harm. We note though that your enforcement officers must show that there is a "significant" risk of "serious harm". Clarification should be given as to the exact meaning of this, whether it could be taken to mean a high likelihood of the harm occurring.

HSE's view, given that to serve a prohibition notice under HSWA an Inspector only has to form the opinion of a "risk of serious personal injury", is that opening the debate to disagreements about the likelihood of the harm may undermine stop notices' effectiveness.

Prohibition notices under s.22 HSWA may come into force immediately or be subject to delay. HSWA included this provision because certain industrial processes may genuinely need a period to shut down the operation safely. It may also be unreasonable to expect the dutyholder, depending on the size of the operation and the geographical areas covered, to achieve immediate cessation of the activity. This is an option that you may wish to consider further.

Question 18

Do you agree that a Stop Notice should not be automatically suspended on appeal?

Stop notices are similar to prohibition notices issued under s. 22 of HSWA in that the Inspector or enforcement officer has to show that there is a significant risk of serious harm. Appealing against a PN does not automatically suspend the notice (see HSWA s.24(3)(b)) as Parliament envisaged that the risk addressed by the notice's service would be so significant that its automatic suspension could not be justified.

It should be noted that enforcement notice provisions are also contained in s.19(5) and (6) of FEPA although the criterion for these is that the authorized person has to be of the opinion that a relevant offence under s.16 is being committed or is at risk of being committed. There is no right of appeal in respect of these notices so the suspension issue does not apply.

You may wish to develop a similar approach for Stop Notices as for the HSWA regime.

Question 19

Do you agree with the principles on which compensation for a Stop Notice will be considered (set out in Annex 1, and schedule 3, paragraph 5 of the draft Order, Annex 2)?

This appears to be equitable.

Question 20

Do you support the introduction of Non-Compliance Penalties?

These are a necessary part of any such a civil administrative sanctioning system to enable it to work.

Question 21

Which of the proposed methods for calculating a Non-Compliance Penalty do you prefer?

HSE suggests Option 1. The purpose of this new regime will be to remove any financial benefit from non-compliance. Delaying costs, especially if this is into the next fiscal or budgetary period, is recognized in business as a method of saving significant amounts of money. Indeed, there have been cases investigated and prosecuted by HSE's Inspectors where the maintenance and replacement of key equipment has been delayed for this reason and thus the incident occurred or was more serious because of the delay. The penalty for non-compliance therefore must match the saving accrued. Option 2, by contrast, may encourage the duty holder to make a cost-saving calculation and decide the saving is greater than the penalty.

Question 22

Do you agree with the proposed approach (set out in section 3 of the draft guidance) to identifying the kinds of case that should normally result in prosecution instead of a civil sanction?

The approach sets out a number of key factors contained in the Code for Crown Prosecutors and the Compliance Code. HSE repeats its belief that prosecution should not be reserved for the most egregious offences alone and so a flexible solution will always be needed.

The factors outilined in section 3, pp 28 – 31 need to be reviewed against your proposed civil sanctions for specific offences as, as we have said above, you do anticipate that offences involving intent, recklessness, neglect or obstruct will be dealt with through the criminal sanctioning regime.

Section 6 – Strengthening the Role of the Criminal Courts, pages 49 - 52

Question 23

Do you agree with the initial proposals for strengthening the role of the criminal courts in sentencing environmental cases?

Yes. In order to achieve a flexible, proportionate civil and criminal sanctioning system under the regime you propose, we would agree that the criminal courts' powers must be increased to reflect the seriousness of cases pursued through the criminal sanctioning system, rather than the civil. Without these extra powers either an anomaly will arise if the criminal route is chosen or a hybrid will be needed.

Question 24

If prosecution would be reserved for the worst offenders do you consider that publicity orders would be justified in these serious cases, at the court's discretion?

HSE has long had a policy of publicising enforcement action by its Inspectors, firstly through the public register of enforcement notices and later through its web-based data-base of enforcement notices and prosecutions.

The Corporate Manslaughter and Homicide Act 2007 make these available to the courts. Work should be undertaken with the Justice Ministry to ensure they are consistently used.

Section 7 – Ensuring Fair Process in use of Civil Sanctions, pages 53 - 56

Question 25

Do you agree with the proposed 28 day period within which a person may make representations and objections to the intended imposition of civil sanctions?

Yes. This is a standard period used for appeals against sentence however; the time limit for appeals against improvement and prohibition notices under HSWA is 21 days.

Question 26

Do you support the proposed grounds of appeal against the imposition of a civil sanction? If not, what further grounds would you like to see and why?

This seems to cover the factors laid down in various legislative and common law provisions to fulfil the requirements of natural justice.

Question 27

Do you agree that if a civil sanction is appealed the regulator should carry the burden of proving its case?

Yes. This is necessary to achieve justice.

Question 28

Do you agree that all proposed notices and penalties (except stop notices) should be suspended until the appeal is heard?

Yes, this follows the appeals procedures for improvement notices under s.21 HSWA.

Question 29 (on behalf of the Tribunals Service)

Do you consider that a Tribunal may sometimes need to hear an appeal against a Stop Notice on a fast track? If so, in what circumstances?

Appeals against enforcement notices issued under HSWA are heard by the Employment Tribunal. These are not subject to any fast track procedure and because of their specialised subject matter, usually require a directions hearing which would not be ideally suited to fast track. However, we can see that there may be urgent situations where stop notice reviews need to be determined quickly. It should however be for the appellant to give good reason for this. Further work will no doubt be undertaken to set out in guidance the factors that will justify moving an application to appeal onto the fast track.

We would envisage that the circumstances would be that the applicant can show special economic damage or other harm to the business or the community through prolonged prohibition of the activity.

Question 30 (on behalf of the Tribunal Procedure Committee)

Do you consider that the draft General Regulatory Chamber Rules will suit the handling of appeals against civil sanctions imposed for environmental offences?

We have no detailed comments to offer at this time.

Question 31

Do you consider that a substantial proportion of appeals in environment cases would have the potential to be decided on the parties' written submissions alone?

We have no specialist, detailed knowledge of the types of scenarios and therefore cannot offer any comments.

Section 9 – Guidance, page 58

Question 32

Do you agree the draft government guidance provides regulators with an appropriate clear, high level, cross-environment framework within which to develop their own guidance as required by the draft Order? If not which elements conflict with this and what would you propose as an alternative?

There are some inconsistencies in the draft with your main consultative document, that we have addressed above. These areas will need to be explored in greater detail before these sanctions can be made available.

Section 10 – Transitional arrangements, page 59

Question 33

Do you agree that EA should not generally take on civil sanctions powers for the time being in relation to enforcement under regulations where they share enforcement responsibility with another regulator, eg regulations on the Control of Major Accident Hazards and on the Registration, Evaluation, Authorisation, and Restriction of Chemicals?

HSE would wish to be involved in any consideration of future proposals for offences under legislation for which we are joint competent authorities, such as the Control of Major Accident Hazards Regulations 1999 (COMAH) and the Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH). In parallel to this, there are many other areas such as genetically modified organisms (GMOs) where safety and environmental considerations overlap, about which you make no proposals for now or indicate that you would wish these to be included in the future.

HSE believes you are right not to make available the alternative sanctions for offences under legislation for which the EA and HSE share enforcement responsibility.

Specifically, we believe it would not be appropriate to establish a penalty system under REACH, which could undermine criminal enforcement of the core duties on registrants to generate information for use of others. We would point to a difficulty in establishing appropriate penalties of an 'effective, proportionate and dissausive' nature, as required by the Regulation, that do not involve criminal sanction.

We also believe it would be wholly inappropriate to introduce civil sanctions for offences under COMAH. These Regulations aim to control the most severe industrial chemical hazards and reduce the risk of a major accident to people and the environment, and it is important that the available enforcement sanctions match the seriousness of the matters they seek to address. HSE cannot conceive of circumstances where we would wish to apply a civil sanction to a breach of COMAH. Equally, it would be inappropriate to have different enforcement sanctions available to different parts of the Competent Authority, the single body that enforces the Regulations.

The outcomes of the consultation, and any lessons learnt during the early stages of the operation of the new system and the formal evaluation at the three year point will be valuable in informing HSE's, local authorities' and other co-regulators' work on this topic. As we have said, we need to work closely together in the areas that you do propose to introduce civil sanctions, such as pesticide regulation, and where we share responsibility for different aspects of the same legislation.

Annex 4

HSE's Response to DEFRA's Consultation on Civil Sanctions for Environmental Offences

List of Consultees

- Legal Advisors Office

- Economic Advisers Unit

- CRD (York) – Pesticides
- CRD - REACH

- Agriculture and Food Sector

- HID SI – Biological agents and Genetically Modified Organisms
- HID SI - Explosives
- HID CI - COMAH
- HID OD

- FOD HQ

- Cross Cuttings Interventions Directorate – Better Regulation
- International Chemicals Unit

- Local Authority Unit

- Nuclear Directorate