



Llywodraeth Cymru
Welsh Government

Review of the use and effectiveness of civil sanctions

A report on the call for evidence on the use and effectiveness of civil sanctions for environmental offences under the Environmental Civil Sanctions (Wales) Order 2010, The Environmental Civil Sanctions (Miscellaneous) (Wales) Regulations 2010, and the Single Use Carrier Bags Charge (Wales) Regulations 2010.

Introduction

This report presents the results of the call for evidence issued in February 2015 by the Welsh Government. The call for evidence invited views to inform a review of the use and effectiveness of civil sanctions for offences under the Single Use Carrier Bags Charge (Wales) Regulations 2010, the Environmental Civil Sanctions (Wales) Order 2010 and the Environmental Civil Sanctions (Miscellaneous Amendments) (Wales) Regulations.

The review of civil sanctions was carried out in accordance with Section 67 of the Regulatory Enforcement and Sanctions Act and Schedule 6, Part 2 of the Climate Change Act 2008. This report is laid before the Assembly pursuant to Section 67 (6)(b) of the Regulatory Enforcement and Sanctions Act 2008, and paragraph 24 (6) (b) of Schedule 6 to the Climate Change Act 2008.

The call for evidence closed on 30 March 2015. We consulted with local authorities, a producer compliance scheme (Valpak), the Welsh Local Government Association, environmental and wildlife organisations, charities, farming and fishery interests and regulatory bodies for environment and water. Nine responses were received. A list of respondents is at annex A.

The call for evidence can be found at:

<http://gov.wales/docs/desh/consultation/150202-the-use-and-effectiveness-of-civil-sanctions-en.pdf>

Background

Sir Phillip Hampton's 2005 review, "Reducing Administrative Burdens: Effective Inspection and Enforcement"¹, set out principles for Better Regulation. The Hampton review concluded that sanctions were not a deterrent to serious non-compliance and needed to be toughened, it recommended a review of regulatory sanctions which was subsequently carried out by Professor Richard Macrory.

The Macrory Report, "Regulatory Justice: Making Sanctions Effective" (2006)², found an overreliance on prosecution in regulatory enforcement. In addition, where prosecution was not proportionate, there were cases where no effective sanction was available to put right non-compliance and its effects, or to deter future non-compliance. A UK Government review of environmental enforcement also identified problems including:

- No easy access to proportionate intermediate sanctions that act as a deterrent, with regulators often having to choose between issuing a warning letter or caution and taking criminal proceedings;
- Heavy reliance on criminal sanctions which was sometimes disproportionate;
- Fines that did not reflect the costs to the environment and communities or which acted as an appropriate deterrent;

¹ <http://webarchive.nationalarchives.gov.uk/20121212135622/http://www.bis.gov.uk/files/file22988.pdf>

² http://www.fwr.org/WQreg/Appendices/macrory_file44593.pdf

- Environmental damage and its effects not being put right.

Overall, the penalty system did not adequately encourage or take account of a good approach to compliance or deter non-compliance. In response to these shortcomings the UK Government concluded that the current sanctioning framework for dealing with environmental offences was inadequate. This led to the introduction of the Regulatory Enforcement and Sanctions (RES) Act 2008 which had the aims of:-

- Making enforcement more proportionate and appropriate to the circumstances;
- Avoiding the criminal prosecution of businesses, individuals or organisations (in suitable cases) so as to reduce the associated administrative costs and reputational damage, where a civil sanction can achieve enforcement objectives equally as effectively;
- Reserving prosecution for the worst offences;
- Ensuring restoration of environmental damage and certain adverse effects on local communities;
- Ensuring 'polluters' pay the cost to society of their non-compliance;
- Removing financial benefit from non-compliance;
- Creating a more level playing field by removing competitive advantages for non-compliant companies;
- Providing a stronger incentive for compliance in the future.

The Welsh Government believes that environmental regulators should have access to effective sanctions that are flexible and proportionate and that ensure the protection of the environment and human health when tackling non-compliance. Civil sanctions allow regulators to distinguish more effectively between those with a good general approach to compliance and those who tend to disregard the law. They enable regulators to respond appropriately to the circumstances of each case. Civil sanctions help to provide a proportionate alternative to prosecution for business and other persons who fail to comply with environmental regulation despite generally having a good approach to compliance.

The use of civil sanctions by regulators, particularly local authority regulators, was part of a series of regulatory reform measures to implement the principles of good regulation into regulatory practice and marked a significant change in enforcement practice. The powers enable the regulator to impose the sanction without recourse to the court system. Given the significance of this change, Professor Macrory recommended that these new powers should only be made available to those regulators which will use them in accordance with the principles of good regulation. These principles of good regulation are described by the Regulators' Code.

Under the provisions of the RES Act the Welsh Government introduced the Environmental Civil Sanctions (Wales) Order 2010 and The Environmental Civil Sanctions (Miscellaneous Amendments) (Wales) Regulations 2010. These statutory instruments gave the Environment Agency Wales (the regulator) the power to impose civil sanctions for a range of environmental offences. These functions passed to Natural Resources Wales following the creation of the new body on 1 April 2013.

Civil sanctions are currently available under the Single Use Carrier Bags Charge (Wales) Regulations 2010; Producer Responsibility Obligations (Packaging Waste) Regulations 2007; Hazardous Waste (Wales) Regulations 2005; Environmental Protection (Disposal of Polychlorinated Biphenyls and Other Dangerous Substances) (England and Wales) Regulations 2007; the Sludge (Use in Agriculture) Regulations 1989; The Salmon and Freshwater Fisheries Act 1975, The Salmon Act 1986, The Environmental Protection Act 1990, The Water Resources Act 1991, The Water Industry Act 1991, The Land Drainage Act 1991, The Environment Act 1995 and The Water Act 2003.

Section 67 of the Regulatory Enforcement and Sanctions Act and Schedule 2 of the Climate Change Act requires a review of civil sanction provisions to take place as soon as practicable after the end of a period of three years beginning with the day on which the provisions come into force. The review must consider whether the provision has implemented its objectives efficiently and effectively. The duty to review the provisions lies with the Welsh Ministers who must consult those persons they consider appropriate. A copy of the review must be published and laid before the National Assembly for Wales.

Conclusions

In gathering evidence and preparing this review we have looked at the responses to the call for evidence and the findings of a UK Government review and short social research report that was commissioned to measure the effectiveness and ease of use of sanctions from both a regulator and business perspective. The UK review was carried out prior to the formation of Natural Resources Wales when the Environment Agency acted as the environmental regulator for both England and Wales. The Environment Agency has also compiled a review covering the first three years of implementation. This sets out how they embedded civil sanctions alongside the other regulatory tools available to them and how they have used civil sanctions and assessed their effectiveness.

The findings of the review are set out below. Section 1 covers the Environmental Civil Sanctions and Section 2 the Single Use Carrier Bag Regime.

Section 1 - Civil Sanctions for Environmental Offences

In Wales evidence in relation to the use of civil sanctions is limited as the regulators have not used the whole range of sanctions that are available. At the time of the review the only civil sanctions used were 'Enforcement Undertakings' and these have only been in relation to companies who have not complied with the Packaging waste regulations under the producer responsibility scheme. During the review period only 4 Enforcement undertakings were issued. The other sanctions have not been used for a variety of reasons which means there is limited evidence to support the review.

Although the number of responses to the call for evidence has been low (9 out of a total consulted of 31), the majority of stakeholders who responded (subject to a number of recommendations) were mostly positive. They agreed that overall civil sanctions allowed flexibility in enforcement, have been successful in helping to

protect the environment and provide investment for environmental improvement or remediation.

Natural Resources Wales has told us that civil sanctions are a fundamental regulatory tool for the application of the eco-system approach in Wales which provides the regulator with the ability to take a proportionate approach in response to an offence or breach. This is important in supporting the delivery of the social, economic and environmental benefits they seek. They have said that civil sanctions are most valuable for bringing offenders into compliance where they have previously been unaware of the law or the implications of their actions. Natural Resources Wales would like civil sanctions to be made available more widely across their remit to enable them to be a fully proportionate, risk based regulator. They would welcome the extension of civil sanctions to Environmental Permitting offences in Wales to enable them to better regulate.

Industry have told us that generally civil sanctions have secured positive results for compliance and direct improvements to the environment at lower cost. It has removed the fear of prosecution for minor breaches which could have a significant impact on the reputation of a business. Overall Industry views civil sanctions as a fair and reflective means of enforcement.

The vast majority of respondents provided positive comments in favour of civil sanctions for environmental offences and agree that the intended objectives of civil sanctions have been achieved by deterring non compliance; providing an effective and proportionate way of enforcement; reducing risks and preventing harm from occurring or continuing.

All agreed that civil sanctions offer new ways to protect the environment. They agreed that they can provide for the restoration of any damage, make the polluter pay for investment in environmental clean up and provide compensation to those effected.

Recommendations

A number of recommendations have been made by stakeholders on how the system could be improved. Including:-

- Expand the use of civil sanctions to include the Environmental Permitting Regulations to ensure a consistent approach between England and Wales. Legislation in England has been introduced to extend the use of civil sanctions to a wider range of environmental offences which may create some disparity with cross border issues such as water quality offences.
- Tailor regulatory guidance for packaging offences under the packaging waste regulations as these are the most common type of enforcement undertaking.
- To avoid delays in Enforcement Undertakings, guidance should be provided on how long should be taken to agree an undertaking. A standard time would help to ensure that the non-compliance/breach is still relevant.

- Ensure the calculation of the penalty for an enforcement undertaking fully reflects all the costs avoided in committing the offence. There is some concern that the calculation used to determine how much a company should have paid for Packaging Waste Recovery Notes is based upon levies provided by the regulator which omits trading fees, therefore offenders may be paying a lower fee than those companies who were fully registered.

Section 2 - Civil Sanctions for the Single Use Carrier Bag Regime

The enforcement provisions of the Single Use Carrier Bag Charge (Wales) Regulations 2010 are founded on the principles of better regulation and premised on an intelligence-led approach to regulatory effort. They are intended to provide local authorities with the powers and flexibility they need to adopt a risk-based, proportionate, consistent and targeted approach to enforcement.

The Regulations do not impose any duties on local authorities to pro-actively monitor compliance with the Regulations or to take steps of their own volition to actively seek out non-compliance. Instead, the Regulations confer powers on local authorities which are available for use where authorities judge the circumstances to warrant it.

The Welsh Government is keen for local authorities and sellers to work together to resolve issues voluntarily wherever possible. The Welsh Government believes that education and guidance should be the first response and that formal enforcement proceedings should be taken only where informal approaches have failed. Where this failure occurs, local authorities have the power to impose civil sanctions to secure compliance.

This section of the consultation sought views on whether these powers have had the desired impact of reducing persistent or intentional non-compliance and whether they have been used proportionately. Of the four responses received, three were from individual local authorities and the other from the Welsh Local Government Association, the organisation that represents the interest of local government in Wales.

It is noted that none of the local authorities who responded to consultation had imposed a civil sanction in relation to the carrier bag charge and a number of reasons for this were provided. The most common was the perception that civil sanctions were too “bureaucratic”, “unduly complicated” and “not proportionate” to the “low-level” nature of the offence.

However, there were some positive comments made by respondents and these included:

- ‘That civil sanctions, have acted as a deterrent to encourage compliance and are a useful tool to aid enforcement.’
- ‘In the right circumstances, the use of civil sanctions would act as a effective deterrent to continued non-compliance and the use of restorative action would be equally as effective, if not more so’;

- ‘Local Government is very aware and carries out its responsibility to follow a proportionate enforcement response;’
- ‘The legislation has been broadly accepted by both business and the public and quickly became commonplace and has achieved its objectives without enforcement’.

Recommendations

A number of recommendations have been made by stakeholders on how the system could be improved:-

- by introducing a fixed penalty notice;
- operating a single stage procedure;
- civil sanctions should be made available for more serious/mainstream trading standards offences.

Next Steps

The purpose of the call for evidence was to gain an understanding of stakeholders’ experiences of civil sanctions, their effectiveness in influencing behaviour change and compliance, and their influence on collaboration between the regulator and those regulated.

The Welsh Government will now consider these findings in the context of the wider review of the single use carrier bag charge in Wales and in conjunction with the ongoing work being taken forward under the carrier bag provisions in the Environment Bill.

Annex A

List of individuals/organisations that responded to the civil sanctions call for evidence

- Kristina Martinsson
- Monmouthshire County Council
- Natural Resources Wales
- Neath Port Talbot Council
- Rhondda Cynon Taff County Borough Council
- Swansea County Council
- Valpak
- Welsh Water
- Welsh Local Government Association