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The NFU represents 55,000 farm businesses in England and Wales involving an estimated 155,000 farmers, managers and partners in the business. In addition we have 55,000 countryside members with an interest in farming and the country.

## Fairer and Better Environmental Enforcement

### Introduction

The NFU welcomes the opportunity to respond to this consultation which outlines proposals for a more proportionate, fairer and effective approach to enforcing environmental offences in England and Wales. We have consulted with our members, through our own internal consultation process, and this response reflects their views.

The NFU can agree in principle with the aims of the consultation for the introduction of civil sanctions and initial proposals to strengthen the role of the criminal courts. However before regulatory agencies are awarded the new powers business needs to be convinced that there is clarity and transparency in their introduction and that their use will be proportionate and consistent. This will provide business with the necessary confidence and trust in the system.

We therefore set Government a clear challenge, which is to ensure and demonstrate that:

- The new sanctions **will not lead to a more complex** and less streamlined enforcement regime for agricultural businesses
- A **'no surprises' approach** will be taken by regulatory agencies when carrying out enforcement action on businesses. Regulators' enforcement policies must provide clarity and transparency about when the sanctions will be used and in what circumstances
- Civil sanction powers will only be awarded to regulators when they have **fully met** all the recommendations and principles of the Hampton Implementation Reviews. This will give business confidence in the process
- **Training and Guidance** is provided to enforcement staff on a regular basis to ensure they are aware of regulators' enforcement policies and a consistent and proportionate approach is taken when non compliance is found
- **Advice and guidance** will remain the normal response in the majority of cases of non-compliance.

Before we respond to the relevant questions within the consultation we would like to make some general comments, expanding on the points highlighted above. We would like to start our response by outlining the position regarding regulatory enforcement within agriculture.

### The voice of British farming

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The agricultural industry is predominately made up of micro and small businesses. The vast majority of these businesses are and seek to be compliant with regulations and many go much further than the minimum standards required in their efforts to be compliant. Farmers and growers recognise the need for intervention through regulation to deliver better results for animal health and welfare, food safety, and the environment. It is in their interests to be compliant to avoid damage to their reputation and SPS penalties (where relevant), which could have long term impacts on their business.

However farmers are currently regulated by numerous different bodies. The 'threat' of new regulation and regulatory sanctions has the potential to create worry and concern amongst our members. Much of this concern stems from cross compliance where under the Single Payment Scheme farmers face significant financial penalties in addition to any regulatory sanction for any non-compliance found.

The vast amount of regulation in place often has a greater impact on smaller organisations as they have fewer resources to keep track of rules that apply to their business. Equally a financial penalty may have a much greater impact for a small organisation than for a larger business.

The introduction of these sanctions should ensure that this concern is reduced for business and that there is a clear approach to environmental enforcement across different bodies, based on the same principles and with a consistent approach for the regulated.

However we believe that these new sanctions would mean the enforcement possibilities for farm businesses would be far from streamlined. Depending on the offence a farmer could potentially:

- Be deducted a financial penalty under cross compliance
- Be hit via the Environmental Permit route – either conditions applied or charges increased
- Be served with remediation notice under the new Environmental Damage regulations
- Be prosecuted by local authority e.g. for nuisance / have an abatement notice served
- Have one of the new civil sanctions applied

Clarification is needed on what sanctions can be applied, and in what circumstances to ensure that farmers are not hit with a double penalty. The NFU would be supportive of an enforcement approach which is transparent, consistent, proportionate and easy for business to understand. We would welcome a commitment from the Environment Agency, Natural England and Countryside Council for Wales for a 'no surprises' approach when contemplating the use of these sanctions and writing their enforcement policies. In other words farm businesses should know from the time of any initial contact what is on the cards in terms of enforcement action, depending on the facts of their particular case.

We also believe there should be a review period after the sanctions have been in use to ensure there is a structured approach being taken.

One example that could be referred to is from the Environment Agency. When the Agricultural Waste regulations were being introduced and implemented the Environment Agency and industry, through the NFU, worked together in producing guidance and briefings for farmers. This guidance detailed how the regulations would be inspected and enforced and conveyed this message using 'regulatory enforcement ladder' diagrams. This helped farmers to identify priority areas in complying with the regulation and provided clarity in detailing how incidents and breaches would be dealt with. Something similar could be adopted in enforcement policies for the regulatory agencies in question.

### ***Gaining access to the extra sanctions***

In our response to the Regulatory Enforcement and Sanctions Bill in 2007 we agreed that regulators must demonstrate they conform to the principles of the Hampton report before being granted these additional powers to sanction non-compliant businesses.

We are therefore somewhat surprised at this consultation stating that the Environment Agency have been granted access to civil sanctioning powers in limited areas even though their Hampton Implementation Review, conducted in November 2007, found that the Agency had not met the requirements and further progress was required.

The process of awarding sanctions to regulatory agencies needs to be clarified. If regulators are being given powers, albeit limited, even where they do not meet the Hampton principles it leads us to question the approval process and highlights a lack of transparency and trust and business will rapidly lose confidence in its results.

Regulators should only be given access to the powers once they have demonstrated they meet all the recommendations from the Hampton Implementation Reviews and all the Hampton principles. Otherwise there is a danger that the reviews become just another paper exercise with no meaningful outcome or objective.

### ***Guidance and Training***

Clear guidance and training must be given to all enforcement staff and the judiciary on these extra sanctions to ensure a consistent approach is taken especially with regards to persistent offenders. We would envisage the monetary penalties and stop notices being targeted at those who intentionally break the law for profit, by illegally dumping waste for example. Those handing out penalties should therefore be given clear and proper guidance on how, when and under what circumstances they should be issued.

It is important enforcement officers have an understanding of the business they are regulating and must be able to distinguish hazard from well managed risk. This training will be even more critical and necessary if regulatory agencies are gaining access to the sanctions without fully meeting the requirements of the Hampton Implementation Reviews.

We recognise that the Environment Agency is working hard to meet the recommendations from their Hampton Implementation Review. However the efforts of meeting these requirements and the provision and delivery of training and education for all staff regarding these sanctions in the next few months would lead us to question whether the timescale of accessing the civil sanctions by April 2010 is realistic.

### ***Provision of advice and guidance***

We welcome the consultation's statement that regulators giving advice and guidance will remain the normal response to many cases of minor non-compliance. It is imperative that regulators use sanctions selectively and not at the expense of giving those that they regulate advice and education in order to encourage compliance. These sanctions should not be allowed to override the informal dialogue which helps to build a relationship between the regulator and the business.

### ***Making information publicly available about sanctions***

The RES Act required regulators' to report on the use of civil sanctions. The consultation document proposes that a web-based register should be established to provide details of all companies issued with civil sanctions. The register will have separate sections for all the different types of sanctions, allowing users to draw distinctions between the seriousness of cases in which the various sanctions are used.

In some cases where the new suite of civil sanctions are applied we believe it would be disproportionate for regulators to publish the specific details about non-compliant businesses, especially where the business is run by a self-employed individual. Regulatory agencies need to

consider the impact the publication of details can have on a business reputation, particularly for those that have previously held a good record of compliance.

We would support summary information being placed on regulatory agencies websites giving details about the nature of the offence and sanction applied. This information could be used to publicise the number of breaches and the areas of non compliance in order to create a positive effect and assist business in understanding what constitutes a breach and what is and is not acceptable. Over time this could lead to a reduction in the number of breaches of particular requirements.

However we would urge Government to be clear about the different sanctions issued when publishing information on their web-register. This must contain a description of the sanctions and in what circumstances they can be applied, in plain English, in order for a member of the public to be able to draw a distinction between them and recognise the different levels of sanctions.

### **Consultation questions**

We have responded to the questions that we felt were most relevant.

#### **Question 1 – Which of the three policy options 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)**

We believe option three is the right way forward but should be adopted on the basis of Government meeting the challenges we have set around clarity, transparency and consistency. This will provide business with the safeguards needed to alleviate fears and ensure confidence in the use of civil sanctions.

Option three gives regulators and courts the breadth of tools they need to ensure Fairer and Better environmental enforcement. We see the potential for Natural England, Environment Agency and Countryside Council for Wales to use these measures for better enforcement of some pieces of legislation which seem in practice to be on the shelf collecting dust.

By way of example the Pests Act 1954 allows for occupiers of land who are not controlling rabbits to be prosecuted. In their current policy statement Natural England state they feel 'it would only be appropriate to spend public money on issuing and enforcing notices in exceptional circumstances; these would not normally be damage at a holding or parish scale'. A more flexible toolkit e.g. Fixed Monetary Penalties, Enforcement Notices or Enforcement Undertakings would be beneficial in helping to unlock the stalemate that often exists in ensuring compliance in this piece of legislation. We could make a similar point about the Weeds Act 1959.

#### **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?**

The NFU realises that officials are under pressure to monetise both costs and benefits in the impact assessment. It is important that estimation of these values remain robust enough to ensure that policy decisions can be made effectively. In this impact assessment, the cost benefit ratio from other policies was taken and the known costs were multiplied by this ratio to give the 'monetised benefits'. Whilst research was undertaken to check that the ratio was robust, and a low estimate was taken to ensure that the benefits were not inflated, it is still not appropriate in this situation.

Whilst it may be reasonable to say that this ratio gives an 'indication' of the benefits, it is not reasonable to compare it across three different options, as the most expensive policy will always come out as having the largest net present value, making it the favoured policy. It may be the case that there is a cheaper more efficient way of obtaining the same benefits which is ignored on the grounds of having lower benefits due to the fact it has lower costs. In addition the relationship between costs and benefits is unlikely to be linear as assumed in assigning the cost benefit ratio.

On another note the impact assessment was highly complex and difficult to follow. It was not helped by the fact that there was not enough data in the impact assessment to cross check the calculations which is something that would usually be expected to be seen in a high quality impact assessment.

### **Question 6 – Do you support the introduction of Variable Monetary Penalties as an alternative to prosecution?**

The NFU would agree that sanctions need to be effective and assist regulators in achieving better compliance. They should act as a deterrent for all businesses and need to be proportionate. We would agree that there is currently an over reliance placed on the use of criminal courts and prosecution for regulatory non-compliance. We therefore agree in principle with the greater range of sanctioning tools being made available to regulators under the RES Act and would therefore support the introduction of Variable Monetary Penalties.

These penalties will have serious implications for business and therefore must only be used in appropriate circumstances. For example we would welcome the introduction of these powers for the enforcement authorities to use against illegal waste criminals who continue to place unfair and unnecessary costs on private landowners and Government agencies.

However in the majority of cases information, advice and discussion must come before the implementation of a penalty. Dialogue between regulators and business can increase understanding of the regulatory requirements and help business compliance. If or when breaches are found, solutions can be sought through conversation and developing the relationship between regulator and business, rather than a burdensome administrative penalty.

### **Question 7 – Do you agree with the proposed method for calculating Variable Monetary Penalties?**

We welcome the introduction of a model to calculate Variable Monetary Penalties (VMP) in an attempt to achieve some consistency in the penalties being applied to business. However we are concerned at the steps that need to be taken to work out the VMP and believe some of these are very subjective.

In the consultation much is made of the financial gain from non-compliance and the undercutting of one business by another through non-compliance. The NFU believe that it is very difficult to determine financial benefit and would also argue that this does not really hold true in many farm related instances – e.g. heather burning breaches or damage to a SSSI. Further clarification is needed on what the proposed method would be in cases like this.

It is also difficult to assess the cost of equipment not invested in. Where a company is deemed to be non compliant because it has not maintained a piece of equipment or invested in new equipment to meet the requirements of a piece of regulation, it is not clear whether the regulator will make the assessment based on the cost of new equipment, or the cost of labour to maintain the original equipment or a combination of the two. It is also not clear whether the regulator will take into account potential variances in cost.

We are concerned that the list of multipliers is highly subjective, open to interpretation and therefore is lacking in clarity. For example it is not clear how the degree of blameworthiness will be calculated.

This is a very subjective term and there can be cases where more than one business is involved, or external factors have an influence on the non compliance. We would advocate the removal of this in the list of multipliers in order to increase the consistency in applying the sanction. It is also worth noting that Natural England's current enforcement policy does not take this into consideration in its 'proportionality' element, instead focusing on other factors.

It is also not clear how the regulators will assess whether 'prompt action' has been taken by the business to eliminate or reduce the risk of damage. We do not believe it should be up to the regulator alone to make a decision on the action taken after the offence has been committed by business. The regulator and business should be able to consult with each other on this aspect.

These points lead us to raise a concern about how the calculation will be communicated to business. This is obviously a very complex area with different factors taken into consideration in different circumstances, making it difficult to fully understand. This could especially be the case for SMEs which may not have the resources or time to be fully aware of the implications. We believe the Environment Agency, Natural England and Countryside Council for Wales should communicate clearly to those it regulates, the circumstances in which sanctions would be used and the method for calculating the monetary penalties.

This method would need to be made clear in regulators' enforcement policies. It would perhaps be clearer through the use of flow charts, diagrams and worked examples. Any enforcement approach or policy needs to be transparent, proportionate, and easy for farmers to understand without the need for further lengthy and complex guidance. We welcome the idea of having a quick start guide as recommended in the Anderson Review on regulatory guidance, published earlier this year.

**Question 8 – Do you agree that there should be no upper or lower limit for a Variable Monetary Penalty for 'either way' offences (i.e. 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?**

We believe a proportionate and flexible approach is needed, so that any penalty reflects the intent to commit an offence and any economic benefit gained from being non compliant. Applying an upper limit of a penalty of say 10% of turnover could significantly damage a business that has sought to be compliant. This especially holds true for the majority of agricultural businesses, which differ from large water or waste companies.

Applying an upper limit will also encourage regulators to edge towards the upper level of penalty which could mean a significant cost for agricultural businesses who operate on a small profit margin.

**Question 10 – Do you support the introduction of Enforcement Undertakings?**

We support the introduction of Enforcement Undertakings (EU) and agree that they can be a useful addition within the toolkit in bridging the compliance gap. There are several instances which we can highlight where we believe these may be beneficial to the farming community. We have already highlighted the benefits of the sanctions bridging the compliance gap for the Pests and Weeds Acts. However we also believe EU could be used under the CROW Act where sites have been damaged. They would also be useful under the Heather Burning regulations as currently prosecution is the only option. This approach would help save on legal costs for business and could be a more proportionate response.

However we would re-iterate our point that information and dialogue may be a more appropriate response; it could help to establish a solution-focussed relationship between the inspector and business.

**Question 11 – Do you agree with the way in which Enforcement Undertakings would operate?**

The consultation states that the ideal situation for the use of EU would be where businesses would offer an EU unprompted when non-compliance is found and they wish to put it right. We would question how businesses are to be made aware of the existence and possibility of using Enforcement Undertakings and how they should be proposed.

We believe regulators should set out and explain to businesses that Enforcement Undertakings are an option available to them when the notice of intent is issued. Where SMEs are involved they are less likely to be aware of the possibilities offered by an Enforcement Undertaking.

Regulators and inspectors should be able to work with business in discussing what should take place and what is to be covered under an Enforcement Undertaking. We agree with the range of action that should be included and welcome the Governments proposals to allow for flexibility in an Enforcement Undertaking.

### **Question 12 – Do you support the introduction of Fixed Monetary Penalties?**

The NFU agrees in principle with the introduction of Fixed Monetary Penalties to add to the toolkit of regulations to ensure a proportionate approach is taken to enforcement. However we still have concerns around the practicalities of this approach and feel some safeguards need to be implemented.

Our members still have a concern that introducing more administrative fines will foster a parking ticket mentality amongst inspectors which will fundamentally change the existing relationship between inspectors and businesses – at a time when the aim should be to encourage more co-operation, flexibility and discussion. Where fines are applied they should be fully transparent.

Introducing monetary penalties will not make non-compliant businesses any easier to target or identify and there is a further concern that generally compliant businesses will be hit hardest by these penalties.

One safeguard could be to impose a limit on the number of fixed monetary penalties that a regulator can use. This will ensure that regulators are mindful of only using them where absolutely necessary or appropriate rather than dishing them out like confetti. This would also allow for greater dialogue between the regulator and business with more advice and guidance being offered.

We welcome the consultation stating that the majority of fixed penalties would normally be applied only after advice and guidance has been given. We also appreciate the Government is keen to demonstrate that the standard of investigation for fixed penalties will be high and robust and they will not be seen as ‘quick wins’. We believe fixed penalties should be reserved for minor offences and therefore businesses should be given every chance to comply and time to rectify their offences and breaches. However we also feel that more clarity is needed on where fixed penalties will be used with specific examples needed.

Earlier in the consultation we highlighted that the enforcement sanction and inspection regime could become far from streamlined for agriculture and called for a ‘no surprises’ approach. One example we can highlight is the IPPC inspection and charging regime. Farm businesses who are not complying with their permit requirements and record non-compliances are penalised under a charging regime for IPPC which the Environment Agency would argue reflects its time spent with poor performers. Non compliance instances under IPPC lead to a build up of points under the OPRA system with a consequence of this being an increase in the annual charge which farmers have to pay.

We would seek clarification on whether this system would remain separate to the Fixed Penalty system or whether either penalty could be applied to a farm business under IPPC. There is potential here to cause confusion for farmers; there are too many regimes with different sanctions that could be applied simultaneously. Farmers could be left unsure as to which regime could be applied and under what circumstances.

The final point we would like to raise on Fixed Penalties regards the publicity afforded to them. We understand from the consultation that the Government does not envisage active publicity for relatively minor sanctions. We would advocate a system that would be parallel to parking tickets where statistics on the number issued are available nationally but no personal details are divulged.

The Environment Agency, Natural England or Countryside Council of Wales could use the figures in a positive way to highlight weaknesses and help them with future information campaigns by identifying areas where awareness appears to be lacking. Over time, this should lead to a reduction in the number of breaches of a particular requirement which would be to the benefit of everyone.

**Question 13 – Do you agree with the proposed level of Fixed Monetary Penalty for individuals and business.**

We agree with the proposed levels put forward but as highlighted above we would appreciate more clarity about the ways in which penalties will be applied.

**Question 14 – Do you agree with the proposed discount for discharge and early payments and penalty for late payments of Fixed Monetary Penalties?**

The NFU would agree with reductions being applied for early payments and charges increasing for later payments and believe this could encourage early payment and future compliance.

**Question 15 – Do you support the introduction of enforcement notices to fill gaps in the regulators present enforcement powers?**

In the right circumstances, as an alternative to monetary or custodial sentences we would agree that enforcement notices can be an effective sanction. We would stress that the obligations put on enforcement notices needs to be made clear and reasonable so that corrective action is carried out. They also need to be proportionate to the breach and transparent. They may be of greater benefit to small businesses in providing time to carry out corrective action which is clear, and measured as opposed to imposing a fine without the chance of remedial action.

**Question 16 – Do you agree with the proposal to make Restoration Notices and Compliance Notices available for the appropriate offences where no similar notice currently exists?**

We would agree with the proposal to make these available for appropriate offences. We would expect a compliance notice to be issued when a stop notice is issued in order to specify the steps that need to be taken to comply with the law. We also agree that these can be issued with a VMP to avoid the situation where the fine is paid but the business is not brought back into compliance.

However we believe that the Environment Agency, Natural England and Countryside Council for Wales enforcement policies must recognise that farmers and landowners are in the best possible situation to ensure conservation of environmental features. Regulators must establish a close relationship between businesses. In the vast bulk of circumstances damage to the natural environment is accidental, temporary and easily rectified.

Regulators should therefore seek to work with the person or persons alleged to have caused the offence to understand fully their perspective, motivation and fully establish the reasons for non compliance before issuing restoration and compliance notices.

**Question 17 – Do you support the introduction of Stop Notices?**

Stop notices are very serious sanctions and therefore should only be used in very serious cases. Regulators need to be made aware under what circumstances they should be used. Regulators may

also be need to take other factors into consideration when issuing stop notices on farms, including the potential effects on the health and welfare of livestock and the continuation of activities in keeping with the local landscape. While we support the appeal procedure we believe that a maximum timeframe of a week must be set for a response to an appeal against a stop notice as these will have implications for the financial wellbeing of a business.

## **Question 20 – Do you support the introduction of Non-compliance Penalties?**

The NFU would support the introduction of Non-compliance penalties in instances where restoration or compliance notices have not been complied with. This will enable the rogue element of businesses to be forced to complete restoration and be served with a series of Non-compliance penalties where non-compliance continued.

## **Question 23 – Do you agree with the initial proposals for strengthening the role of the criminal courts in sentencing environmental cases?**

We would agree with the initial proposals for strengthening the role of criminal courts in sentencing environmental cases. However we are slightly concerned that a timeframe is not provided for this. It would be to the benefit of business and regulators if these proposals were introduced at the same time as regulatory agencies gained access to the new civil sanctions. This would help ensure a consistent approach is taken.

The courts need to be reserved for the worst cases of non-compliance and therefore we believe there is a need to increase the level of fines that can be handed out.

One area that we would advocate going through the courts would be that of illegal waste crime. For fly tipping offences, arguably the main hurdle lies in magistrates' inexperience and lack of knowledge in waste crime and the average level of fine issued for these offences certainly reflects this. It is fair to say they are currently inadequate to act as a deterrent. Until fines are increased to match the seriousness of the crime offenders will continue to breach the regulation. Raising the fines and strengthening the role of criminal courts in this instance would send a clear message to deter convicted offenders from repeating again whilst helping to deter potential offenders.

However it is imperative more training is given to help make magistrates appreciate the seriousness of the crime so greater fines and sentences are imposed.

## **Question 24 – As prosecution would be reserved for the worst offenders do you consider that publicity orders would be justified in these serious cases, at the courts discretion?**

As these are reserved for the most serious cases we believe that details of an individual or business would be readily available in the public domain.

We have raised our concerns on publicising other sanctions elsewhere in the consultation. However we would add that where details are published of the business and nature of offence for civil sanctions, where an element of restoration has taken place or the business has taken action to come back into compliance these details should also be recorded on the web register and left on the site for a set period. This will demonstrate the business has taken action and will go some way to restoring and rebuilding their reputation.

## **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?**

The NFU agrees with this approach for clarity and consistency purposes

