

To: Civil Sanctions consultation
Better Regulation Policy Team
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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 how the Environment Agency proposes to implement the new civil sanctioning enforcement powers. We have consulted with our members, through our own internal consultation process, and this response reflects their views.

Before we respond to the consultation questions, we would like to raise a few general points regarding the implementation of the new civil sanction enforcement powers.

Our primary concern is the potential for 'double jeopardy' with cross compliance:

Overlap with cross compliance

The NFU agree in principle with the use of civil sanctions but the biggest concern expressed by our members is the potential overlap with cross compliance and the significant financial reductions that can result from this inspection regime.

In our response to the introduction of civil sanctions consultation we challenged Government to demonstrate that access to the additional sanctions will not lead to a more complex enforcement regime for agricultural businesses and highlighted the wide-range of enforcement sanction possibilities that farmers could face. We urged for clarification to be provided on what sanctions can be applied, and in what circumstances to ensure that agricultural businesses are not hit with a 'double penalty' for the same offence.

While the enforcement and policy guidance documents contained within the consultation attempt to address this issue we believe that agricultural businesses will rightly perceive the imposition of penalties issued under the civil sanctioning regime as 'double jeopardy' where they may also potentially receive a financial reduction under the cross compliance inspection regime for the same offence.

The consultation outlines that civil sanctions are intended to cover environmental Statutory Management Requirements and Good Agricultural and Environmental Conditions under cross compliance i.e. those breaches relating to NVZ's, Sewage Sludge and Water Abstraction. These regulations have their own enforcement provisions as well as possible financial penalties when inspected as part of the cross compliance regime.

Cross compliance conditions have to be met by farmers receiving direct payments (known as the Single Payment Scheme) under the Common Agricultural Policy (CAP). Farmers are required to respect a number of legal requirements (known as Statutory Management Requirements) as well as requirements relating to maintaining the land in Good Agricultural and Environmental Condition (GAECs). If a breach under these requirements is found by a competent control authority, this will result in a penalty being applied to the direct payment to the farmer in respect of the scheme year in which the breach was found. If the claimant negligently fails to comply with a cross compliance requirement their overall payment will generally be reduced by 3% for each non-compliance. This may be reduced to 1% or increased to 5% depending on the extent, severity and permanence of the breach. Penalties may be significantly higher for intentional breaches, or repeated non-compliances.

The level of penalty applied will result in a significant financial deduction in what can be the main income for an agricultural business. The Single Payment is often used by agricultural businesses to invest in their business and goes some way to covering the compliance cost of regulation.

The intended outcome for the civil sanctioning regime is to encourage compliance and ensure that breaches and offences are dealt with in a proportionate manner. To achieve this, the NFU strongly believe that the RPA and Environment Agency need to work jointly and collaboratively to avoid financially penalising farmers twice for the same offence. The Environment Agency must ensure there is full transparency when issuing penalties under the civil sanctioning regime and that full consideration is given to any penalties imposed by the RPA under cross compliance when considering whether to impose a civil sanction for the same offence.

This intended outcome will not be achieved if the two enforcement regimes operate in isolation and the Environment Agency 'stacks up' penalties alongside those from other inspection regimes for the same offence.

Indeed, Defra's guidance on the use of civil sanctions states that 'regulators should take account of any investigations or actual sanctions by other regulators relating to the same matter. This would be to ensure overall proportionality'. We seek clarification on how the Environment Agency intends to interpret this guidance specifically in relation to the cross compliance inspection regime. It is the NFU's view that, if the Environment Agency is seeking to achieve a particular outcome in applying a civil sanction, then it must take into account at very least any penalty that may be applied by another regulator in respect of the same offence, otherwise the Environment Agency's purpose in applying the civil sanction could be frustrated by the penalty applied by the other regulator.

Regular review periods

We recognise this regime is a major change, not only for business but also for Government, and processes and procedures need to be in place to ensure the use of sanctions is as effective, consistent and proportionate as possible.

The NFU therefore welcome the safeguards outlined by the Environment Agency in the consultation. We are also reassured with the consultation stating that "feedback will be sought from stakeholders to ensure that the powers are used effectively". With this in mind we believe that public reviews need to take place at regular intervals within the first couple of years of their use and the application of such sanctions shared with stakeholders. As a good regulator, the Environment Agency needs to be receptive to industry bodies who wish to raise issues or concerns with the use of sanctions.

We are reassured that Government will hold a review of the civil sanctioning process after a two year period. However due to the anticipated low number of offences with the first couple of years we believe that further reviews need to take place after this period. We also recommend that the Environment Agency National Panel is in place for longer than two years, again due to anticipated low number of sanctions they will oversee in the first two years.

Increasing the scope for civil sanctions

We remain concerned about the potential increase in enforcement action as result of civil sanctions in future years and an increase in the legislation that these additional measures can apply to. The consultation states that the Government intends to introduce civil sanctions for Environmental Permitting Regulations and flood risk offences in due course. Before civil sanctions may be used for these regulations we believe there must be further consultation. Our members need to have confidence that the sanctioning regime is working effectively and proportionately before the powers are used too widely.

An option for businesses and individuals to go via the criminal courts route

Under the current proposals, it is the Environment Agency who decides at the outset whether to use the prosecution and criminal courts route, or whether to use the new civil sanction route (if available in relation to the offence). Although the business against whom a civil sanction is applied has the option of appealing to the First-Tier Tribunal, the business does not in the current proposals have the option of having the offence dealt with via the prosecution and criminal courts route. To remove this option from businesses and individuals removes a fundamental right to be tried by a court for a criminal offence (and with it the further option of being tried by a jury of peers in a criminal court). It cannot be right and equitable for the Environment Agency to have the option of choosing between the criminal court route and the civil sanction route, but for the suspected offender to have no such choice at all.

The NFU would suggest that, at the point that the Environment Agency suspects an offence is committed, the suspected offender is given the option of the offence being dealt with via the prosecution and criminal courts route, or by the civil sanction route, if the EA believes that the civil sanction route is available and appropriate for the offence in question.

Consultation questions

1 Do you agree with the structure of the new Enforcement and Sanctions documents? If not, please explain why and provide details of any alternatives.

The NFU agree with this approach. We would envisage little change being required for the policy and therefore it is better that this is a stand-alone document. The Offence Response options document is welcome but needs to be comprehensive for it to achieve its objective. We would envisage this changing more regularly so it is therefore sensible to make this is a separate document from the policy. We would recommend further consultation when new areas of legislation are considered for the civil sanctioning regime.

2 Do you agree with the content of the new Enforcement and Sanctions documents? If not, please explain why and provide details of any alternatives

The NFU welcome the new enforcement and sanctions documents and can agree with the majority of the content. We are supportive of a policy document that is short, concise and an approach that is proportionate, consistent, transparent and targeted.

However we believe further content should be included to increase confidence amongst businesses in the inspection and enforcement approach taken by the Environment Agency. A further explicit aim we would like to see, possibly included within the transparency section of the policy document, is a commitment to a 'no surprises' approach when inspecting. In other words businesses should know from the time of any initial investigation what is on the cards in terms of enforcement action, depending on their particular case. This was highlighted in the recent Hampton Implementation progress review of the Environment Agency which stated that the 'style of a minority of officers should change to create a

'no surprises' culture. Where non-compliance is identified the officer should notify the business immediately, face-to-face where possible, and not in writing after leaving the premises'.

We would also like to see the inclusion of the Hampton principles within the policy. For example there is currently no reference to the principle that inspections will only take place for a reason and that regulators use comprehensive risk assessment to concentrate resources on the areas that need them most. We would also welcome a section within the policy that explains how the Environment Agency monitors their enforcement action. In terms of the guidance we welcome the inclusion of examples where civil sanctions could be issued and used.

The guidance document should make it clear what the process is for each sanction from the time they are imposed. It should be clear to the offender what Governance and approval processes are in place and what the procedures will entail.

We welcome the references made in the documents to advice and guidance. We strongly believe that advice and guidance should precede all civil sanctions including Variable Monetary Penalties where possible. In many cases this will be sufficient to change business behaviour.

As outlined above one major concern we have is the cross over with other inspection regimes. While the Enforcement Policy states that where the Environment Agency and "another enforcement body both have the power to take enforcement action we will liaise with that other body to ensure effective co-ordination, to secure consistency, and to ensure that any action taken is the most appropriate to the offence". We would like this section clarified for agricultural businesses, specifically in relation to the overlap with cross compliance so that our members have a clearer picture of which sanction regime and penalty will take precedence.

Under the consistency section of the policy document we would question the inclusion of Environment Agency officers taking into account the attitude of individuals and managers of business in deciding on whether to take enforcement action. We are concerned that many other factors could influence the attitude of the offender and it is quite common for personal attitudes to change under stress.

We would also like to see the guidance provide clarity on the publicity afforded to the different sanctions. We are concerned about the possibilities of individual names and other information being published in relation to relatively minor offences. The enforcement and sanctions guidance should provide details on the publicity that is being considered in general for each sanction or offence.

- 3 Does the VMP guidance in Annex 5 provide a clear explanation of how one of the three possible starting points would be selected in a particular case? If not please explain how it could be improved?**
- 4 Do the VMP multipliers work to adjust the deterrent element in a fair and proportionate way? If not, please explain why.**
- 5 Do the VMP mitigating features work to reduce the deterrent element in a fair and proportionate way? If not please explain why.**
- 6 How should the offender and regulator work together to identify and agree VMP cost deductions?**
- 7 Do you agree with our proposal to reduce the total VMP by £1 for every £2 spent on Third Party undertakings to a maximum of one third of the overall penalty? If not, please explain why and provide details of any alternative suggestions.**

It is difficult to comment on the above questions at this stage. It will only be once Variable Monetary Penalties are applied and we have experience of the process and guidance being applied that we will be able to comment and feedback in more detail.

However there are some general comments on VMPs that we would like to raise. We have concerns around the complexity of the calculation and methodology used and how this will impact on businesses' understanding of the sanction. We believe that worked examples need to be included to increase understanding. We would also raise issues over how the financial or restoration costs are to be calculated when they may be uncertain. It is important that the workings and costs remain transparent at all times.

We would also like clarification on the multipliers that are contained within the guidance. For example we would question why the low or no culpability factor should have a 0.1 multiplier. We believe that if there is no culpability on behalf of the offender then this factor should be absent. It also isn't clear why mitigating factors can only provide a total reduction of up to 80% of the deterrent factor and not the full 100% reduction.

We also have concerns about the "blameworthiness" factor as regards how this might apply to offences which require there to have been intent on the part of the offender for an offence to have been committed. In such offences, it is difficult to see how a negligent or low culpability multiplier could be applied, since if the offender has been negligent, an offence has not been committed. Equally, it is difficult to see how the intent of the offender can be considered to be an aggravating factor, when the intention is a prerequisite to the offence having been committed.

To explain this more fully; the "blameworthiness" section states that a multiplier of 3 will be used where the offence has been committed deliberately; a multiplier of 2 will be applied where the offence has been committed recklessly; a multiplier of 1 will be applied where an offence has been committed negligently; and a multiplier of 0.1 will be applied where there is no or low culpability. We do not understand how this can sensibly apply to offences which require intent on the part of the offender to be proven in order for the offence to have been committed. The Environment Agency need to distinguish between factors which contribute to evidence that an offence has been committed, and factors which are relevant to the level or type of sanction that will be applied once the Agency is satisfied beyond reasonable doubt that an offence has been committed. The NFU understands that a multiplier may be applied to the sanction if a strict liability offence has been committed, if that offence was committed deliberately, rather than negligently. However, this does not make sense for offences that require there to have been intent on the offender's part before an offence can be committed. In such circumstances, if the Agency is satisfied beyond reasonable doubt that an offence has been committed because the offender had the requisite intent, it would be nonsensical for the Agency to then determine that a multiplier of 1 should be applied to the penalty because the offender had in fact acted negligently. If the offender acted negligently, then an offence which requires intent on the part of the offender would not have been committed at all. Likewise, if Parliament has decided that no offence will be committed if the offender has not acted with intent, then there should be no reason why, if it is determined that the offence has been committed because the offender had the requisite intent, the penalty that is applied should be multiplied by a factor on the basis that the intent of the offender is considered an aggravating factor. The intent in such a case is not an aggravating factor; it is a requisite without which an offence has not been committed.

The NFU would suggest that the "blameworthiness" multipliers should not be applied to offences which require intent on the part of the offender to be proven beyond reasonable doubt before an offence will have been determined to have been committed.

Further, we don't agree with the proposal to reduce the total VMP by £1 for every £2 spent on Third Party undertakings to a maximum of one third of the overall penalty. Taking this option would offer no saving for the offender and is therefore a major disincentive. The proposed reduction is lower than the

£1 for £1 offset that is currently used for other costs such as restoration and we believe this level should be adopted in this case.

8 Do you agree with the proposals for use of Enforcement undertakings? If not, please explain how they might be improved

We welcome the use of voluntary Enforcement Undertakings. However with a lot of emphasis being placed on the offender to propose these as a solution we would question how businesses are to be made aware of their existence and the possibility of proposing an Enforcement Undertaking in the first instance.

We believe the Environment Agency should seek to publicise these in as many ways as possible. Due to the nature of the industry the majority of agricultural businesses will not spend time searching or looking for information like this on websites. We would therefore welcome an approach where the Environment Agency inspectors inform businesses fully of their options where an offence has been, or is suspected of having been, committed, and explain the process behind an Enforcement Undertaking. It would also be beneficial to businesses for the Notice of Intent to include a reference to, or to indicate where businesses can offer Enforcement Undertakings. This again highlights the need for inspectors to ensure there is a 'no surprises approach' and that the civil sanctioning regime is fully transparent.

The consultation document also needs to be clearer on the length of time it would take to compile an Enforcement Undertaking and whether the business would be given the opportunity of re-drafting and improving the offer if it is rejected.

Clarification is also required on the publication of details. We believe that Enforcement Undertakings should include an option which prevents details from being published due to their complex nature and the negative coverage they could receive which could destroy a business's reputation. The publication of details of the Enforcement Undertakings may deter businesses from offering them.

The guidance for Enforcement Undertakings should also provide clarification and details on how Data Protection and Freedom of Information legislation will impact on details being made public.

In instances where details are published recognition should also be given to the completion of an Enforcement Undertaking. This will go some way to restoring the reputation of the business that caused the offence.

We would also like to confirm who assesses the Enforcement Undertaking and who decides if it is appropriate. We believe this should be decided by the National Panel to ensure consistency.

We would also like further details about how Enforcement Undertakings will fit with other approaches taken by other regulators. For the NFU members, the principal concern will be how Enforcement Undertakings will fit with the cross compliance regime. We would welcome further details from the Environment Agency about how Enforcement Undertakings will impact upon the cross compliance regime.

9 Do you agree with the format for the proposed use of Enforcement Undertakings? If not please explain how it might be improved.

The NFU agree with the format for the proposed Enforcement Undertaking and the example included in the consultation is helpful. We believe there should be examples of the format made available on the Environment Agency website for ease of use. We strongly encourage joined up working between Government departments in this area so that other departments who also accept Enforcement Undertakings follow a similar template.

10 Are the civil sanction processes clear? If not please explain how they might be improved

The system of civil sanctions can be complex and we feel that the process needs to be made clear to the offender once a breach has been committed with the Environment Agency officer working with the business to bring it back into compliance. Further information on the Governance and approval process is also recommended so that the process remains fully transparent to the recipient of any sanction.

We would also recommend that specific reference to Environment Agency officers working with the offender to set an Enforcement Undertaking is included, especially in the early stages of the application of civil sanctions. This will help to ensure that the offender knows this is an option and also what needs to be included in the agreement.

We also require clarification on the completion process for an Enforcement Undertaking. In the process section of the consultation it states that once the Environment Agency are satisfied that the Enforcement Undertaking has been fully complied with a completion certificate will be issued within 14 days. However elsewhere in the consultation it states that the business will have to apply in writing for a completion certificate. This process should happen automatically and be free of charge.

It is crucial that concerns regarding what is contained within the regulators initial letter to a business outlining the Environment Agency intention (the notice of intent) are understood and it is clear on how the business may appeal.

11 Do you think the proposed Governance structure will provide the right degree of safeguards? If not, please explain why and provide details of any alternatives

We believe the proposed Governance structure and safeguards will go some way to providing business with confidence in the system. The issuing of any penalty needs to be transparent, consistent, proportionate and accountable and the Governance structure proposed should help to ensure this. Businesses need to be kept informed of what is happening at all stages of the process to reduce the concerns and worry that sanctions can bring.

We believe the diagram contained within the consultation on the Governance and Approval process could be clearer for each sanction so that it details exactly what happens from the time an offence is committed to a sanction being imposed. In particular, we believe it would be helpful for the exact approval and governance processes which will apply for each potential civil sanction should set out clearly and transparently. At present, the consultation document does not set out sufficiently clearly how the approval and governance regimes will interact. It is difficult for the NFU to comment further on the appropriateness of the safeguards until the detail of how the safeguards will operate is more fully set out.

While we think it is sensible to put in place in a number of additional checks into the system for the civil sanctioning regime we would ask for further clarification on who is going to pay for the extra costs the running of the National Panel will bring, and whether these costs will be recoverable from offenders in Enforcement Cost Recovery Notices.

We strongly recommend that the National Enforcement Panel remains in place for longer than two years due to the anticipated low number of civil sanctioning decisions it will have oversee in this period.

12 Do you agree with our proposals for reporting information on the use of sanctions? If not, please explain why.

The NFU believes it is disproportionate to publish the specific details of businesses issued with civil sanctions where this would breach the privacy and confidentiality of those involved. If the public

register idea is taken forward we would support the publication about the nature of an incident and the level of enforcement action taken (which civil sanction was applied etc) without identifying the individual or business involved. A more relevant summary of breaches and subsequent actions, which the Environment Agency is looking to include in their annual report, could be used in a positive way to assist businesses in understanding what is and what is not possible.

In cases where details are published and the details of an individual or business are in the public domain, we believe it is also important that any corrective action which brings them back into compliance is also published, giving the business an opportunity to restore their reputation.

When publishing details of civil sanctions it is important the Environment Agency draws a distinction between the different types of civil sanctions available, for example, a fixed monetary penalty, enforcement undertaking or compliance notice, in a language a member of the public would easily understand. For example it could easily be thought that a fixed penalty is a serious offence as there is a financial element involved, even though such penalties are routinely applied for simple traffic offences.

The NFU would be keen to be part of a stakeholder review when the use of the sanctions commence and urge the Environment Agency to strongly consider and act upon stakeholder feedback they receive with regards to using the powers effectively. We also believe there should be continual, regular reviews on the use of civil sanctions in the first stages of their use.

If you would like to follow up anything in this response please contact Lee Osborne.