

## Enforcement trends and targets--environmental offences

12/05/2015

**Corporate Crime analysis: What does the future hold for the enforcement of environmental offences? Simon Tilling, senior associate at Burges Salmon, suggests the use of enforcement undertakings for offences committed under the environmental permitting regime is the big issue to watch.**

### What have been the latest important enforcement actions in the area of environment law?

Undoubtedly, the most important development is the extension of enforcement undertaking civil sanctions to environmental permitting offences. From 6 April 2015, businesses operating under an environmental permit have the opportunity to take control of non-compliance and propose the steps they are prepared to take on a voluntary basis.

Enforcement undertakings are a novel form of enforcement action because, rather than waiting for the regulator to impose sanctions, the business undertakes to put in place measures to make amends for the non-compliance. The scope of the offer is prescribed in some detail and must:

- o address the conduct causing the breach--for example, putting in place control mechanisms to ensure such failures do not occur again
- o rectify the consequences of any breach--such as through restoration works
- o offer reparations to those impacted by the incident

Importantly, once the enforcement undertaking is accepted, the regulator can no longer prosecute for the breach in question.

Not only does this provide the possibility of better outcomes for both the business and the environment, it has the potential to encourage more open relationships between the Environment Agency and those it regulates. Furthermore, the importance of business being able to control the agenda should not be underestimated--the process of being investigated for non-compliance and waiting for your fate to be decreed by the Environment Agency can be not only time-consuming and costly but also stressful for the staff involved.

Enforcement undertakings have been around for a few years and have already been used by the Environment Agency, Natural Resources Wales and Natural England for certain non-compliances with environmental law. For example, I negotiated the first enforcement undertaking for a pollution event in Wales following an accidental discharge into a fish spawning watercourse. However, the extension to environment permitting offences means that enforcement undertakings are now available for a far greater number of offences and all regulated businesses need to be aware of this.

### What is the impression of the regulator and the current approach towards enforcement?

Enforcement is becoming more targeted. Waste crime has been a particular focus of the Environment Agency recently. Defra figures indicate that waste crime costs the economy £568m a year. Defra and the Welsh government have just closed a consultation on increasing regulator powers to tackle this problem, which proposed solutions such as further scrutiny of operators and wider powers to undertake anti-pollution works and recover the costs from the operator.

Moreover, enforcement options have increased through 2010-15 and, while it is too early to have any view on the application of enforcement undertakings to permitting offences, we have seen a willingness on the part of the regulators to accept enforcement undertakings for other environmental offences, which is a positive development. The use of other civil sanctions, such as variable monetary penalties, is less developed--it may be that the prospect of drawn-out appeals has deterred the use of complicated sanctions such as variable monetary penalties.

However, businesses should be focused on these civil sanctions as an alternative to criminal prosecutions. Recently, the cap on fines that can be imposed by the magistrates' court for most environmental offences has been removed--it had previously been set at between £5,000 and £50,000, depending on the offence. Combined with the new sentencing guidelines for environmental offences that came into force in 2014, we can now expect far higher criminal fines following

prosecutions than we have seen in the past and, correspondingly, more complex sentencing hearings in the magistrates' courts, as the process set out in the sentencing guidelines is implemented.

### **Are there any areas of enforcement that have been noticeably absent?**

Against a backdrop of tightening budgets and a focus on particular areas such as waste crime, one might expect that regulatory attention to other areas of environmental law might have reduced, leading to fewer enforcement actions for breaches of those areas of environmental law. However, it is difficult to say positively that this is the case because as practitioners, we often only see non-compliance when it comes to light as part of a regulatory investigation. Even if it was true, there is no single area where enforcement has been absent altogether, and we are still seeing regulator action for a variety of environmental non-compliances.

### **How do you envisage enforcement in this area developing over the coming months?**

The big issue to watch is the use of enforcement undertakings for offences committed under the environmental permitting regime. I suspect we will see a steady rise as the regulated community realises the value of such a mechanism. It will be interesting to monitor the Environment Agency's responses to offers in order to gauge what is, and what is not, an acceptable offer. For example, should the operator offer to contribute to investigatory costs? Those costs could be recovered following a successful prosecution and the Agency has indicated that it would welcome such offers as part of an enforcement undertaking.

We should also be monitoring the outcome of the Defra consultation on waste crime. This will be of particular interest to the waste industry. The consultation closed in May 2015 and we await the results.

*Interviewed by Nicola Laver.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*



CLICK HERE FOR  
A FREE TRIAL OF  
LEXIS®PSL

[About LexisNexis](#) | [Terms & Conditions](#) | [Privacy & Cookies Policy](#)  
Copyright © 2015 LexisNexis. All rights reserved.