Draft Order laid before Parliament under section 61(1) of the Regulatory Enforcement and Sanctions Act 2008, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2010 No.

ENVIRONMENTAL PROTECTION, ENGLAND TRIBUNALS AND INQUIRIES, ENGLAND

The Environmental Civil Sanctions (England) Order 2010

Made - - - -	***
Coming into force - -	*6th April 2010*

The Secretary of State makes this Order in exercise of the powers contained in sections 36, 39, 42, 46, 48 to 55, 63 and 65 of the Regulatory Enforcement and Sanctions Act 2008.

The Secretary of State has carried out consultation in accordance with section 60 of that Act.

The Secretary of State is satisfied, in accordance with section 66 of that Act, that the Environment Agency and Natural England (who are the regulators for the purpose of this Order) will act in accordance with the principles referred to in section 5(2) of that Act in exercising a power conferred by this Order.

In accordance with section 61(1) of that Act, a draft of this Order has been laid before, and approved by resolution of, each House of Parliament.

PART 1

Introduction

Citation, application and commencement

1. This Order may be cited as the Environmental Civil Sanctions (England) Order 2010; it applies in England and comes into force on 6th April 2010.

Regulators

2. These are the regulators for the purposes of this Order in relation to the offences under the provisions specified in Schedule 5 which are enforced by them—

(a) the Environment Agency, and

(b) Natural England.

PART 2

Civil sanctions, notices and undertakings

Civil sanctions, notices and undertakings

3.—(1) Schedule 1 makes provision for fixed monetary penalties.

(2) Schedule 2 makes provision for variable monetary penalties, compliance notices, restoration notices and third party undertakings.

(3) Schedule 3 makes provision for stop notices.

(4) Schedule 4 makes provision for enforcement undertakings.

(5) Those terms have the meanings specified in those Schedules.

Scope

4. Schedule 5 sets out the provisions creating the offences to which this Order relates.

Combination of penalties

5.—(1) A regulator may not serve a notice of intent relating to a fixed monetary penalty if a variable monetary penalty has been imposed or a compliance notice, restoration notice or stop notice has been served on that person relating to the same act or omission.

(2) A regulator may not serve a notice of intent relating to a variable monetary penalty, compliance notice or restoration notice, or serve a stop notice, on any person if, in relation to the same act or omission—

(a) a fixed monetary penalty has been imposed on that person, or

(b) that person has discharged liability for a fixed monetary penalty following service of a notice of intent to impose that penalty.

PART 3

Non-compliance and enforcement

Recovery of payments

6. The regulator may recover any fixed monetary penalty, variable monetary penalty or non-compliance penalty on the order of a court, as if payable under a court order.

Non-compliance penalties

7.—(1) If a person fails to comply with a compliance notice, a restoration notice or a third party undertaking, the regulator may serve a notice on that person imposing a monetary penalty ("a non-compliance penalty") in respect of the same offence irrespective of whether a variable monetary penalty was also imposed in respect of that offence.

(2) The amount of the penalty must be determined by the regulator, and must be a percentage of the costs of fulfilling the remaining requirements of the notice or third party undertaking.

(3) The percentage must be determined by the regulator having regard to all the circumstances of the case and may, if appropriate, be 100%.

(4) The notice must include information as to—

(a) the grounds for imposing the non-compliance penalty;

(b) the amount to be paid;

(c) how payment must be made;

(d) the period in which payment must be made, which must not be less than 28 days;

(e) the right of appeal;

(f) the consequences of failure to make payment in the specified period;

(g) any circumstances in which the regulator may reduce the amount of the penalty.

(5) If the requirements of the compliance notice or restoration notice are complied with or a third party undertaking is fulfilled before the time set for payment of the non-compliance penalty, the penalty is not payable.

(6) The person on whom the notice imposing the non-compliance penalty is served may appeal against it.

(7) The grounds of appeal are—

(a) that the decision to serve the notice was based on an error of fact;

(b) that the decision was wrong in law;

(c) that the decision was unfair or unreasonable for any reason

(d) that the amount of the penalty was unreasonable;

(e) any other reason.

Enforcement cost recovery notices

8.—(1) A regulator may serve a notice ("an enforcement cost recovery notice") on a person on whom a variable monetary penalty notice, compliance notice, restoration notice or stop notice has been served requiring that person to pay the costs incurred by the regulator in relation to the imposition of that notice up to the time of its imposition.

(2) Costs include in particular—

(a) investigation costs;

(b) administration costs;

(c) costs of obtaining expert advice (including legal advice).

(3) The enforcement cost recovery notice must specify—

(a) how payment must be made;

(b) the amount required to be paid and the period in which payment must be made, which must not be less than 28 days;

(c) the grounds for imposing the notice;

(d) the right of appeal; and

(e) the consequences of failure to comply with the notice in the specified period.

(4) The person on whom the notice is served may require the regulator to provide a detailed breakdown of the amount.

(5) The person required to pay costs is not liable to pay any costs shown by that person to have been unnecessarily incurred.

(6) The person required to pay costs may appeal—

(a) against the decision of the regulator to impose the requirement to pay costs;

(b) against the decision of the regulator as to the amount of those costs; or

(c) for any other reason.

PART 4

Administration

Withdrawing or amending a notice

9. A regulator may at any time in writing—

(a) withdraw a fixed monetary penalty notice;

(b) withdraw a variable monetary penalty notice, a non-compliance penalty notice or an enforcement cost recovery notice or reduce the amount specified in the notice;

(c) withdraw a compliance notice, restoration notice or stop notice or amend the steps so as to reduce the amount of work necessary to comply with the notice.

Appeals

10.—(1) An appeal under this Order is to the First-tier Tribunal.

(2) In any appeal (except in relation to a stop notice) where the commission of an offence is an issue requiring determination, the regulator must prove that offence according to the same burden and standard of proof as in a criminal prosecution.

(3) In any other case the tribunal must determine the standard of proof.

(4) All notices (other than stop notices) are suspended pending appeal.

(5) The Tribunal may suspend or vary a stop notice.

(6) The Tribunal may, in relation to the imposition of a requirement or service of a notice—

(a) withdraw the requirement or notice;

(b) confirm the requirement or notice;

(c) vary the requirement or notice;

(d) take such steps as the regulator could take in relation to the act or omission giving rise to the requirement or notice;

(e) remit the decision whether to confirm the requirement or notice, or any matter relating to that decision, to the regulator.

Guidance as to use of civil sanctions

11.—(1) Where power is conferred on a regulator in this Order to impose a civil sanction in relation to an offence—

(a) the regulator must publish guidance about its use of the sanction;

(b) in the case of guidance relating to a fixed monetary penalty, variable monetary penalty, compliance notice, restoration notice or stop notice, the guidance must contain the relevant information;

(c) the regulator must revise the guidance where appropriate;

(d) the regulator must have regard to the guidance or revised guidance in exercising its functions.

(2) In the case of guidance relating to a fixed monetary penalty, the relevant information referred to in paragraph (1)(b) is information as to—

(a) the circumstances in which the penalty is likely to be imposed;

(b) the circumstances in which it may not be imposed;

(c) the amount of the penalty;

(d) how liability for the penalty may be discharged and the effect of discharge; and

(e) rights to make representations and objections and rights of appeal.

(3) In the case of guidance relating to a variable monetary penalty, a compliance notice or a restoration notice, the relevant information referred to in paragraph (1)(b) is information as to—

(a) the circumstances in which the requirement is likely to be imposed;

(b) the circumstances in which it may not be imposed;

(c) in the case of a variable monetary penalty, the matters likely to be taken into account by the regulator in determining the amount of the penalty (including voluntary reporting by any person of their own non-compliance); and

(d) rights to make representations and objections and rights of appeal.

(4) In the case of guidance relating to a stop notice, the relevant information referred to in paragraph (1)(b) is information as to—

(a) the circumstances in which the regulator is likely to serve the notice;

(b) the circumstances in which it may not be imposed; and

(c) rights of appeal.

Additional guidance

12. The regulator must issue guidance relating to the use of non-compliance penalties and enforcement cost recovery notices specifying—

(a) the circumstances in which they are likely to be imposed;

(b) the circumstances in which they may not be imposed;

(c) matters to be taken into account in establishing the amount involved;

(d) rights of appeal.

Consultation on guidance

13. The regulator must consult such persons as it considers appropriate before publishing any guidance or revised guidance under this Order.

Publication of enforcement action

14.—(1) Where a power is conferred on a regulator to impose a civil sanction under this Order in relation to an offence, the regulator must from time to time publish—

(a) the cases in which the civil sanction has been imposed,

(b) where the civil sanction is a fixed monetary penalty, the cases in which liability to the penalty has been discharged by payment of the penalty following the notice of intent and without further action being taken;

(c) where the civil sanction is a variable monetary penalty, restoration notice or compliance notice, the cases in which a third party undertaking has been accepted;

(d) cases in which an enforcement undertaking has been entered into.

(2) In paragraph (1)(a) the reference to cases in which the civil sanction has been imposed does not include cases where the sanction has been imposed but overturned on appeal.