

Review of Enforcement in Environmental Regulation

Stakeholder Event on Emerging Issues: 29 March 2006

Note of plenary feedback session

Following a presentation by WRC Plc giving a high-level outline of its research to date and emerging issues, the Review team requested feedback on five key questions. This note summarises the discussion based on those areas.

Impact of enforcement policies

- **In what ways could what is covered in regulator enforcement policies impact on the organisation, resourcing and outputs of enforcement?**

The existence of enforcement policies was acknowledged to be important to aid transparency and consistency. Generally, it was felt that tailored policies assisted effective enforcement. Too detailed a policy, though, could inhibit regulator flexibility. Detailed but divergent policies, for example across different local authorities, might create inconsistencies, which had an impact on operator costs. A policy that set out very specific goals, say on prosecutions, risked the development of a 'target culture'.

Some noted that a standard policy across regulators could aid consistency. However it was also suggested that this would reduce enforcement flexibility and that a common approach, with room for specific tailoring by the regulator would be more effective.

Participants also suggested that regulator culture, management and attitude were at least as important as the formal policy. Equally, the understanding of the regulated community, and practical guidance on the requirements expected of them was significant.

Overall, it was considered that regulators should develop a clear, tailored policy and apply it transparently.

Better data should be collected to enable the effectiveness of enforcement actions to be assessed

- **How could a cross-environment approach be taken to monitoring and evaluating future enforcement across environmental regulatory areas?**
- **What kind of performance indicators could be set?**

Participants generally considered that currently available data was not adequate to assess the effectiveness of enforcement. Consistently collated data, carefully qualified and distinguished, should be collected – the differences as well as similarities between regulatory areas needed to be considered. Different organisations analysed different sets of data leading to inconsistencies and prohibiting effective analysis. Some enforcement actions,

for example summary offences, gave rise to very little data to collect and analyse. The formatting and analysis of repeat offences would be particularly important when assessing the effectiveness of enforcement actions. Who should develop the criteria for data collection, and which organisation should collate it, were important questions to answer.

Performance indicators needed to be carefully designed and properly understood. It would be very difficult to get baselines, methodologies and reporting levels right, so all available experience and expertise should be used.

The data is not in itself good enough to support the commonly held belief that fines are too low

- **In what ways could the case be established?**
- **Can the criminal courts be expected to: punish serious breaches; ensure gains from non-compliance are forfeited; create incentives to future compliance; secure remediation and restitution?**
- **If not, which should be the priority for courts?**
- **It is often said that courts need more information, training, and guidance to get sentencing right? If so, what kind of information is the key to that?**

Generally, as noted above, participants considered that the data was not reliable enough to definitively support the belief that fines were too low. Given the number of factors taken into account by magistrates and others, issues like this could only be properly assessed on a case-by-case basis. Any conclusions drawn from the data should therefore be cautious.

Nevertheless, attendees did feel that fines were too low, especially when wider environmental and health effects of an offence were considered, or where there had been intent. Fines did not reflect regulator and societal costs, and criminals were profiting from their activity. The level of fines also varied across regulatory regimes – many seemed too low, while some appeared relatively high. Certain businesses might never be brought into compliance, even with very large fines, so alternative sanctions should be considered, like ‘naming and shaming’.

Opinions diverged on the sufficiency of guidance. Some argued that current guidelines did cover the key issues, and that more training might be required. Not all participants agreed, and suggested that more specific and robust guidelines still needed to be developed.

It is commonly held that cost is a barrier to challenging enforcement decisions

- **How relatively important in allowing effective challenges are participation in decision-making, regulator complaint systems, raising issues with the Ombudsman, and judicial review?**

Overall, participants did feel that cost was a barrier to challenging enforcement decisions, and focused heavily on individuals' access to judicial review proceedings. Despite the 'Cornerhouse' ruling, attendees argued that the "personal interest" criterion for bringing judicial review meant that cost remained a barrier. Cross-undertaking in damages for individuals and non-governmental organisations remained a solid requirement even in public interest cases.

It was noted that cost was more of an issue for individuals than for businesses, which might not be concerned with cost, but more with publicity and 'regulatory backlash'. Private individuals should perhaps have the opportunity to engage with enforcement processes earlier and more comprehensively. This, though, might risk 'politicising' the process and could in turn lead to increased scope for judicial review. Conversely, increasing community involvement might lead to better enforcement decisions and reduce judicial review.

It was important to be clear about the purposes of different means of challenging enforcement decisions. Judicial review should be seen as a check on the administrative process. Other routes, like appeal to the Ombudsman, also served specific purposes.

The question has been raised whether strict liability is a proper basis for criminal regulatory offences

- **What impact may strict liability offences, with or without defences, have on sentencing of environmental breaches?**

Opinion was divided over the impact of strict liability on sentencing. Some suggested that its existence had very little consequence and that other factors, for example the experience of magistrates and resources dedicated to enforcement, had much more influence.

Others considered that the practical and administrative benefits of strict liability argued for its retention for environmental offences. A fault-based system would be intensive and time consuming for regulators and businesses, particularly the requirement to investigate the 'controlling mind'. Courts were also not equipped to examine business management systems.

Participants suggested that there might be more advantages to strict liability than had been presented. It could be argued that its existence emphasised the importance attached to complying with regulation and increased environmental standards.

The drawbacks of strict liability were also recognised. It was suggested that its existence enabled the defence to resist allegations of culpability. Consideration of intent was absent from many environmental cases, with no distinction made between rogue operators and regulated businesses trying to comply. Strict liability also gave regulators significant powers of discretion, which was useful in terms of flexibility, but gave room for inconsistency to develop.

The existence, or otherwise, of strict liability would also have significant implications for developing any system of flexible administrative penalties.