



FARMERS' UNION OF WALES

UNDEB AMAETHWYR CYMRU

Llys Amaeth, Plas Gogerddan, Aberystwyth, Ceredigion, SY23 3BT

Ffôn/Tel: 01970 820820 Ffacs/Fax: 01970 820821

E-bost/Email: head.office@fuw.org.uk

Rhyngrwyd/Internet: <http://www.fuw.org.uk>

Ein Cyf/Our ref: AG/GD/E/35

Dyddiad/Date: 4 May 2010

Civil Sanctions Consultation
Better Regulation Policy Team
Environment Agency
Block 1 Government Buildings
Burghill Road
Westbury on Trym
BRISTOL
BS10 6BF

Dear Sir/Madam

FAIRER AND BETTER ENVIRONMENTAL ENFORCEMENT: IMPLEMENTING THE NEW CIVIL SANCTIONS

Thank you for inviting the Union's comments on proposals to implement the New Civil Sanctions enforcement powers. Following an internal consultation with its membership, the Union submits the following views for your consideration.

In its response to the original consultation, the Union favoured Option 1 - maintaining the status quo - believing that the current system appeared to be working successfully.

The FUW recognises that Civil Sanctions should provide regulators with a broader, more proportionate toolkit to deal with the full range of non-compliance, although it does have concerns that the process could be overly complicated and difficult for the farming industry to understand.

The agricultural industry in Wales is predominantly made up of small businesses which are highly dependent on family labour. It already has a wide range of regulatory requirements to comply with and the associated paperwork to complete, and is therefore one of the most highly regulated industries.

The overwhelming majority of farmers already comply with the existing regulations and, given their concern about understanding the complexity of the standards that are required and the potential financial impacts on the business if an offence is committed, many exceed the expected requirements.

Farmers have to contend with a range of Regulatory processes, most of which come under the auspices of the CAP Cross Compliance regime. Breaches can not only result in a percentage loss of Single Farm Payment, but farmers might also suffer whatever additional sanction is deemed necessary by the Regulator. This can result in a business facing an extremely high financial penalty for transgressions, which could affect the financial viability of the business or its ability to rectify the problem for which it was originally penalised.

If the Government is adamant that it wants to improve the fairness and transparency of its regulatory regimes, it should ensure that the penalties for any transgressions are proportionate and are only imposed once, either as a civil sanction or a penalty under the CAP Cross Compliance Regulations.

The Union is concerned that the introduction of civil sanctions such as 'Fixed or Variable Money Penalties' would result in less dialogue between the operator and regulator, and believes that even minor infringements, which historically carried a warning and a remedial notice, would, in future, attract a financial penalty. The Union also believes that any financial penalties should only be used as a last resort once all other avenues have been exhausted.

Without prejudice to the preceding comments, the Union's responses to the questions highlighted in the consultation are given below.

Q1. Do you agree with the structure of the new Enforcement and Sanctions documents?

Yes.

However, the FUW would suggest that links could be made between the documents, especially Annexes 2, 3 and 4, so that they are easier to follow.

Q2. Do you agree with the content of the new Enforcement and Sanctions documents?

No.

Given the current economic climate in which businesses are striving to operate on a no cost increase basis, the Union opposes the imposition of any form of monetary penalty.

While recognising that Fixed Monetary Penalties will be applied where advice and guidance have failed to secure the necessary improvements, the Union is deeply concerned that, under Section 9 of Annex 3, it is envisaged that Fixed Monetary Penalties will be mainly used for paperwork or administrative offences which have not had a negative impact on the environment.

As previously mentioned, the FUW believes that there needs to be a presumption towards non-financial penalties with the use of financial penalties as a last resort.

Q3. 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?

Yes.

The Union is in favour of any estimates of financial benefit being determined using evidence supplied by the offender, industry or professional body, as this will provide a degree of independence to the figures.

Q4. Do the VMP multipliers work to adjust the deterrent element in a fair and proportionate way?

Don't know.

While the Union acknowledges that each case will need to be treated individually, it believes that there needs to be a process whereby individual cases are assessed against one another to ensure that the aggravating and mitigation factors are being applied uniformly across all cases.

The Union would also ask whether consideration has been given to applying a maximum cap to the deterrent element of Variable Monetary Penalties.

Q5. Do the VMP mitigating features work to reduce the deterrent element in a fair and proportionate way?

No.

The Union has reservations over the use of the 0.1 multiplication factor where an offence has occurred as a result of a genuine accident or due to exceptional events. The Union believes that where an offence has been committed due to a genuine unforeseeable accident or exceptional event, then this should be taken into account and not have a multiplication factor imposed.

The FUW would also query whether a genuine accident will be taken into account when determining the history multiplier (Annex 5, section 2.4.2) to be applied, believing that a genuine accident should not be a factor in this calculation.

The Union would also question whether prohibitive costs of restoration will be a factor in determining which deduction rate, under section 2.5.4, will be applied as this is not clarified by the guidance document.

Q6. How should the offender and regulator work together to identify and agree VMP cost deductions?

The Union believes that the regulator should provide the offender with every opportunity and assistance to provide the necessary information to agree the cost deductions to bring about the greatest reduction. Also the guidance needs to provide greater clarity on the form of evidence needed to prove a deductible value.

Q7. 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?

While the Union agrees that any payments made under a Third Party Undertaking should be taken into account during the deductions calculations, it is concerned that the deduction of third party compensation is applied before the percentage reduction for mitigating circumstances.

The Union believes that the third party undertaking should be applied after the percentage deduction as this will give the offender an incentive to compensate affected third parties because this will lead to a greater reduction in the overall Variable Monetary Penalty.

Q8. Do you agree with the proposals for use of Enforcement Undertakings?

The Union agrees with the proposed use of Enforcement Undertakings although it would query whether those offenders who have the option to sign an Enforcement Undertaking will be provided with advice or guidance on the actions that could be included in the Undertaking.

The Union is concerned that the consultation states that blank agreements and completed examples will be provided on the Environment Agency's website. If the Agency wants to encourage their use, then, due to the low proportion of Welsh farmers who use a computer regularly, hard copies of the documents need to be readily available.

While the consultation makes the consequences for the offender clear if an Enforcement Undertaking is not received within a certain period of time (i.e. offers received after 21 days will only be accepted if there is a clear environmental benefit in doing so), clarity needs to be given to the consequences of the Environment Agency failing to meet its own timescales (i.e. a decision on whether to issue a Completion Certificate within 14 days of the receipt of the application).

Q9. Do you agree with the format for the proposed Enforcement Undertakings?

The FUW agrees with the format, although it believes that guidance on completing the Undertakings form will need to be provided to ensure that the form is completed accurately, especially given the short timescale within which the form has to be returned to the Environment Agency for the offer to be accepted.

Q10. Are the civil sanction processes clear?

The Union agrees that the civil sanctions processes are clear but, as previously outlined, it has concerns regarding the implementation of financial penalties, especially Fixed Monetary Penalties for administrative offences.

Q11. Do you think the proposed Governance structure will provide the right degree of safeguards?

As previously mentioned, the Union believes that a process needs to be put into place to ensure that there is uniformity in the use of civil sanctions for individual cases. The Union agrees, therefore, that the proposed structure will provide the right safeguards.

Q12. Do you agree with our proposals for reporting information on the use of sanctions?

While the Union broadly agrees with the proposals for reporting information, it believes that a process needs to be put into place to modify the system as soon as an issue is highlighted, rather than at the review stage which is currently envisaged to be two years after civil sanctions are made available.

In conclusion, while the Union recognises that civil sanctions should provide regulators with a greater range of options to deal with non-compliance issues, it has concerns regarding certain aspects of civil sanctions, particularly the introduction of monetary penalties for minor offences, during the current economic climate.

I trust due regard will be given to the preceding comments.

Yours sincerely

ANDREW GURNEY

Policy Officer