

# Environmental Law Overview

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**What's Dangerous in Environmental Law?**

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# Areas Covered

- Environmental Offences – the Dangers
- Environmental Law
  - Environmental Permitting
  - Waste and Packaging
  - Water
  - Hydrocarbon Storage
  - Contaminated Land
  - Environmental Damage
  - Statutory Nuisance
- Sentencing
- Avoiding Prosecutions
- Sources of Information

## Dangerous?

- Criminal! Beware Trustees and Partners
- Strict liability, or are they?
- No time limitation on prosecutions (mostly)
- Triable either-way?
- Fines? £5,000 - £50,000 - Unlimited?
- Legal Costs – Defence & Prosecution
- Regulatory Enforcement and Sanctions Act
- Rising Fines?

## Dangerous?

- Fines and potential imprisonment
- Prosecution costs
- Economic loss through down time
- Remediation costs
- Reputational risks
- Increased insurance premiums
- Indemnities given on subsequent sale
- Devaluation of business
- POCA Reporting (Mergers & Acquisitions)

# Dangerous?

- Enforcement Powers
  - Clean-up
  - Publicity
  - Imprisonment
  - Disqualification of Directors
  - Permit Revocation
  - Remediation of Environmental damage
  - Confiscation Orders
  - Serious Crime Prevention Orders

# Insurance Issues

- Insurance Issues
  - Public Liability Insurance (Legal Costs & Clean-up of sudden & unforeseen incidents - Not where arising from deliberate act)
  - Fines not covered - public policy
  - Complying with insurance contract – withdrawal of indemnity
  - Environmental Damage

## How are Environmental Offences Prosecuted?

- Who prosecutes
  - EA
  - Local Authorities
- Prosecution tests and making representations
  - Evidential test
  - Public Interest
- When?
- Limitation?

# Permitting

- Environmental Permitting (E&W) Regs 2010 – further consolidation of permitting
- Prevention first, then control
  - Compliance, management and monitoring
  - Environmental Management Systems
  - ISO14001?
- “Fit and Proper Persons”
  - Technical competence

## Permits – Do I need one?

Reg.8

- regulated activities (Part II schedule I)  
whether carried out at installations or by mobile plant
- a waste operation
- a mining waste operation
- a radioactive substances activity
- a water discharge activity
- a groundwater activity

Note: Exempt Activities and Excluded Waste Operations

Don't forget to register your exemption!

# Permitting

Incorporates PPC regime activities

“Best Available Techniques”

- To prevent and control pollution
- *R (on the application of Rockware Glass Ltd) v Chester City Council [2006] Env.L.R. 30 (QBD(Admin))*
- **Best Available Techniques (BAT)**

# Environmental Permitting (England and Wales) Regulations 2010

- Stage 2 of UK Government's Environmental Permitting Programme (EPP2)
- Purpose is to reduce costs for all parties by cutting unnecessary red tape whilst continuing to protect the environment and human health
- Intention is for all parties to move towards a "one permit, one regulator, one site regime."
- EPP1 was the Environmental Permitting (England and Wales) Regulations 2007
- EPP2 replaces EPP1 but with minimal changes. Permitting framework created under EPP1 carries over unchanged

## Effect

- Main thrust of EPP2 is to extend the system of environmental permits to cover
  - Water discharge consents
  - Groundwater authorisations
  - Radioactive substance authorisations
- DEFRA and EA also propose the following regimes to be brought within EPP2 in “due course” and separately:
  - Mining Waste Directive
  - Batteries Directive
  - Waste carriers and brokers not already included in the existing waste management regime
  - Water abstraction and impoundment
- Existing water discharge consents, groundwater/ radioactive substances authorisation will automatically transfer to environmental permits when EPP2 takes effect

## Permitting

### Main Offences – R.38 EP Regs 2010

- Operation without a permit
- Contravening a condition
- Contravening a “notice”

### Punishable by

- fine of 50k (unlimited in the Crown Court)
- 6 months’ imprisonment (5 years in Crown Court)

# Waste Overview

## Part II – Environmental Protection Act 1990

### • List of Wastes Regs 2005

#### Controlled Waste

- s.34 EPA 1990
- EPA (Duty of Care) Regs 1991
- “Packaging Waste” Regs 2007

#### Hazardous Waste

- Hazardous Waste Regs 2005
- Landfill Directive



#### Waste Management



- s.35 EPA 1990
- Waste Management Licencing Regs '94
- Environmental Permitting Regs 2007
- Packaging Waste Regs 2007
- WEEE Regs 2006
- ELV Regs 2003/2005

# Waste Defined

- s.75 EPA 1990
  - “...anything discarded..”
- Cases
  - *Van der Walle...(c-1/03) 7/9/04*
  - *Antonio Niselli... (c-457/02) 11/11/04*
  - *Palin Granit (C-9/00 [2002] ECR I-3533)*
    - “Waste” unless:
      - a) economic value as a product in its own right without the need for further processing or treatment, and
      - b) the reuse is a certainty, and
      - c) it forms an integral part of the same process of production or use.
    - Otherwise it will be “waste” until such time it reconstituted into a final and finished product.



## Revised Waste Framework Directive

- The Directive entered into force on the 12 December 2008.
- Member States must transpose the Directive by the 12 December 2010.
- Amends the definition of Waste:
  - Article 1(a) – ‘waste’ means any substance or object which the holder discards or intends or is required to discard (does not dictate a list of categories)

## Revised WFD (cont)

- Article 6 – provides for a new ‘End of Waste status’ – when a material considered to be waste, ceases to be waste.

It must have undergone a recovery operation and it must comply with 4 broad conditions prior to its reclassification as a primary resource, namely:

- “(a) the substance or object is commonly used for specific purposes;
- (b) a market demand exists for such a substance or object;
- (c) the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and
- (d) the use of the substance or object will not lead to overall adverse environmental or human health impacts.”

# EPA Offences

- S.33(1)(a)-(c) EPA 1990
  - “Keeping, treating or disposing of controlled waste...”
  - *ENDS Report 359, December 2004 p.62* – illegally burning waste. 2-year ASBO, 240 hrs community service and £11.5k costs.
  - Inglenorth 2009
- S.33(6) EPA 1990
  - Contravene any condition of a licence
  - *AK Waste Management v Waste Agency (August 2003)* - £74k for 6 offences + costs
- The Defence – S.33(7) EPA 1990
  - “...due diligence”
  - Emergency
- The Penalty – S.33(8)
  - 50k max fine and/or 12 months imprisonment (unlimited fine and/or 5 years in the Crown Court)
  - Haigh Contracts Ltd (19 Nov 2008)
    - Record fine set for waste offences - £171k + costs of £5,965

# Duty of Care

- S.34 EPA 1990

- Self monitoring
- Takes such measures as are reasonable
  - to prevent contravention of s.33 by any other person
  - to prevent the escape of waste from his control or any other person
  - to ensure that transfer of waste is only to an authorised person along with a written description of the waste

*(Camden LBC v Mortgage Times Group [2006] EWHC 1615)*

- **Recent Cases**

*Wandsworth LBC v Rashid [2009]* – abuse of process

*Milton Keynes Council v Leisure Connection Ltd [2009]* – must take reasonable measures to prevent escape



# Duty of Care

- S.34A EPA 1990
  - Fixed penalty fines (£300): duty to furnish Local Authority with documents under s.34(5)
- EPA (Duty of Care) Regs 1991
  - Waste Transfer Notes to be completed for every transfer of controlled waste.
  - Waste Transfer Noted to be kept for minimum of 2 years



# Hazardous Waste



## Hazardous Waste Regulations 2005

- List of Wastes Regs 2005 – more “hazardous” waste types
- Cradle to Grave tracking
- Prohibition on mixing hazardous waste types
- Site registration requirement if over 500kg p.a. of “hazardous waste” produced.
- **NO** need to pre-notify the Agency of consignments
- New consignment notes system – records to be kept for a minimum of 3 years.
- Consignees only to submit quarterly returns



## Offences - R.69



- Main Summary Offences
  - Notifications
  - Consignment codes and notes
  - Consignee returns
  - Duty to supply information.
- Main Indictable Offences
  - Mixing hazardous waste
  - Records of tipped/disposed/recovered hazardous waste
  - Duties in the event of an emergency/grave danger
  - False and misleading information





## Offences 2



- Regulation 67
  - Other persons
  - Individual liability of Director/Manager or similar officer if “*consent, connivance or neglect*” proven
- Regulation 70
  - Fixed Penalties
  - Currently £300.00
- Regulation 66 – The Defence.
  - Emergency
  - “*...all reasonable precautions and... due diligence*”
  - Does not apply to Regulation 68 offence

# Producer Responsibility Obligations (Packaging Waste) Regulations 2007

In force as of 16 March 2007

- Scope extended – more waste-types included
- >£2m turnover & >50t packaging
- PRNs/PERNs
  - Issued to prove compliance
  - Tradable – market value



## Packaging Waste – poorly understood

“The Sellers know nothing about these regulations and consider that it is hard to determine the weight of packaging which they handle. The Sellers in fact do not know where to start with this and if required will provide an indemnity for pre-completion matters”

# Packaging Waste

- Compliance Options
  - Direct registration with Environment Agency
  - Compliance schemes
- Non Compliance (150 prosecutions in 3 years)
  - Up to £15K per annum fine
  - 2005 Porsche fined £25k but saved £22k!
  - 2008 Western Wines fined £225,000 plus costs (saved £185,059)
  - 2009 Red Bull fined £261,278 plus costs (saved over £180,000) – approached the EA
- N.B. Re useable packaging!



# Water Overview

## Water Resources Act 1991

- Water pollution offences
- Environment Agency powers
- Discharge consents
- Main river 'Land Drainage' consents



## Water Industry Act 1991

- Discharge Consent (effluent)

## Land Drainage Act 1991

- Land Drainage consents

**N.B** The Control of Pollution (Oil Storage) Regulations 2001

## s.85(1) WRA 1991

- The Offence
  - “...causes or knowingly permits any poisonous or noxious or polluting matter or any solid waste matter to enter any controlled waters”
- Penalty
  - Maximum £20k in Magistrates
  - Unlimited fine and/or maximum 2-years imprisonment in the Crown Court



## s.85(1) – Definitions

- **“Causes”** - *Empress cars v NRA (1998) HL*
  - Unnecessary to show intention, knowledge or negligence
  - An active operation to which the presence is attributable.
  - Contractors – *The Environment Agency v Biffa Waste Services, Eurotech Environmental Ltd [2006] EWHC 1102 (Admin)*
- **“Knowingly permits”** - *Schulman’s v NRA (1993)*
  - Requires knowledge and the power to prevent.
- **“Noxious or polluting”** - *R v. Dovermoss Ltd (1995) CA*
  - Noxious = harmful
  - Polluting = “...to make physically impure, foul, or filthy; to dirty, stain, taint, befoul”.
- **Defence?**
  - s.88 Consent
  - s.89 Emergency – see Express Dairies Case

## s.161 WRA 1991

- Proactive powers to remedy actual, or prevent threatened pollution of controlled waters.
- Agency costs recoverable in civil court
- “Works Notice”
  - Criminal offence if default
  - Costs recoverable in civil court
  - Compensation to third party affected land owners
- *Are you covered by your insurance?*

# Hydrocarbon Storage

- The Control of Pollution (Oil Storage) Regulations 2001
  - Fully in force as of 1<sup>st</sup> September 2005
  - Commercial, industrial, institutional premises
  - > 200 litres AND above ground
  - Tanks, Drums, IBCs, Mobile Bowsers
- Principle Requirements
  - Secondary containment
    - bund, or drip tray etc.
  - Good tank design standards (inc pipework)



# Exemptions

- Waste Oil
  - Waste/Waste Management Legislation
- Agricultural Use of Oil on Farms
  - Control of Pollution (Silage, Slurry and Agricultural Fuel Oil) Regulations 1991
- Refining & distribution
- Underground Storage
- Inside Buildings
- Domestic Oil Storage < 3500 litres
- NB. Building Regs Requirements



# Contaminated Land

- Section 78A(2) EPA 1990
  - "significant harm is being caused or there is a significant possibility of such harm being caused"
  - "pollution of controlled waters is being, or is likely to be, caused".
- Pollution Linkage



e.g.



## So what happens?

- LA identifies site
- LA identifies the “appropriate Person”
  - Polluter pays – Class A or B
- 3-month consultation
  - Voluntary remediation?
- If above fails, Remediation Notice
  - Non Compliance = Offence
  - S78N states LA/EA carry out remediation and recover costs from non-compliers

## First Appeal!

- *Circular Facilities v. Sevenoaks DC (2005)*
- First appeal against a Remediation Notice
- Brickworks in 60s and 70s
- Scott buys in 1978 became CF partner '79
- 8 domestic dwellings built and sold 1980's
- 1990s SDC monitor at own expense CO<sub>2</sub> and CH<sub>4</sub>

## CF v. SDC

- Following Part IIA EPA - declare site and serve notice
- Notice appealed, frozen, SDC do £46k work
- CF argue
  - 1. SDC done work so notice sterile,
  - 2. not polluter (as in polluter pays)
- District Judge - CF knew from '78 report of gases = knowingly permitted = appropriate person
- Previous owner not liable as CF introduced the 'pathway to do harm'

## CF v. SDC

- Decision Appealed
- Legal basis for first instance decision was not explored
- Re-trial ordered as there was evidence to support SDC's conclusion that CF was an "appropriate person".

## CF v. SDC

- Settled out of court- confidential outcome
- Withdrawal of remediation notice
- Happy with settlement?
- Appears that the Council not. Huge legal costs. Would not pursue contaminated land case again. Too difficult to prove knowledge for Class A category.

# Statutory Nuisance – s.79(1) EPA



## Statutory Nuisance - Appealing

- 21 days to appeal from the date of service of Abatement Notice
- Statutory Nuisance (Appeals) Regulations 1995
  - Is it justified?
  - Is it unreasonable in extent?
  - Is the time-limit unreasonably short?
  - Are you already using the “Best Practicable Means” to prevent the nuisance?
  - Has it been served on the right person?
  - If it requires works to be done, has it specified what works are required?

# Environmental Liability Directive

- Environmental Damage (Prevention and Remediation) Regulations 2009 – 1<sup>st</sup> March 2009
- Seeks to impose remedies for damage to the un-owned environment – not merely to persons/property
- Strict liability for operators of hazardous activities, include
  - Installations with PPC permit
  - Waste management facilities
  - Operators that discharge into controlled waters or that manufacture, use, store or transport dangerous substances

# ELD – Controversial

- Operators to take remedial measures, including:
  - Primary = restore habitat to baseline level
  - Compensatory = for resource facility e.g. habitat equivalent analysis
  - Complimentary remediation = if can't remediate to baseline at damaged site, improve another site.

# Environmental Damage (Prevention and Remediation) Regulations 2009

Issues of particular relevance:

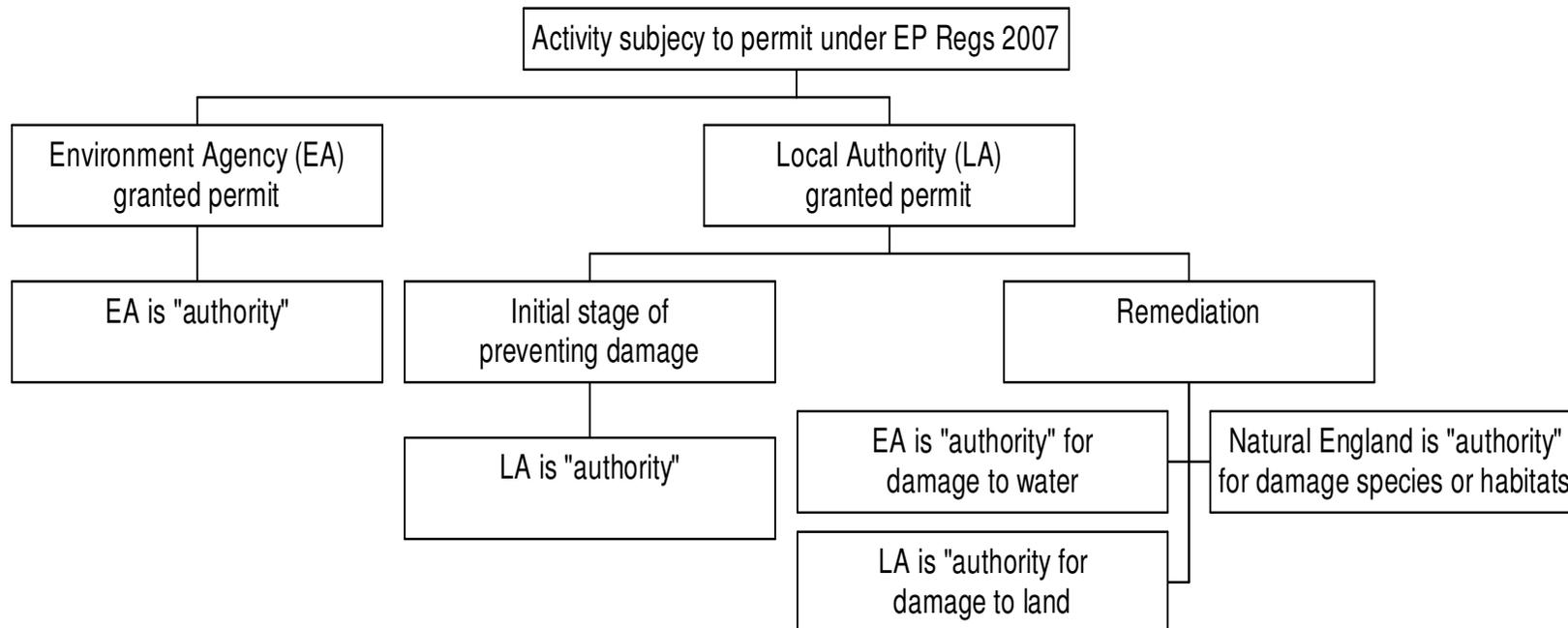
- Liability is limited to damage occurring post 1<sup>st</sup> March 2009 – but not if operations have ceased but conditions have changed so damage occurs;
- Late being transposed – stakeholders could compel the competent authority to enforce the regulations as if they had come into force on time (30<sup>th</sup> April 2007);
- Where more than one party liable, competent authority can choose which possible defendant to prosecute;

## Environmental Damage (Prevention and Remediation) Regulations 2009

- Directors/senior managers can be convicted – consent, connivance or neglect;
- Stakeholder groups have the power to request the competent authority to take action against operators who have caused environmental damage/where it is imminent;
- Public liability insurance is unlikely to provide effective cover for liability under the regulations

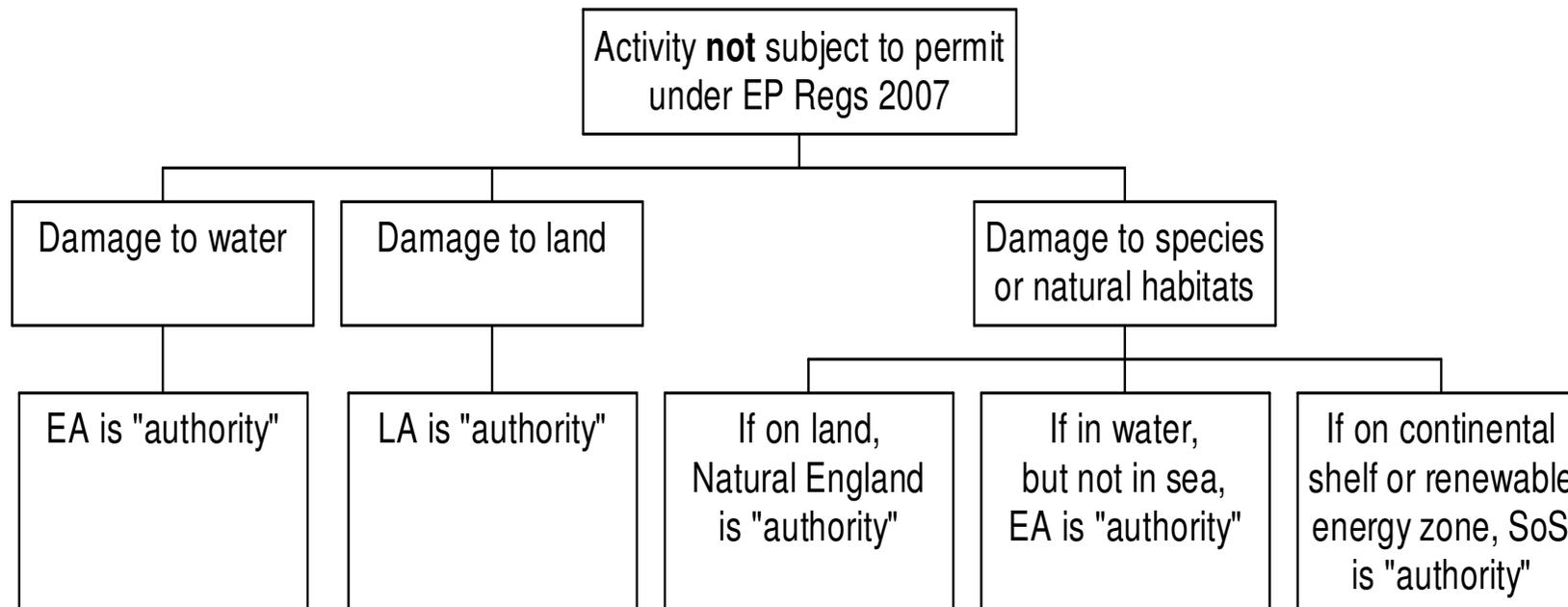
# Environmental Damage (Prevention and Remediation) Regulations 2009

## Competent Authority?



# Environmental Damage (Prevention and Remediation) Regulations 2009

## Competent Authority?



# Protection of Wildlife and Nature Conservation – EU Law

Two Directives adopted:

- Birds Directive (74/409/EEC now consolidated within 2009/147/EC) – provides framework for the conservation and management of, and human interactions with, wild birds in the EU
- Species and Habitats Directive (92/43/EEC)

# The Wildlife & Countryside Act 1981 (1)

## 1. Protection of wildlife (incl. birds, some animals & plants)

It is an offence to...

- a. intentionally kill, injure or take any wild bird, their eggs or nests.  
Also, disturbing birds at their nests
- b. intentionally kill, injure, take, possess, or trade in any wild animal listed in sch. 5. Also, prohibits interference with places used for shelter or protection, or intentionally disturbing animals occupying such places.
- c. intentionally pick, uproot, trade in, or possess (for the purpose of trade) any wild plant listed in sch. 8.

# The Wildlife & Countryside Act 1981 (2)

- Who can investigate?
  - Wildlife inspectors
    - Enter premises
    - Check documentation
    - Take specimens
  - Constables
    - Stop and search
    - Seize and detain for the purpose of proceedings

# The Wildlife & Countryside Act 1981 (3)

Defences include:

- Any act, which would be unlawful under this Act unless the act was the incidental result of a lawful operation and could not reasonably be avoided (the only defence available for plants);
- If the act is done under and in accordance with a licence granted by the appropriate authority. Includes work for the following:
  - Scientific or educational purposes;
  - Conserving wild birds, wild animals or wild plants;
  - Conserving any area of natural habitat

# The Wildlife & Countryside Act 1981 (4)

## Penalties:

- Summary conviction
  - Imprisonment for up to 6 months; and/or
  - Up to £5,000 fine
  
  - Judge may order the forfeiture of any animal, vehicle, weapon or other thing used to commit the offence

# The Wildlife & Countryside Act 1981 (5)

Also covered by the Act...

## 2. Nature Conversation, Countryside and National Parks

- Provides for the notification of SSSI's
- Operations on land specified in the SSSI notification should not be carried out unless:
  - Natural England have been informed of the proposed works; and
  - written consent is obtained, or a management scheme is in place for that land
- Can appeal if works refused – to SoS

## The Wildlife & Countryside Act 1981 (6)

### Defences:

- The operation was carried out with planning permission and with the permission of the local authority who will have liaised with Natural England
- The operation was an emergency operation – notified to Natural England ASAP after commencement

### Penalties for Owner/Occupier/third party

- Summary conviction - £20,000 fine
- Indictment – unlimited fine

# The Countryside and Rights of Way Act 2000

- Act provides for public access on foot to certain types of land and increases protection for SSSI
- Place duty on Government Departments to have regard for the conservation of biodiversity and maintain lists of species and habitats for which conservation steps should be taken/promoted
- Made amendments to the Countryside and Wildlife Act 1981 to strengthen enforcement legislation

# Conservation (Natural Habitats) Regulations 1994 (1)

Transpose the EC Habitats Directive into national law

Place a duty on the SoS to propose a list of important sites for habitats or species to the EU

An offence to deliberately capture, kill, disturb, or trade in the animals listed in sch. 2 or pick, collect, cut, uproot, destroy, or trade in the plants listed in sch. 4.

# Conservation (Natural Habitats) Regulations 1994 (2)

## Penalties

- Imprisonment for a term not exceeding 6 months
- Fine not exceeding £5,000

## Defence:

- Licence to carry out the works granted by Natural England

# The Conservation of Habitats and Species Regulations 2010

- Into force 1<sup>st</sup> April 2010
- Have not repealed the 1994 Regs in full and make no substantive changes to existing policies and procedures
- Consolidation and updating exercise

# THE ENVIRONMENTAL CIVIL SANCTIONS ORDER 2010

## Background

- In force on 6<sup>th</sup> April 2010
- Regulatory Enforcement and Sanctions Act 2008
- Any monies recovered are paid into the Consolidated Fund and NOT to the regulator
- Regulators involved:
  - EA
  - Natural England
  - Countryside Council for Wales

## Available Penalties

- Fixed monetary penalties
- Variable monetary penalties
- Stop notices
- Enforcement undertakings
- Compliance notices
- Restoration notices
- 3<sup>rd</sup> Party undertakings

## Fixed Monetary Penalties (FMP)

- Only designated Schedule 5 offences
- Regulator must first be “satisfied beyond reasonable doubt” of guilt
- Fixed at £100 (individual), £300 (body corporate)
- Notice of Intent
- Recipient can make written representations/ objections
- Issue of final notice – early payment discount
- Right of appeal against service of final notice
- If notice/ full penalty are paid then recipient cannot later be convicted of the relevant offence

## Variable Monetary Penalties (VMP)

- Cannot exceed maximum fine for summary offences
- Only available for specified Schedule 5 offences
- Regulator must be satisfied beyond reasonable doubt
- Notice of intent
- Recipient can make written representations/ objections
- Issue of final notice and appeals
- May be accompanied by a requirement to take steps specified by the Regulator to secure that the offence does not continue or recur (Compliance Notice)
- May be accompanied by a requirement to take steps specified by the Regulator to secure that the position is restored, so far as possible, to what it would have been had the offence not been committed (restoration notice)

## Stop Notices

- Notice prohibiting a person from carrying on a specified activity until they have taken designated steps
- Recipient must be carrying/ likely to carry on the specified activity and the regulator must reasonably believe this is causing (or presents a significant risk of causing) serious harm to human health or the environment which, if left unchecked, would involve (or is likely to involve) the commission of a specified Schedule 5 offence
- Right of appeal (on specified grounds) within 28 days of receipt
- Completion certificates
- Offence not to comply with Stop Order within specified time period (summary - £20,000 and/ or 12 months, indictment – unlimited and/ or 2 years)

# Enforcement Undertakings (EU)

- Promise by a person (including a company) to the the Regulator to take specific action. Must include:
  - Terms of the undertaking and how/ when it is discharged
  - Actions to ensure offence does not continue/ recur
  - Action to ensure the position is, sfap, restored to its pre-offence state
  - Action to benefit any person affected by the offence (inc. payments)
  - Period within which the action must be completed
- Regulator may accept where they have reasonable grounds to suspect the organisation has committed an offence specified in Schedule 5
- No requirement for Regulator to accept but must publish a procedure for entering into them and consult on doing so
- Where accepted and complied with the Regulator must issue a certificate to that effect
- If accepted then, unless breached, the organisation cannot be convicted of the relevant offence or have another notice/ penalty imposed pursuant to it

# Appeals

- First-tier Tribunal (Environment)
- Regulator carries the burden of proof
- Tribunal may:
  - withdraw/ confirm the notice or penalty
  - take such steps as the regulator could in relation to the offending activity
  - refer the sanctioning decision back to the regulator for further consideration
- Publication of enforcement action
  - Regulator must periodically publish cases in which civil sanctions have been imposed
- Cost recovery notices
  - Regulators can recover certain costs when imposing a sanction (not FMP's or EU's)
  - Regulator should serve notice of costs at same time as sanction is imposed

## What's covered?

- Packaging Waste – IN
- Hazardous Waste Regs – IN
- Wildlife and Countryside Act – IN
- Water Resources Act – IN (not s.85!)
- Water Industry Act – IN
- Environmental Protection Act – IN (ss.33(6) & 71)

# The Carbon Reduction Commitment (CRC)

- A new compulsory UK emissions trading scheme starting in April 2010 for large non-energy intensive organisations
- Government estimate that it will cut carbon emissions by 1.3m tonnes pa (0.2% of UK emissions)
- All public and private sector organisations whose metered half-hourly electricity usage in 2008 exceeded 6,000 MWh will have to participate.
- Organisations using 3000-6000MWh must disclose total annual consumption of HH electricity. Those using less than 3000MWh of HH metered electricity must still complete the online disclosure form
- Aims to capture “whole company groups” in determining whether the threshold is exceeded
- Emissions already covered by the EU ETS and CCA’s are excluded
- Emissions “belong” to the customer of the energy supplier (i.e. landlords who pay energy bills for commercial premises)

## What must organisations passing the threshold do?

- Registration opens on 1<sup>st</sup> April 2010 and closes on 30<sup>th</sup> September 2010.
- Those affected must register as a scheme participant (registration packs sent out by EA in September 2009 to all billing addresses with half hourly meters)
- Calculate their 2008 emissions
- Purchase allowances from the government based on their expected energy use
- Monitor their energy usage and purchase or sell allowances on the secondary market.

## How does it work?

- Introductory phase runs for 3 years from April 2010
- Subsequent phases last 7 years
- Full participants must monitor their total emissions from relevant energy use for each “footprint” year and report this to the scheme administrator
- Compliance Years (CY’s) run from 1 April – 31 March each year during which organisations must purchase enough allowances to cover their forecast emissions for the proceeding year
- Allowances are fixed at £12 per tonne of CO2 for introductory phase. No sales of allowances in first year of scheme. One month sale windows open in April 2011/12
- Organisations surrender allowances in July each year (commencing 2012) equal to their total energy use emissions (EA will conduct a risk based audit on 20% of participants each year)

# Enforcement

- £40 fine per tonne of carbon dioxide for which allowances are not surrendered
- Further financial civil penalties for failure to register for CRC, report or disclose necessary information
- Criminal offences for falsifying evidence, deception, non-compliance with enforcement orders, failing to provide assistance or allow inspection
- Reputational Impact – performance tables will be published in the October following each CY and made publicly available. Organisations that cut energy use will fare better.
- Position in table determines how much the organisation receives back as a “recycling payment” from revenue raised by selling allowances (payable in the July following each CY). CRC is intended to reward those that cut emissions whilst penalising those that do not
- Criticism – CRC discourages investment in renewable energy by rewarding only those that reduce energy use and not those that buy power from renewable sources or build their own low-carbon plants

## Will the EA prosecute?

- The Environment Agency Enforcement and Prosecution Policy
  - Aim = Protect the Environment and to secure regulatory compliance
  - Purpose = to punish wrongdoing...avoid a recurrence...act as a deterrent to others
  - 2 Tests to satisfy:
    - a) Evidential test
    - b) Public Interest test

## Who can be prosecuted?

- No-one is safe!
  - The Company
  - Managers/Directors (consent, connivance or neglect)
  - Partnerships – joint and several liability
  - Trustees (e.g. Charities etc.)
  - Employees
  - Contractors

## Factors to Consider

- *Environmental effect of the breach*
- *Foreseeability of the offence*
- *Intent of the offender*
- *History of offending*
- *Attitude of the offender*
- *Deterrent effect of a prosecution*
- *Personal Circumstances of the offender*
  - *R v Howe (1999 2 Cr.App.R)*

# Decision to Prosecute

## R v Adaway [2004] CA

- Appeal against a conviction for supplying goods with a false trade description under the Trade Descriptions Act 1968.
- Supplied and fitted the wrong sort of glass in a greenhouse – said had made a mistake in the ordering and offered to replace the glass
- Complainant referred the matter to the LA who successfully prosecuted
- Appeal allowed as there was no evidence of fraud or of the LA meeting its Policy criteria for a prosecution.

Distinguished by *LB of Wandsworth v Rashid [2009] EWHC* – Council had reserved its right to prosecute in all cases

# Alternatives to Prosecution

*Do Nothing*

*Enforcement Notice*

*Written Warning*

*Home Office Caution*

# Sentencing of Environmental Offences

- Aggravating Factors
  - Death
  - Deliberate Act
  - Failure to heed warnings
  - Environmental Impact
  - Social Impact
  - Regular/Continuing Breach
  - Adverse effect on legitimate businesses
  - Obstructive attitude to EA
- Mitigating Factors
  - Timely guilty plea
  - Remedial steps
  - Co-operation with Regulator
  - Good record
  - Genuine & reasonable misunderstanding of law
  - No damage to environment

## Sentencing of Environmental Offences – other factors

- Defendant's means – should make real economic impact
- Should be no financial benefit from non compliance
  
- Sentencing Guidance
- Guidance For Magistrate's Courts Guidelines
  - Magistrates' Association 'Costing the Earth'
  - R v CEMEX Cement Ltd [2007] (approves Howe & Son)
  - Sentencing Guidelines Council – Overarching Principles :  
Seriousness

## Avoiding a Prosecution – Key Messages

- 1) Know...
  - Your environment
  - Your site
  - Your business
  - Your activities
    - Employees
    - Contractors
- 2) Control
- 3) Check

# Sources of Information

## 1) Websites –

DEFRA

The Environment Agency

Netregs.gov.uk

Ends Legal Compliance Manager

Practical Law Company – PLC Environment

Lyons Davidson

**END**