

Tough on crime

Environmental and health and safety offences are now subject to tougher penalties following a raft of new legislation. *Steven McNab, Romola Parish, Pippa Heggie and James Bingham* provide an overview

General criminal regulation now applies to certain environmental offences, demonstrating that such crimes are increasingly being incorporated into the mainstream criminal penalty regime.

Anti-social behaviour orders (Asbos) apply to some environmental crimes and (according to a news release from the Department of Environment, Food and Rural Affairs of 25 February – www.defra.gov.uk/news/2009/090225a.htm) wildlife crimes such as poaching and the illegal trade in endangered species will incur stronger, co-ordinated responses from enforcement authorities.

Protecting people

● Corporate Manslaughter and Corporate Homicide Act 2007

This applies to companies incorporated in the UK and overseas as well as public bodies, the Crown and the police force. The offence arises from a gross breach of the relevant duty of care owed by the organisation to the deceased.

Responsibility for the offence lies with the senior management of a company. The court will consider the company's organisation and protocols; it is no longer necessary to identify a culpable "controlling mind" within the organisation. Companies must scrutinise their management practices, health and safety systems and records to ensure that adequate standards of care are being applied.

There is no upper limit to the fine that the court can impose, although it should reflect the relative size of the organisation and the scale of the offence. Guidelines will be published by the Sentencing Guidelines Council.

● Health and Safety (Offences) Act 2008

This increases the maximum penalties available to courts in respect of certain offences under the Health and Safety at Work Act 1974.

Fines for some offences tried in a magistrates' court have quadrupled, and sums of up to £20,000 can be imposed, with or without imprisonment for a term of up to 12 months (twice the previous maximum sentence).

The Health and Safety Executive (HSE) has issued guidance in the form of an enforcement policy statement, indicating when breaches are likely to be prosecuted:

see www.hse.gov.uk/pubns/hse41.pdf. Prosecution should follow in the event of: reckless disregard for health and safety requirements; repeated breaches; serious non-compliance with or the failure to hold an appropriate licence; a consistently low standard of managing health and safety; and failures to comply with improvement or prohibition notices.

Protecting the environment

● Regulatory Enforcement and Sanctions Act 2008 (RESA)

Part 3 of RESA came into force on 1 October 2008. It gives regulators, including the Environment Agency (EA) and the HSE, new powers to impose civil penalties on businesses as an alternative to prosecutions. These comprise fixed monetary penalties, discretionary requirements, stop notices and enforcement undertakings.

RESA applies to specified offences under certain existing acts, including the Clean Air Act 1993, the Control of Pollution Act 1974, the Environmental Protection Act 1990, the Highways Act 1980, the Planning (Listed Buildings and Conservation Areas) Act 1990 and the Pollution Prevention and Control Act 1999. The penalty regimes are expected to be in place in October.

The fixed monetary penalties may be imposed if the regulator is satisfied beyond reasonable doubt that a person or company has committed the relevant offence. The regulator must first serve a notice of intent giving the offender the opportunity to discharge any liability by the payment of a prescribed sum within a specified period. Criminal proceedings cannot be started before the expiry of that period.

This mechanism is intended to provide an alternative to prosecution for low-level offences. A regulator can also impose discretionary sanctions in mid- to high-level examples of non-compliance.

Alternatively, a stop notice may be served. This prohibits the offender from carrying on an activity specified in the notice until certain steps have been taken. The activity must cause or be at significant risk of causing serious harm to human health, the environment or the financial interests of consumers.

The use of such notices as a general preventative sanction is encouraged, but the test of significant risk of harm is stringent

and only serious cases are caught, thereby avoiding negative consequences for business trading. A failure to comply with the notice is a criminal offence subject to a fine of up to £20,000 and/or 12 months' imprisonment.

The person or company committing an offence may be subject to enforcement undertakings, whereby the offender is obliged to take specified action within an agreed period. Once the regulator has accepted an undertaking, the party in question cannot be convicted of the relevant offence unless it fails to comply with that undertaking.

RESA imposes civil sanctions, but it applies only to offences that are legislatively defined as criminal. There is provision to prevent double jeopardy; if the civil sanction is sought and recovered, any potential criminal liability would fall away.

In all cases, the criminal burden of proof "beyond reasonable doubt" is the threshold, rather than the civil burden of "balance of probabilities". Some financial penalties are recoverable as debts or under a civil judgment, unlike fines imposed under criminal convictions.

● Serious Crime Act 2007

This expands the definition of "serious crime" to include a number of environmental offences; in particular, breach of section 33 of the Environmental Protection Act 1980, which relates to the prohibition of unauthorised or harmful waste treatment or the disposal of waste.

The Act gives the High Court and crown courts a new power to make serious crime prevention orders against persons, companies and incorporated associations convicted of a serious offence. An order can last up to five years and the court has discretion as to its terms. These can include prohibitions, restrictions and requirements relating to financial property or business dealings, communications with associates, premises to which the defendant has access and the use of premises or items.

Breach of an order is a criminal offence punishable by imprisonment and/or a fine.

● Crime and Disorder Act 1998 (amended in 2006)

Under this Act, the EA has the power to apply to the court for an Asbo to tackle environmental crime such as vandalism,



Fly-tipping is just one of the offences that can land an individual or company with an Asbo

noise nuisance and fly-tipping. These can apply to companies as well as to individuals, and the resulting stigma could damage a company's reputation.

Breach of an Asbo is a criminal offence subject to a fine and/or imprisonment.

● **Environmental Damage (Prevention and Remediation) Regulations 2009 (EDR)** The EDR transpose into UK law the Environmental Liability Directive (2004/35/EC). "Environmental damage" includes harm to: protected species or natural habitats; sites of special scientific interest; surface or groundwater; and land.

The EDR cover activities such as: the operation of energy and manufacturing plants; landfill sites; mines; water abstraction and discharge; transport by road, rail and so on; use, transport or deliberate release of genetically modified organisms; and trans-boundary shipping of waste.

The enforcing authority can serve the operator with a notice specifying the measures required to prevent the damage and a time period within which they must be accomplished. Non-compliance with the notice is an offence, as is the failure to comply with the EDR's requirements.

A company can be found guilty under the EDR if the offence is committed with the consent or connivance of, or attributable to the neglect on the part of, any director, manager, secretary or other similar person; that person will also be guilty of an offence.

As with many environmental offences, the EDR impose strict liability offences. To

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avoid prosecution, companies need to be active in the management of any possible environmental damage that is occurring or likely to occur.

In the pipeline

Further bills and regulations to transpose EU directives are in the pipeline.

● **Policing and Crime Bill**

This was introduced into parliament on 18 December 2008. Under Part 4, environmental law enforcement agencies and prosecutors would be given new and reinforced powers to recover criminal assets. Under the present regime, the EA can refer cases to the Serious Organised Crime Agency, which can use its powers to recover the profits of environmental crime by means of restraint or confiscation orders or civil recovery proceedings.

The new bill would extend these powers. For example, restraint orders would be extended to apply to any party seeking to deal with the property, not only the individuals named in the order. Searches of vehicles and other powers would be introduced. It is proposed that the limitation period for bringing proceedings

for civil recovery of property obtained through unlawful conduct will be extended from 12 to 20 years.

● **Directive on Environmental Crime (2008/99/EC)**

This will require member states to impose criminal penalties for certain breaches of environmental legislation. The type and level of criminal penalties is not specified, but member states will have to take "necessary measures" to ensure that effective, proportionate and dissuasive penalties are imposed. The activities include: ionising radiation; waste; carrying out dangerous activities; nuclear materials; killing; the destroying, taking or trading of protected fauna and flora; conduct causing significant deterioration of protected habitats; and the marketing of ozone-depleting substances.

To have committed an offence, the person must be shown to have acted intentionally or to have been seriously negligent. This differs from the civil penalties imposed by the Acts described above and from strict liability imposed under the specific environmental regime. Individuals or companies may be convicted. The government is required to implement the directive by 26 December 2010.

Most of the offences are already criminal offences under English law. It is not clear how the directive will interact with RESA, particularly where criminal offences are, by virtue of the Act, "converted" into civil penalties.

Things could get interesting

The new legislation represents a hardening of attitudes towards environmental crimes and punishment. How it operates in practice will be seen as prosecutions come to court. Hopefully, it will force companies to place greater emphasis on proactive environmental protection and high standards of health and safety.

Perhaps the most interesting aspect of the new regime is the interaction between the civil and the criminal penalties under RESA. Certain offences may be punished by way of a civil penalty under that Act rather than a criminal prosecution under the relevant statute. It is a novel concept for a regulator to have to choose between a civil penalty and a criminal prosecution; generally in English law, civil proceedings are not a bar to a criminal prosecution.

It will also be interesting to see how RESA interacts with the Directive on Environmental Crime, which "converts" criminal offences into civil penalties. It is this area that, in practice, could cause the greatest difficulty and controversy.

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