Consultation Response to the DEFRA Consultation on
Proposals for Fairer and Better Environmental Enforcement

This consultation response has been drafted
by Peter Harrison QC
on behalf of Fish Legal

Summary

This Response addresses Voluntary Enforcement Undertakings (and similar proposals) as they relate to pollution of watercourses and other waters and submits that there should be:

- a change to the wording of the draft regulations in Paragraph 4 (2) of Schedule 4 in order to require the regulator to consult with interested persons before accepting a Voluntary Enforcement Undertaking.

- a change to the wording of Paragraph 4(3) of Schedule 4 to require a regulator to publish the terms of a Voluntary Enforcement Undertaking whenever it is accepted.

- alterations to the wording of the guidance to be issued accompanying the regulations to make clear that the acceptance of a Voluntary Enforcement Undertaking by the regulator will not be a substitute for or in any way pre-empt action being taken in private nuisance, negligence, under the rule in Rylands v Fletcher, for breach of statutory duty or for trespass (or similar such actions) by any person or persons seeking to recover damages, arising either wholly or in part from the same pollution incident as that which the regulator has dealt with by way of accepting a Voluntary Enforcement Undertaking.

The response indicates that the same representations also apply to Third Party Undertakings. Suggested specific changes of wording are set out in this response.

Introduction and Background

The Consultee

1. Fish Legal (formerly the Anglers Conservation Association) is a unique non-profit making organisation set up to use the law to fight pollution and other damage to the water environment - both freshwater and marine - and to protect the rights of anglers and angling. Fish Legal acts for fishing clubs, fishery owners, syndicates, commercial fisheries across the whole of the UK. In England, Fish Legal is the legal arm of the Angling Trust.

2. Fish Legal has approximately 1,000 angling club, fishery owner and other such members as well as about 11,000 individuals. At any one stage, Fish Legal handles approximately 80 cases across the UK of which over half involve claims for damage caused to fishing rights, based in nuisance.

The role of the common law and the need for openness.

3. Where pollution of a river or lake occurs it is nearly always the local angling society or commercial coarse or game fishery whose direct interests are most affected. Not only will the stocks of fish be depleted and often wholly wiped out, but the amenity of angling may be also be affected for prolonged periods by the lack of opportunity to catch those fish killed, particularly those specimen-sized fish. The value of the proprietary fishing rights, whether leased or held freehold, can be significantly reduced. In the experience of Fish Legal, the fact of the ownership or tenancy of fishing rights by angling groups is persistently overlooked and misunderstood by regulators.

4. Where there has been a prosecution under current provisions resulting in a fine or other disposal, the owner, tenant and, in some cases, the licensee of the rights to fish in the affected waterway is able to recover damages to compensate them for the losses they suffer from the pollution incident through bringing or threatening an action at common law. Generally, the common law has provided

an efficient and flexible mechanism, not only for compensating those who have lost out through the polluting incident, but also for ensuring the full application of the "polluter pays" principle where a fine in the criminal courts has not reflected the losses actually inflicted by any particular incident.

5. In theory, the proposed arrangements for Voluntary Enforcement Undertakings set out in the draft regulations and covered by the guidance could provide compensation to those affected by pollution. For instance, the polluter could undertake to pay a sum of money directly to the owner of the rights to fish to compensate them for losses which have occurred and this may have been a scenario welcomed by those proposing to implement these provisions. This may also occur where a polluter is offering a Third Party Undertaking once they have received notice that other sanctions are being contemplated.

6. However, in practice, Fish Legal is clear that with the regulations and guidance in their current form, there will be a watering down of the level of protection for the water environment and of the "polluter pays" principle. This was not the intention of Parliament in drafting the Regulatory and Enforcement Sanctions Act 2008 nor is it the avowed intention of the draft regulations. For this reason, Fish Legal is suggesting changes in wording of the proposed regulations and the accompanying guidance.

The Changes Proposed

Deletions are shown by ~~strike out~~, additions by underlining.

To paragraph 4(2) of Schedule 4

"(2) The regulator must consult such persons as it considers appropriate before ~~doing so~~ establishing the procedure for entering into an enforcement undertaking or the regulator accepting any enforcement undertaking"

Reasons for the proposed wording change

7. Fish Legal welcome the requirement on the Environment Agency to consult such persons as it sees fit before establishing the procedure for a polluter entering into a Voluntary Enforcement Undertaking. It is hoped that the procedure imposed by the Environment Agency would include such matters as an assessment of environmental damage and a future prognosis being supplied rather than more limited information likely to be relevant to the regulator such as clean-up costs.

8. However, it is also important that, before accepting a Voluntary Enforcement Undertaking, the regulator consult with those likely to be affected. Who those persons may be would vary from case to case, applying the well established principles of consultation, but would certainly include the owners, tenants or licensees of the fishing rights to that part of any watercourse or water body where fish stocks or angling amenity may have been affected.

9. On the current wording, the acceptance of a Voluntary Enforcement Undertaking by a regulator will be an act carried out on behalf of the public and in the public interest yet, unless there is a requirement to consult, this will be determined without any input from the public whatsoever. This is a backward step, moving the sanction for causing pollution from the open criminal courts to the privacy of an agreement between the regulator and polluter.

10. In putting forward a Voluntary Enforcement Undertaking the polluter will, lawfully, be putting forward a sanction they are happy with. In determining whether or not the sanction meets the justice of the case the Environment Agency will need information on the effects of the offence on those touched by it. Paragraphs 2.58 to 2.61 of the guidance indicate that it is intended the regulator go through a detailed exercise before accepting a Voluntary Enforcement Undertaking yet, unless there is a requirement for consultation with those affected by the pollution, this assessment would be undertaken on the basis of the evidence in the possession of the regulator and that put forward in support of the undertaking. This would mean there was no input from those affected by the pollution which

has triggered the offer of the undertaking at all and no information from them as to the affects of the pollution upon them.

11. Currently the courts have victim impact statements which inform both the presentation of the prosecution case and the sentencing court. To require the regulator to consult with those affected, the "victims" of the pollution, before accepting a Voluntary Enforcement Undertaking will be necessary to mirror the position in the criminal courts in the context of civil sanctions. Further, as a matter of good practice, prosecuting authorities would usually consult with the victim of crimes before deciding whether to discontinue proceedings or accept pleas to lesser offences and there appears to be no justification for reducing the involvement of those affected by pollution if a civil rather than a criminal sanction is to be imposed or accepted.

12. There is nothing in the draft regulations to stop a regulator consulting before accepting a Voluntary Enforcement Undertaking. However, a <u>requirement</u> to consult is necessary in practice if the provisions for Voluntary Enforcement Undertakings are not to permit closed deals between the regulators and those they are required to regulate where the interests of the "victims" of the pollution are not given enough weight.

To Paragraph 4(3) of Schedule 4.

"(3) When it accepts an undertaking the regulator ~~may~~ <u>shall</u> publish it in whatever manner that it sees fit. "

<u>Reasons for the proposed wording change</u>

13. The current wording leaves it open to the regulator to decide whether or not to make public the action it has taken in respect of a sanction imposed in lieu of prosecuting for a breach of the criminal law or other sanction. This allows the regulator to accept a Voluntary Enforcement Undertaking from a polluter in respect of a pollution incident which would currently warrant investigation and probably prosecution and yet choose not to disclose any details whatsoever. On

the currently proposed wording, there is not even a requirement to make public the fact that an undertaking has been accepted let alone the details of the incident leading to the undertaking or the details of what the undertaking contains.

14. Whilst it cannot be appropriate policy for a regulator to act in private concert with those it has a duty to regulate, nor can it have been the intention of the Act, in this case the regulations would also be **unlawful.**

Current Intention of DEFRA?

15. Fish Legal is not clear as to whether the current wording of paragraph 4(3) of Schedule 4 to the draft regulations in fact reflects DEFRA's intention. This is because paragraph 2.85 of the draft guidance to be issued to regulators reads:

> *Publicity*
> *2.85 Regulators will be **required** to publicise the **details** of **any** enforcement action taken using civil sanctions ie where a civil sanction is imposed **or where an undertaking is accepted**. The Government considers it good practice for a regulator to maintain a public database of sanctioning decisions it has taken as well as criminal convictions on its web site. The use of web-based registers is good practice.*
> *(*emphasis added)

16. The current use of the word "may" in Schedule 4 paragraph 4(3) to the draft regulations gives a discretion to the regulator whether to publicise accepting a Voluntary Enforcement Undertaking. This is inconsistent with the use of the mandatory language of "required" in paragraph 2.85 of the guidance and should be amended in the way urged in this response if the guidance does reflect the intention of DEFRA as to what these regulations should contain.

Illegality

17. The Environmental Information Regulations 2004 (SI 2004/3391) ("the 2004 Regulations") transpose into English Law the provisions on access to Environmental Information contained in European Directive 2003/4/EC. Were the 2004 Regulations to be contradicted or thwarted by the draft regulations on the use of environmental civil sanctions that would be a breach of EU law.

18. There are a number of provisions of the 2004 Regulations which make clear that the Environment Agency as a regulator dealing with environmental matters is required to publicise the relevant information. Further the 2004 Regulations make clear that what action has been taken in respect of an incident causing pollution of controlled waters would be relevant information. Therefore there would be a duty on the regulator not only to disclose it but to publicise (and disseminate) it.

19. The relevant provisions of the 2004 Regulations mean that:

- the knowledge of a pollution incident and the contents of the undertaking in respect of it would come, inter alia, within items (c) and (e) of the definition of "environmental information" in the interpretation regulation, Regulation 2.

- the Environment Agency is a public authority for the purposes of the 2004 Regulations and in respect of accepting an undertaking would not be acting in a judicial or legislative capacity.

- the Environment Agency would be under a duty to disseminate the environmental information under Regulation 3.

- the information relevant to the acceptance of an undertaking would not be covered by any of the exceptions to the duty to disseminate information set out in regulation 12. There would be no requirement on the Environment Agency to publicize their consideration of the undertaking until after it had been accepted.

20. In contemplating the use of civil sanctions for environmental enforcement in passing the Regulatory and Enforcement Sanctions Act 2008, it was not the intention of Parliament to replace the publicity and open justice of the criminal courts with the possibility of a polluter avoiding any adverse publicity and / or concealing the scale or culpability of their negligence through offering an undertaking which could be kept private. This is not the intention of the Act nor the guidance issued with these regulations.

21. For the reasons set out the use of the word "may" in Paragraph 4(3) of Schedule 4 to the draft regulations is not only contrary to policy and the stated intention of DEFRA it is also incompatible with the duty of the Government to implement Council Directive 2003/4/EC and therefore unlawful. The word "may" should clearly be replaced with "shall".

Changes to the Wording of the Guidance

22. Paragraph 2.44 of the guidance considers Third Party Undertakings ("TPU's"). These are where a polluter is able to offer a TPU (in an enforcement undertaking) in substitution or part substitution for a compliance notice, restoration notice or a variable monetary penalty. The final part of the paragraph reads:

> "……..A TPU may not always be appropriate: the civil courts are likely to remain the means by which affected persons obtain compensation when appropriate for damage to health or substantial economic interests".

23. Fish Legal is not opposed to the use of TPU's or Voluntary Enforcement Undertakings per se. Any money which the owner, tenant or licensee of the fishing rights received in compensation via a TPU or other payment made under a Voluntary Enforcement Undertaking would not be turned away ! It would, of course, have to be credited against any assessment of damages which was later found due to be paid by the polluter to the owner, tenant or licensee of the fishing rights in respect of the consequences of that pollution incident.

24. However, it is important that neither TPU's or Voluntary Enforcement Undertakings more generally are seen to be, or can become in practice, any form of proxy for the private nuisance action, or similar such actions, in the civil courts. This is because the Environment Agency will often not be in a position to assess the true extent of the damage to the fishing rights even had it the time, resources or inclination to do so. In particular, it is likely that the full resources necessary to assess the extent of the undertaking being offered may not be available. In those circumstances, it is even more important that the guidance is unambiguous in making clear that civil sanctions are not the same and are not intended to be a substitute for civil remedies available to persons affected by pollution incidents.

25. It is submitted that a more appropriate wording for the guidance would be to start a new paragraph where the current wording of paragraph 2.44 begins its last sentence. The new text of the guidance :

> 2.44 …….. ~~A TPU may not always be appropriate: the civil courts are likely to remain the means by which affected persons obtain compensation when appropriate for damage to health or substantial economic interests.~~
>
> 2.45 A TPU may not always be appropriate: the civil courts are likely to remain the means by which affected persons obtain compensation when appropriate for damage to health or amenity or to economic or property interests. The regulator may not be in a position to assess the extent to which there has been damage to the interests of private persons or the offering of an undertaking may come at a time before that damage can be fully assessed. The regulator should therefore always make clear that the acceptance of an enforcement undertaking will not prevent a civil action being brought if any amount paid to a private person under the undertaking is not adequate compensation for losses incurred by the person to whom it is to be paid or for any losses incurred by other persons as a result of the acts or omissions to which the undertaking relates.

26. Similar wording needs to incorporated into the Section of the guidance dealing with Voluntary Enforcement Undertakings.

27. Suggested wording is to insert a new paragraph after 2.61 to read:

> 2.62 The regulator may not be in a position to assess the extent to which there has been damage to the interests of private persons or the offering of an enforcement undertaking may come at a time before that damage can be fully assessed. The regulator should therefore always make clear that the acceptance of an enforcement undertaking will not prevent a civil action being brought if any amount paid to a private person under the undertaking is not adequate compensation for losses incurred by the person to whom it is to be paid or for any losses incurred by other persons as a result of the acts or omissions to which the undertaking relates.

Conclusions

28. Fish Legal considers that in their current form the draft regulations and the guidance are neither legal nor achieve the objectives of Parliament in passing the Regulatory and Enforcement Sanctions Act 2008. Perhaps the wording allowing information in respect of enforcement undertakings to be kept confidential does not reflect the intentions and objectives of those implementing the regulations and guidance themselves.

29. Fish Legal considers that if the alterations to the wording of the draft regulations and draft accompanying guidance set out in this consultation response are included in the final wording of the regulations and guidance which come into force then the problems and illegality highlighted by this consultation response will have been overcome and the regulations will operate better in practice, so as to achieve the objectives of the legislation and to continue the “polluter pays” principle.

30. These representations have been kept as short as possible but if it would be helpful to DEFRA for there to be any elaboration of the points set out, Fish Legal would be happy to provide it. Should the suggestions for the amendments to the draft regulations and draft guidance be rejected by DEFRA, Fish Legal would be grateful to be able to understand the reasons for doing so.

Peter Harrison QC

On Behalf of Fish Legal
13th October 2009.