

Securing safe, clean drinking water for all



Enforcement policy

Introduction

The Drinking Water Inspectorate (DWI) is the independent regulator of drinking water in England and Wales set up in 1990 by Parliament to provide independent reassurance that the privatised water industry delivers safe, clean drinking water to consumers. Our aim is to secure safe, clean drinking water for all and our work contributes to the strategic priorities for the essentials of life – food, air, land and water - of our sponsor, the Department for Environment, Food and Rural Affairs (Defra). Within its strategic priorities, Defra is focused on achieving a number of specific outcomes one of which is sustainable water use aiming to achieve a balance between water quality, environment, supply and demand. Our work also contributes to the policy on water in Wales as set out in the Welsh Assembly Government's consultation document 'A Living Wales'.

For the period 2010 – 2015 the five Strategic Objectives of DWI are for:

- Water suppliers to deliver water that is safe and clean
- The public to have confidence in their drinking water
- Drinking water legislation to be fit for purpose and implemented in the public interest
- DWI to be a progressive and trusted organisation
- DWI staff to be accessible and globally recognised technical experts in drinking water regulation.

The way we intend to achieve these objectives is set in more detail in *Securing Safe, Clean Drinking Water for All: Our Strategic Objectives 2010-2015*.

We are responsible for enforcing a wide range of legal obligations, some of which carry a criminal sanction for non compliance by water undertakers and licensed water suppliers with drinking water law and quality standards. This Enforcement Policy sets out the general principles we will follow in relation to our powers for enforcement of the legislation relating to the safety and quality of public drinking water supplies in England and Wales. These principles, so far as they are relevant, will also apply to our role of overseeing and supporting regulation of private water supplies by local authorities in England and Wales. We will keep this policy under review and update it to reflect changes in law and learning from its implementation.

1. Better Regulation

DWI recognises that the best way to achieve compliance with the law is to ensure, by guidance and advice, that those carrying out regulated activities understand the nature and extent of their responsibilities and comply voluntarily. However, there are times when conformity with the law needs to be sought by formal enforcement action. Formal enforcement is about securing compliance with regulatory requirements. To this end there is a spectrum of civil and criminal options available to us. These range from advisory letters, warning letters, legally binding agreements for remedial action, enforcement notices with statutory effect (where an offence is committed if not obeyed) and criminal prosecution before the courts. This policy will guide our decision making as to the most appropriate choice of sanction in any particular case.

The Legislative and Regulatory Reform Act 2006 places the seven Hampton principles of good regulation on a statutory footing. The Act introduced a new code of practice for regulators known as the Regulators' Compliance Code. The Code, which came into force on 8 April 2008, specifies the regulatory functions to which the seven principles should apply. The Code applies to the regulatory functions of DWI. The effective use of enforcement powers in regulatory schemes is important to secure compliance with the law and, where necessary, to ensure that those who have not complied may be held to account. Enforcing authorities need to take into account the need to maintain the balance between enforcement and other advisory activities when allocating resources.

In developing this Enforcement Policy, we have had regard to the Enforcement Policy of Defra, the Investigator's Convention (2009) sponsored by the Government National Investigator's Group and the revised Prosecutors' Convention (2009). These conventions deal with situations where a criminal course of conduct could be investigated and prosecuted by more than one investigative or prosecuting authority and seeks to ensure that matters are co-ordinated from the earliest possible stage, so that only one investigation and prosecution takes place, or if this is not possible, proper co-ordination takes place to ensure that the public can have confidence in the outcome of each case and the law is enforced in a fair and effective way.

In line with our existing working practices and in relation to relevant water quality incidents, we renew our commitment to effective and early co-ordination of our investigations with other authorities. We are also committed to entering into, publishing and keeping up to date relevant Memoranda of Understanding with other authorities.

2. Principles of Enforcement

DWI believes in firm and fair regulation of the matters for which it has responsibility and has adopted four principles for achieving this.

i) Proportionality

Proportionality in securing compliance with drinking water law will generally involve taking account of the degree of the risk of adverse consequences; in particular, inadequate public health protection or loss of public confidence in drinking water. Sometimes, however, the precautionary principle will require enforcement action to be taken even though the risks may be uncertain, in which case our decisions will be guided by the best available evidence as to the likelihood of occurrence of those risks in the relatively near future.

ii) Consistency

Consistency means taking a similar approach in similar cases to achieve similar outcomes within which a degree of discretion is available. There are many variables to be taken into account in using discretion to achieve an outcome, such as the attitude and competence of the regulated person or business to bringing about the outcome sought.

iii) Transparency

Transparency means helping those regulated to comprehend what is required of them at the outset and setting out what they may expect from DWI in return. It also involves making clear what remedial action is required from the regulated person or business and providing details of any rights of appeal.

iv) Targeting

Targeting of enforcement action means prioritising and directing regulatory effort effectively. This means concentrating on the activities which create the most significant risk, either because the nature of the activity is inherently high-risk or because of a lack of appropriate controls or appropriate attitude in other less high-risk activities. It also involves identifying and focusing on evidence of systemic risk or behaviour not conducive to effective risk management, including timeliness of response.

3. Enforcement Options

Investigation of the circumstances or matters discovered on inspection, or following a complaint, or identified by assessment of data is vital; however, such an investigation does not have to be a criminal investigation and we will seek a resolution of matters by taking the most appropriate enforcement option. The three general options open to us are as follows:

3.1 Advisory letters

We may decide that circumstances do not warrant carrying out a detailed investigation of a potential breach of law and, in such cases, we will send an advisory letter or make recommendations in a written inspection report reminding the regulated business of the need to obey the law without prejudice to other purely civil remedies.

3.2 Civil enforcement remedies

Civil enforcement remedies for breaches of drinking water law can comprise the use of statutory powers such as:

- Stop and Remediation Notices;
- Minded to Enforce Letters (inviting the business to enter into a legally binding agreement to affect a remedy, these agreements are generally known as undertakings and once in place they negate the need for an Enforcement Order);
- Formal Letters requiring the business to make an application for a time limited exemption or approval (but only where such discretion is available to us in law);
- Enforcement Orders (requiring the business to enter into a legally binding agreement to affect a remedy)

Before issuing a formal letter or notice we will explain the actual or potential breach of drinking water law to the nominated working level contact in the regulated business. The formal letter and any subsequent enforcement documents will be addressed to the nominated Board Level contact in the regulated business. The formal letter will always offer the Board Level contact the opportunity of a meeting with a Deputy Chief Inspector to discuss the matter, including any alternative remedies permitted by law. After any such meeting and once we have decided on the most appropriate enforcement action, we will explain the consequences to the regulated business of any Notice, Undertaking, Exemption or Approval that we serve, accept or grant. We make available on our website Information Letters, Guidance on the Regulations and other protocols and tools to assist our regulated businesses in making applications and submissions to us.

3.3 Criminal Investigations

A criminal investigation is carried out for the purposes of gathering evidence to be used in a criminal trial. In such investigations, special provisions apply for the protection of suspects; most notably suspects are entitled to be cautioned in accordance with Code C of the Codes of Practice made under the Police and Criminal Evidence Act (1984) PACE.

Where we suspect that a criminal offence has been committed and the particular circumstances merit, at first sight, seeking criminal sanction, then the decision to carry out a criminal investigation will be made by a Deputy Chief Inspector having regard to the following criteria:

- The impact or potential impact of the offence on consumers;
- The alleged offender's response to previous advice and guidance;
- The risk of other similar offences being committed in relation to the same or other drinking water supplies under the control of the suspect;
- The likelihood that avoidance of regulatory requirements was intentional as opposed to a simple error or misunderstanding by the offender;
- The extent to which the risk management focus of the legislation is evident in the alleged offender's actions.

4. Conduct of Criminal Investigations which may lead to prosecution

Criminal investigations will always be led by an inspector authorised by appointment under Section 86 (4) of the Water Industry Act 1991 to conduct such investigations. It is an offence for a water undertaker or licensed water supplier to impede an appointed inspector in the course of such duties. We may appoint any other specialist person, on a temporary basis, to assist our inspectors in the conduct of such an investigation. Such persons will be authorised under the Water Industry Act 1991.

The commencement of a criminal investigation potentially leading to prosecution is an important part of enforcement. The purpose the investigation is to secure a conviction and ensure the defendant may be punished by a court and act as a deterrent to the defendant and others. We may commence such an investigation where the suspect does not accept their guilt for offences or where the matter is too serious for a simple caution or a conditional caution. Since the Water Act 2003, the law has provided for the Chief Inspector of Drinking Water to take forward prosecutions in her name. Previously decisions on prosecutions were reserved to the Secretary of State or the Director of Public Prosecutions. It is our general policy to take forward prosecution cases in the name of the Chief Inspector of Drinking Water.

Public prosecutors fall under the supervision of the Attorney General and decisions to prosecute in any case are taken in accordance with the two principles set out in the Code for Crown Prosecutors (2009) (6th edition). Although DWI is not a public prosecutor in this sense, we have adopted these same principles as governing our decision making on prosecutions adapting them only where this is necessary to make them relevant to the specific offences in drinking water law. The two principles are explained below.

4.1 Sufficiency of Evidence

The Chief Inspector of Drinking Water will only commence a prosecution when satisfied that there is a “realistic prospect of conviction” on the available evidence. If the case does not pass this evidential test it will not go ahead, no matter how important or serious the allegation may be.

If the sufficiency of evidence test is met, then the Chief Inspector of Drinking Water will next take into account whether any other enforcement powers would constitute sufficient remedy, and if not, consider which of the following options is the most appropriate: a warning letter, a caution or a prosecution before the courts. In determining the appropriate response, the Chief Inspector shall take account of the public interest of prosecuting.

4.2 Public Interest Factors

In addition to relevant matters set out in the Code for Crown Prosecutors relating to the personal circumstances of the offender and the circumstances of the offence, the Chief Inspector will consider other factors in deciding whether or not to prosecute. These factors include:

- The impact, or potential impact, of the offence on consumers having regard to our strategic objective *that the public have confidence in their drinking water*;
- The implications of the offence for the credibility and enforcement of the regulatory regime. An example in the context of drinking water might be a failure to use only approved products in the treatment and conveyance of drinking water as this would undermine the integrity of the self regulation principles embedded in the particular drinking water law;
- The perceived benefit accruing to the offender from not being duly diligent e.g. in relation to industry best practice, not carrying out adequate maintenance of assets or failing to invest in adequate water treatment, competent operators and competent analysts or failing to collect sufficient samples and analyse these for all the relevant organisms and substances;
- Whether the offence was committed deliberately or inspectors obstructed in the course of their duties;
- The previous enforcement record of the offender;
- The attitude of the offender, including behaviour towards inspectors, and whether robust and permanent corrective measures to remedy the offence or prevent any reoccurrence are being put in place;
- Where offences are prevalent or difficult to detect, the general deterrent effect on others by making an example of the offender;
- Whether inspectors have given previous written advice to the offender which if followed would have reduced the likelihood of an offence being committed;

- If the offence arose from unusual circumstances where the situation could not have been foreseen or reasonable precautions have previously avoided the situation; and reasonable steps were taken to mitigate the matter and the appropriate authorities notified.

4.3 Companies and company office holders

If the Chief Inspector considers it is in the public interest to initiate criminal proceedings in court these will normally be commenced against those responsible for the offence. Almost always this will be the regulated business but in addition it may also be another body corporate vicariously liable for the offence, for example, contractors employed by the regulated business. We have available to us special provision for also prosecuting the appropriate office holders in person where the offence was committed with their consent, connivance or neglect.

The law also provides for us to prosecute “any relevant person”. Typically we would consider this where, despite reasonable controls by the regulated business, a person outside of its control is responsible for deliberate damage to water assets, or introducing contaminants into drinking water or other material circumstances. It is our policy not to prosecute individual employees of the regulated business or its contractors, and we would only consider this in exceptional circumstances where the offence arose out of the personal actions of an employee that were knowing, deliberate and clearly contrary to training and instructions.

4.4 Civil penalties

Where an offence has been committed, in drinking water law we do not have the option of offering the offender a civil financial penalty which if paid would mean a prosecution would not take place. It is our policy not to seek such powers.

4.5 Cautions under Criminal Justice Act 2003

Before a caution can be imposed, the offender must admit their guilt in writing and agree to the imposition of requirements to assist in their rehabilitation or reparation. If the offender does not comply with the requirements as set out in the caution, they may be prosecuted for the original offence. We will consider the option of a caution when we are satisfied that all necessary remedial action to prevent a recurrence has been taken by the regulated business and the offence arose, at least in part, as a result of a simple mistake or genuine misunderstanding. For example we have accepted cautions in respect of the offence of supplying water unfit for human consumption, where the water was discoloured and rejected by consumers, and the cause was work being carried out on a distribution network that was subject to a schedule of planned future improvement work.

4.6 Warning Letters

Where there is good reason to believe that an offence has been committed but a caution is not appropriate, we may issue a warning letter. For example, where the offence relates to a failure to comply with a Notice, then a Warning Letter may be issued. The issue of a Warning Letter comprises part of the enforcement record of the regulated business.

5. Appeal Mechanism

As explained above, if we are considering any type of enforcement action, we will explain the situation to the nominated working level contact in the regulated business. If following discussion we decide to initiate enforcement then a Deputy Chief Inspector will write to the nominated Board Level contact of the regulated business to notify them formally and explain the matter. This letter will offer a meeting with a Deputy Chief Inspector to hear any proposals for alternative remedies.

If, after full participation in the above enforcement arrangements, the nominated Board Level contact in the regulated business feels that the final approach to enforcement has been unfair or there are important matters which have not previously been brought to our attention, then the Chief Executive Officer (or equivalent) may appeal to the Chief Inspector of Drinking Water in writing.

On receipt of an appeal letter, the Chief Inspector will discuss the matter with the Chief Executive Officer of the regulated business as soon as practicable, normally within seven days. Following discussion and where appropriate, submission of further information by the regulated business, the Chief Inspector will reach a final decision on the appropriate enforcement action as soon as practicable, normally within 30 days.

6. Consultation

This policy was developed in consultation with the businesses we regulate, in particular members of the council of Water UK. It replaces the Inspectorate's Code for Enforcement published in 1995. Any questions regarding this policy should be addressed in the first instance to Claire Pollard, Deputy Chief Inspector, Science and Strategy at claire.pollard@defra.gsi.gov.uk.