

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. We provide independent assurance 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 Department, the Department for Environment, Food and Rural Affairs (Defra). Within its strategic priorities¹, 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 Government's document 'Water Strategy for Wales'.

For the period 2015 – 2020 the four Strategic Objectives of DWI are for:

- Water suppliers to deliver water that is safe and clean
- The public to remain confident 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

The way we intend to achieve these objectives will be set out in more detail in our Business Report 2016.

We are responsible for enforcing a wide range of legal obligations, some of which carry a criminal sanction for non-compliance with drinking water law, and quality standards by water undertakers and licensed water suppliers. This Enforcement Policy document sets out the general principles we will follow in relation to our powers of enforcement 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 <https://www.gov.uk/government/organisations/department-for-environment-food-rural-affairs>

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 sanctions available to us. These include statutory undertakings to take remedial action, statutory notices (where in some instances 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 2006² (“the Act”) and the Legislative and Regulatory Reform (Regulatory Functions) Order 2007³ require that regulatory functions under legislation enforced by DWI are carried out in a way which is transparent, accountable, proportionate and consistent, and that regulatory activities should be targeted only at cases in which action is needed. The Act provides for a code of practice for regulators known as the Regulators’ Code⁴. The Code, which came into effect on 6 April 2014, requires that those carrying out regulatory functions under the Act must have regard to the Code when developing policies and operational procedures that guide their regulatory activities, as well as when setting standards or giving guidance which will guide the regulatory activities of their regulated community.

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 and the Investigators’ Convention (2009) sponsored by the Government’s National Investigator’s Group, and the Prosecutors’ Convention (2009)⁵, sponsored by the Attorney General. 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.

² http://www.legislation.gov.uk/ukpga/2006/51/pdfs/ukpga_20060051_en.pdf

³ http://www.legislation.gov.uk/ukdsi/2007/9780110788708/pdfs/ukdsi_9780110788708_en.pdf

⁴ <https://www.gov.uk/government/publications/regulators-code>

⁵ http://www.cps.gov.uk/legal/p_to_r/prosecutors__convention/

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 follows the five means for achieving this under the Act.

i) Accountability

DWI must be able to justify decisions made within the context of the regulatory framework within which it operates. The Water Industry Act (1991)⁶ describes the DWI's duties which include the duty to enforce when certain circumstances present themselves. Information on proposed enforcement is published on the DWI's website and drawn to the attention of affected stakeholders and details of resulting enforcement including the delivery of actions to secure compliance or mitigate risks to health are also published and open to public scrutiny as part of our record of enforcement.

ii) Proportionality

Proportionality in securing compliance with drinking water law will generally involve taking account of the degree of the risk of adverse consequences resulting from non-compliance; in particular, inadequate public health protection or loss of public confidence in drinking water quality. 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 the realisation of those risks in the relatively near future.

iii) 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 decide on the most appropriate course of action, such as the attitude and level of competence of the regulated person or business to bringing about the outcome sought.

iv) 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

⁶ http://www.legislation.gov.uk/ukpga/1991/56/pdfs/ukpga_19910056_en.pdf

involves making clear what remedial action is required from the regulated person or business and providing details of any rights of appeal.

v) 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, despite being less high-risk, because of a lack of appropriate controls or appropriate attitude on the part of a particular business. 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 will not necessarily be a criminal investigation. We will seek a resolution of matters by taking the most appropriate enforcement option in the circumstances of the particular case.

3.1 Advisory Letters

We may decide that circumstances do not warrant formal enforcement action and, in such cases, we will send an advisory letter or report and make recommendations (for example, an audit inspection letter and report; a compliance assessment letter; an event assessment letter) for the regulated business to take certain specified actions. Failure to do so may result in civil or criminal sanctions being considered by DWI.

3.2 Civil Enforcement

Civil enforcement powers in respect of breaches of drinking water law comprise statutory powers to:

- Serve notices requiring certain steps to be taken by the regulated company;
- Accept undertakings from the company to take appropriate steps to achieve compliance instead of the company being subject to an enforcement order;
- Serve enforcement orders.

Before serving any of the above we will explain the actual or potential breach of drinking water law to the nominated working level contact in the regulated business. Subsequent enforcement documents will be addressed to the nominated Board Level contact in the regulated business.

Where DWI proposes to take any of the above actions, it will offer a period within which the company may make informal representations to it. The Board Level

contact may take 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 enforcement measure we take.

However, if there is evidence of an immediate risk to health, enforcement action may be initiated without a period for representations.

Failure to comply with undertakings, notices or orders may result in further enforcement action being taken by DWI. In the case of failure to comply with an enforcement order, the company will be given notice if the DWI decides to apply for a court injunction for non-compliance. Failure to comply with a court injunction may result in the imposition of a period of imprisonment and/or a fine for contempt of court.

The DWI's commitment to hearing representations does not displace the statutory right of a company aggrieved by an enforcement order to make an application to the High Court under the legislation.

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 to gather evidence to assess whether an offence may have been committed. That evidence may ultimately be used in a criminal trial. In criminal 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)⁷.

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 alleged offender;

⁷ http://www.legislation.gov.uk/ukpga/1984/60/pdfs/ukpga_19840060_en.pdf

- The likelihood that avoidance of regulatory requirements was intentional as opposed to a simple error or misunderstanding by the alleged offender;
- The extent to which the risk management focus of the legislation is evident in the alleged offender's mitigating actions.

4. Conduct of Criminal Investigations which may lead to prosecution

Criminal investigations will always be led by an inspector authorised to conduct such investigations under section 86 (2) of the Water Industry Act 1991. 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 of the investigation is to obtain evidence to establish whether an offence may have been committed. The Chief Inspector of Drinking Water (the Chief Inspector) is empowered to institute and carry on proceedings in his name. DWI will commence a criminal investigation where the matter is too serious for a caution to be given and there is a significant likelihood that an offence has been committed.

In deciding whether to commence a prosecution, the Chief Inspector will apply the two principles explained below, specifically, sufficiency of evidence and public interest factors. These are set out in the Code for Crown Prosecutors issued by the Director of Public Prosecutions. The Chief Inspector will only adapt these where this is necessary to make the principles relevant to the specific offences under drinking water law.

4.1 Sufficiency of Evidence

The Chief Inspector 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 means of redress would constitute sufficient remedy. He may decide it most appropriate in all the circumstances to issue a caution. In determining the appropriate response, the Chief Inspector will take account of the public interest in 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 remain confident 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 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 or 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 were obstructed in the course of their duties;
- The previous enforcement record of the alleged offender;
- The attitude of the alleged 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 alleged offender;
- Whether inspectors have given previous written advice to the alleged 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 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 holder in person where the business is guilty

of an offence and that offence is proved to have been committed with the office holder's consent, connivance or neglect.

The law also provides for us to prosecute a "relevant person" in the case of water unfit for human consumption being found to have been supplied. A relevant person includes any employer of persons, or any self-employed person, who is concerned in the supply of water to premises. 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.

4.4 Cautions under the Criminal Justice Act 2003⁸

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 the offence arose, at least in part, as a result of a simple mistake or genuine misunderstanding. For example we have given 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 appropriately risk assessed in advance, and was subject to a schedule of planned future improvement work.

5. Warning Letters

Where there is evidence that an offence has been committed and a caution is not appropriate, we may issue a warning letter informing the regulated business that it has committed an offence. The issue of a warning letter comprises part of the enforcement record of the regulated business. Should the offender continue to offend, this warning letter may be taken into account in determining future action.

6. Representations to the Chief Inspector of Drinking Water

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, unless there is evidence of an immediate risk to health. 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.

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

⁸ http://www.legislation.gov.uk/ukpga/2003/44/pdfs/ukpga_20030044_en.pdf

previously been brought to our attention, then the Chief Executive Officer (or equivalent) may make representations to the Chief Inspector in writing.

On receipt of representations, 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.

In the case of a proposed enforcement order, the company may make representations to the Chief Inspector under the provisions of the legislation

7. Consultation

This policy was developed in consultation with the businesses we regulate, in particular members of Water UK. It replaces the Inspectorate's Enforcement Policy published in 2010. Any questions regarding this policy should be addressed in the first instance to Milo Purcell, Deputy Chief Inspector at milo.purcell@defra.gsi.gov.uk.