



THE LCF SANCTIONS FRAMEWORK



**REGULATING THE LANDFILL COMMUNITIES FUND
BENEFITING PEOPLE AND THE ENVIRONMENT**

Consultation Paper

June 2009

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Project: Prees Heath, Shropshire

Description: Butterfly conservation at Prees Heath

Supported by: Grantscape



Executive Summary

1 Reasons for considering the sanctions framework

1.1 The Macrory Review aimed to provide guidance on how to effectively provide and enforce a sanctions toolkit that would allow reasonable and appropriate responses to non-compliance.

1.1.2 The Hampton Review recognised the importance of sanctions that are appropriate, effective and proportionate.

1.1.3 ENTRUST encounters non-compliance. Significant issues of non-compliance are tracked on the compliance issues log. There are a considerable number of Environmental Bodies (EB) who do not return the statutory and other returns to ENTRUST in a timely manner. This latter example of non-compliance indicates that the current sanctions framework may require enhancing.

1.2 Regulation and guidance

1.2.1 The Landfill Tax Regulations 1996 (Regulations) provide for final sanctions of revocation, and the claw back of funds from EBs

Project: Rollright Stones

Description: Improving access to the stones

Supported through: Trust for Oxfordshires Environment



- 1.2.2** ENTRUST's current sanctions policy has a focus on coaching to compliance. However, the high levels of non-compliance, especially with the submission of statutory returns to ENTRUST indicates that changes to the sanctions available to ENTRUST should be considered.

1.3 Benchmarking

- 1.3.1** In other sectors such as tax returns and company accounts a fine is levied for late returns. The Charity Commission also list charities that have not filed accounts on their website.

1.4 Environmental Bodies

- 1.4.1** EB support naming and shaming, but the majority did not support fines, in particular citing the charitable nature of their operations.
- 1.4.2** Although EB commented that they had too little experience to judge if ENTRUST operated its sanctions toolkit with sufficient justification, two respondents raised concerns that ENTRUST should implement sanctions speedily.

1.5 Proposed framework

- 1.5.1** ENTRUST needs to ensure its sanctions framework is in accordance with the recommendations of the Macrory Review and that it has effective sanctions to reduce non-compliance.
- 1.5.2** The biggest area of non-compliance is in relation to meeting the deadline for the return of the Form 4. However, there are also issues regarding the timeliness of other returns to ENTRUST.

Project: Leesbrook Nature Reserve

Description: Creation of a nature reserve

Supported through: Veolia Trust



- 1.5.3** There is support for naming and shaming from the EB consulted as an appropriate sanction, and for reporting non-compliant EB to funding LO. This goes further than the proposal agreed by ENTRUST's Board in June 2009 to name and shame as it includes a positive notification to LO.
- 1.5.4** Recommendation 1: ENTRUST implements naming and shaming for non-compliance. This naming and shaming should be by ENTRUST, and should be to anyone via the ENTRUST website, and to funding LO in respect of non-complaint EB.
- 1.6** Fining follows the example of other statutory returns such as personal tax returns and company accounts. It would not be popular with EB, but this is hardly surprising, but there was some support albeit with qualifications. The very high level of non-compliance with the Form 4 is set out in paragraph 5.2. The comments made by EB in consultation that special circumstances might apply for small EB or when EB change staff, and similar comments made to ENTRUST staff by EB shows that very significant action needs to be taken to emphasise that Form 4 returns should be treated no differently than other statutory returns required by legislation. A fine for late submission in line with other statutory returns would seem appropriate. Given that small EB and often unfunded EB are the worst offenders, and all EB are charitable organisations a low level fine of £100 would be appropriate in the first instance for a late return of the statutory Form 4.
- 1.6.1** Recommendation 2: A fine of £100 would be appropriate in the first instance for late submission of the Form 4.
- 1.7** Consideration needs to be given to ensuring compliance with other returns. It is recommended that this is considered in the light of experience of fining for Form 4s, as this may have an effect on the return of other forms.
- 1.7.1** Recommendation 3: The extension of fining by ENTRUST for the late return of other forms should be considered in the light of experience of fining for Form 4s.

Project: Lucky Lane Kinross

Description: Improving access

Supported through: Perth and Kinross Quality of Life Trust



- 1.8** Given the number of errors in Form 4s a decision would need to be made whether a fine would apply if the form is in on time but incorrect. It is recommended that this is not done in the first year, but a review is held in the light of experience in the first year.
- 1.8.1** Recommendation 4: Consideration is given to the extension of fining for the submission of incorrect form 4s in the light of experience.
- 1.9** A review of the impact of fining could then consider if there should be a scaled set of fees depending on the size of the EB. If larger EB do show a less marked improvement in compliance compared to small EB it might be because the level of fine is not significant enough to change behaviour.
- 1.9.1** Recommendation 5: Consideration is given to a scaled set of fees depending on the size of the EB, if justified by a review of the impact.
- 1.10** There will be some EB who default on their fine and a decision will need to be taken as to how these should be managed. It would seem appropriate to revoke EB who have no funds and do not pay their fine within 6 months of it being issued, as it is likely that they are dormant and ENTRUST would spend a disproportionate amount of time in trying to bring them to compliance. If ENTRUST has the power to compulsorily revoke these organisations and HMRC were appointed as the body to hear any appeal this may resolve this issue.
- 1.10.1** Recommendation 6: ENTRUST is given the power to revoke EB who have no funds and do not pay an ENTRUST fine within 6 months of it being issued, and HMRC would hear any appeal.
- 1.11** EB that are funded might decide not to pay a fine. ENTRUST could take action against the EB. Alternatively Directors of the EB could be made to have personal responsibility. It is recommended that there is further discussion with HMRC on this issue.

Project: Tudeley Woods Butterflies

Description: This 3 year project has created the ideal environment for the butterflies and has also funded a captive breeding and release scheme.

Supported through: Ibstock Cory Environmental Trust



1.11.1 Recommendation 7: There is further discussion with HMRC on how EB who have funds and do not pay their fines are treated.

1.12 EB that are funded might decide not to pay a fine. ENTRUST could take action against the EB. Alternatively Directors of the EB could be made to have personal responsibility. It is recommended that there is further discussion with HMRC on this issue.

1.12.1 Recommendation 7: There is further discussion with HMRC on how EB who have funds and do not pay their fines are treated.

1.13 The EB comments regarding the need to ensure EB are fully aware of the sanctions framework and any changes agreed needs to be communicated through bulletins, and be the subject of training in the training strategy.

1.13.1 Recommendation 8: To ensure EB are fully aware of the sanctions framework and any changes agreed can be communicated through ENTRUST e-bulletins, and training events.

2 Reasons for the Sanctions Framework Review

2.1 In the light of Macrory and Hampton Reviews, ENTRUST needs to ensure its sanctions framework meets best practice.

2.2 The Macrory Review aimed to assess the penalty and sanctioning regimes of regulators across the UK, it followed the Hampton review. The Macrory Review aimed to provide guidance on how to effectively provide and enforce a sanctions toolkit that would allow reasonable and appropriate responses to non-compliance.

2.3 The Hampton Review had recommended that a regulatory framework should have a pro-active and risk-based approach to regulation. It also recognised the importance of sanctions that are appropriate, effective and proportionate.

2.4 ENTRUST encounters non-compliance. Significant issues of non-compliance are tracked on the compliance issues log. There are a considerable number of EB who do not return their statutory and other returns to ENTRUST in a timely manner. This latter example of non-compliance indicates that the sanctions framework may require review as it is not effective.

3 Regulations

- 3.1** The Regulations give powers to HMRC to revoke an EB if they do not comply with their obligations which are also set out in the Regulations, or “where it appears to them necessary to do so for the proper operation of the credit scheme established”.
- 3.2** Section 36 of the Regulations gives HMRC the ability to enforce repayment of non-compliant expenditure. This is a specific sanction for this particular regulatory breach.
- 3.3** ENTRUST has no specific enforcement powers in the Regulations. However, ENTRUST has an agreed sanctions framework, which is summarised below in Paragraph 4.
- 3.4** The sanction of revocation is extremely serious and not proportionate for lesser breaches of regulation such as the non-compliance of timely form returns.

4 Sanctions Policy

- 4.1** ENTRUSTS’ policy recognises Macrory principles in that compliance is primarily obtained through a mixture of advice and incentives. The sanctions available are a vital part of ensuring effective regulation. ENTRUST is committed to the principle of ‘coaching to compliance’. However the experience below shows that an element of changing the behaviour of non-compliant organisations will have to be addressed through sanctions.
- 4.2** The sanction used in each circumstance will depend on a number of factors including the severity of the breach, the recent activity and the level of intent of the offender. The sanctions framework sets out the following:
- **Advice and Guidance:** At the lowest level of breach and when deemed appropriate, the first course of action from ENTRUST would be to undertake a programme of advice and guidance. This would be aimed at addressing the breach that had occurred and providing assurance that the organisation would now act in a compliant manner;
 - **Warning Letter:** The breach that has occurred, coupled with the recent activities of the organisation or the risk that is deemed to exist may lead to a warning letter being sent. This will outline the breach and the action that must be taken to restore compliance;

Project: My Space Our Space

Description: My Space Our Space, Battle

Supported through: Veolia Trust



Please note: This report has been submitted to HMRC and any comments will be published in due course.

- **Enforcement Letter:** If there is no resolution following the Warning Letter being sent, it is likely that an enforcement letter would be sent to the organisation in question. This is likely to outline the risks of continued non-compliance and the steps that must be taken to prevent the breach being referred to the following options;
- **Removal of Accredited Status:** If the organisation in question has received accredited status, in the case of a breach it may be deemed appropriate to remove the accredited status. ENTRUST can do this as accreditation is not formally recognised by the Regulations;
- **Notification to HMRC:** By officially reporting an organisation that has breached the Regulations to HMRC, HMRC may recover the tax credit that was claimed from the contributing landfill operator if it is a matter of non-complaint expenditure and/or use their powers of revocation;

5. Evidence of Non-Compliance

- 5.1** Evidence of non-compliance can be gained from a number of areas; returns from EB, compliance inspections, or intelligence passed to ENTRUST by a third party.
- 5.2** Less than 50% of EB have returned their Forms 4s within 28 days in the last two years. The figures for the past two years are as follows:

Year of Return	% Late
2007/2008	78.7
2008/2009	59.9

- 5.3** For EB not funded in the previous two years the return rate is very low with almost 75% of unsubmitted Forms 4s for 2008/2009, being outstanding in mid-June 2009, being attributable to these organisations.
- 5.4** From 200 compliance inspections where the data has been collected since mid 2008, information regarding returns non-compliance is as follows:

Non compliant return issue	%
Form 4 late	45
Notification of Director/Contact details not made	31.5
Form 4 incorrect	12
Form 3 late	6
Form 3 not completed	2.5
Form 7 not completed	1

5.5 Other common issues of non-compliance and potential for non-compliance found through compliance visits and the frequency of occurrence are set out in the table below:

Non compliance issues	%
Policies and procedures	42
Asset interest is not noted	17.5
No asset register	16.5
Project files not available	9.5
No project post completion monitoring	9.5

However, when these issues are raised with EB there are almost always no problems with them making the necessary operational changes, and those very few that don't will be subject to further review by ENTRUST.

6. Good Regulation

6.1 BERR (The Department for Business Enterprise and Regulatory Reform) issued the Regulators Compliance Code- Statutory Code of Practice for Regulators in December 2007. The following two paragraphs are particularly relevant:

“Regulators should ensure that their sanctions and penalties policies are consistent with the principles set out in the Macrory Review 13. This means that their sanctions and penalties policies should:

- aim to change the behaviour of the offender;
- aim to eliminate any financial gain or benefit from non-compliance;
- be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
- be proportionate to the nature of the offence and the harm caused;
- aim to restore the harm caused by regulatory non-compliance, where appropriate; and
- aim to deter future non-compliance

In accordance with the Macrory characteristics, regulators should also:

- publish an enforcement policy;
- measure outcomes not just outputs;
- justify their choice of enforcement actions year on year to interested parties;
- follow-up enforcement actions where appropriate;
- enforce in a transparent manner;
- be transparent in the way in which they apply and determine penalties; and
- avoid perverse incentives that might influence the choice of sanctioning response”

7. Benchmarking

HMRC

- 7.1** Individuals who make late personal tax returns are charged £100 and interest is charged on a daily basis until the outstanding balance is cleared.

Companies House

- 7.2** Companies who file accounts late are fined as follows:-

How late are the accounts delivered	Penalty – Private Company	Penalty - PLC
Not more than one month	£ 150	£750
More than one month but not more than three months	£375	£1500
More than three months but not more than six months	£750	£3000
More than six months	£1500	£7500

The Charity Commission

- 7.3** The Charity Commission have a duty to keep an up to date register of charities, and they indicate on their website if the annual return is overdue.

8 Consultation with EB - Procedure

8.1 ENTRUST is committed to engaging stakeholders wherever possible, to ensure that the regulation of the LCF complies with best regulatory practice. The fourth consultation exercise looked to review the Sanctions Framework in place in the LCF with a view to:

- ensuring the LCF adopts the principles laid out in the Macrory Review; and
- increasing compliance

8.2 A consultation document was published and open for twelve weeks. Responses were welcomed electronically or by post. Separately, ENTRUST held a focus group with interested stakeholders to further discuss the issues covered in the consultation. Notes taken at the focus group have been added to the official consultation responses. There were 11 responses to the consultation.

8.3 The consultation covered the following topics concerning the current Sanctions Framework and proposals to amend the sanctions available:

- The current LCF Sanctions Framework;
- Publicising organisations that did not fulfil the Regulatory Requirements;
- Adoption of an administrative penalty system (e.g. fines);
- Suitability of current revocation procedure; and
- Alternative sanctions and other areas to consider

9 Analysis of Consultation Responses

9.1 The current LCF Sanctions Framework

9.1.1 Stakeholders were asked whether they felt the current sanctions in use, as outlined in Section 4.2 of this report, could be improved and were invited to suggest improvements to be made.

9.1.2 The majority of respondents advised that the sanctions in use in the LCF could be improved, both in terms of the sanctions themselves and their application.

Project: Reserve improvements at Sandwell.

Description: Enhancing access to wildlife.

Supported through: *Ibstock Cory Environmental Trust.*



9.1.3 It was suggested that efforts should be made to remove those enrolled organisations that either hold no LCF monies or do not intend to be actively applying for funding. This would benefit the LCF by:

- Improving statistic collation and accuracy; and
- Allowing the regulator to concentrate on those organisations that are active and/or hold LCF monies.

9.1.4 This removal could be undertaken through a simpler option than the full revocation procedure. It was also proposed that enrolment could be simply 'rescinded' on organisations that do not report by a required date. This would not prohibit these organisations from re-enrolling in the future.

9.1.5 It was suggested that terminology be agreed to differentiate between those organisations that voluntarily seek to leave the LCF and those that are forcibly removed.

9.1.6 Concern was also raised regarding the length of time taken to initiate the sanctions in question. It was stressed by respondents that to ensure sanctions were used effectively, the sanctions process must begin as soon as the breach is identified by the Regulator.

9.2 Publicising Organisations that did not fulfil their Regulatory Requirements

9.2.1 Opinion was mixed amongst stakeholders as to whether it would be appropriate to publicise those organisations that did not fulfil their regulatory requirements.

9.2.2 Half the respondents were in favour of publicising organisations that breached the statutory requirements and advised that it would be an effective sanction and inducement to the stakeholder community at large to comply with the regulatory requirements.

9.2.3 The other half of respondents expressed concern regarding the implementation of this sanction. This was mainly due to the fact that a large number of EB are operated by individuals on a purely voluntary basis. On the occasion that a breach occurs, it is often due to lack of knowledge or resource to undertake the statutory requirements.

9.2.4 Concern centred on the fact that the instant publication of an organisation for breaching a statutory requirement would not take account of any mitigating circumstances that may have lead to the breach. Ultimately there was concern that the sanction of publicising an organisation would involve damaging the reputations of organisations when the sanction is not an appropriate or reasonable response.

9.2.5 It was also stressed by stakeholders that by publishing an organisation in breach of the regulations there is a risk of tarnishing that organisation and every project it has undertaken. As a result, it is imperative that any breach is unambiguous and the sanction is defined as appropriate and justified.

9.2.6 Based on the responses received, the majority of respondents would support the introduction of this sanction providing the Regulator was able to confirm it would only be used in appropriate cases with an ability to take account of mitigating circumstances. This was considered and agreed by the ENTRUST Board in June 2009.

9.2.7 It is also important to consider any negative publicity to the LCF as a whole that could develop through publishing a large number of organisations as ‘not fulfilling their statutory requirement’.

9.3 Adoption of an Administrative Penalty System (e.g. fines)

9.3.1 The majority of respondents advised that they did not consider the introduction of an administrative penalty system, such as fines, to be a suitable sanction. This was largely due to the not-for-profit nature of the LCF and the fact that enrolled EB usually operate on a voluntary basis. Concern was raised regarding who would receive the fines and what the money would be used for.

9.3.2 Amongst the minority of respondents that felt the establishment of the fines process would be justified, the following points were outlined as requirements:

- The statutory requirements to be reasonable;
- An early warning process to be established – to make stakeholders aware of the risk of fines;
- The number of offences to be taken into consideration;
- Mitigating circumstances taken into account via a right of appeal;
- If a DEB, the donor landfill operator would be notified;
- Confirmation of who would receive the proceeds of fines and how it would be used;
- Allowance for payment of fines to be considered compliant expenditure under the LCF; and
- The fines proportionate to the resources of the organisation rather than to a standard level.

9.3.3 It was argued that a system of fines was only appropriate when a breach could be confirmed as having taken place with intent by the organisation, as opposed to carelessness or inexperience. This ultimately refers back to the stakeholder request that any sanction should only be used when it can be justified as reasonable or appropriate, in line with the principles of the Macrory Review.

- 9.3.4** Examples of when an financial penalty sanction would not be considered to be appropriate are on a single project EB which has secured the money required to undertake a project and the imposition of a fine would risk the non completion of the project itself, and when the breach is caused through change of staff in an EB and therefore lack of knowledge of processes or requirements.

9.4 Suitability of Current Revocation Procedure

- 9.4.1** At present, when an organisation is forcibly revoked from the LCF for breach of Regulations, any individual connected with the management of the organisation is prohibited from being involved in the management of any other enrolled organisations in the future.
- 9.4.2** This consultation sought to confirm whether stakeholders considered this to be an appropriate sanction and whether any changes should be made.
- 9.4.3** Respondents advised that if the severity of a breach was considered to be justifiable, this sanction was appropriate and acted as a strong incentive to operate in accordance with the governing Regulations.
- 9.4.4** This sanction was well supported by stakeholders in part due to the fact that it was very well established and therefore publicised to organisations currently enrolled and those in the process of becoming enrolled.
- 9.4.5** A significant point raised through the consultative process was that this sanction should only be used when there was confirmation that the members of the Management Committee were aware of the breach in question. It is not considered reasonable for an individual to be prevented from controlling any EB in the future if there is any doubt as to whether they were aware of the breach, either directly or through systems in place, and therefore can be held responsible for not addressing the issue that resulted in the revocation.
- 9.4.6** As advised by respondents, this sanction by its nature can only be considered to be used as a last resort.

Project: Aberlleiniog Castle, Anglesey.

Description: Building restoration and managing and improving access to the surrounding woodland.

Supported through: Menter Mon.



9.5 Alternative Sanctions and Other Areas to Consider

- 9.5.1** Asked whether they felt the Regulator operated its sanctions toolkit with sufficient justification and transparency, respondents advised that there was so little experience of the sanctions being used, it was difficult to say.
- 9.5.2** Reviewing the responses received, it is cited by a number of respondents that the sanctions framework and the process whereby the breaches are managed and resolved requires further publication. Publishing an annual report of compliance issues and breaches committed by stakeholders would allow the regulator to demonstrate transparency and justification to stakeholders. This is already done in ENTRUST's annual report.
- 9.5.3** Separately, it was argued that in the time from identification of the breach to the resolution of the issue, the regulated organisation in question was at risk of bringing the LCF into disrepute through breaches of the governing Regulations. This is an added incentive to ensure sanctions are pursued effectively and quickly.
- 9.5.4** With regards to alternative sanctions that should be considered, the following points were suggested by stakeholders:
- More frequent auditing for repeat offenders - An incentive to resolve breaches and to allow the Regulator to be aware of issues from a 'high-risk' organisation. As breaches are recognised in the risk model this is already addressed;
 - Mandatory training in the case of breaches - If an organisation is claiming not to be aware of the requirements to remain compliant, an option is to require that organisation to undergo a training course in the areas that have resulted in the current breach. The training strategy highlights some of the breaches, and is a key tool in coaching to compliance;
 - A program of targets to target compliance - Outlining a series of targets to compliance over time, the program could be considered to be a sanction. This again, would work with any inexperience or 'knowledge gap' that exists at the regulated organisation. In effect the compliance reports adopt this approach which changes being expected where procedures are deemed inadequate;
 - Additional supervision, for which the transgressing body must meet full ENTRUST costs - Increased contact, in the form of visits or reports submitted to the Regulator to provide assurance of compliance;

- Notify all members of the Management Committee directly of the breach through the warning letter - The implications of this are twofold – ensuring the management committee know the details of the breach and also that it is addressed at the highest possible level; and
- Notify an EB funders in cases where a breach occurs - Whether the organisation in question is funded by a LO or an EB, a sanction could be for the regulator to advise the funder of the issues encountered.

9.5.5 With regards to the last suggestion concerning informing the funder in the case of a breach, discussion circulated on this point through the consultation responses and subsequently at the focus group. Currently there is no routine contact between the Regulator and the funding LO. If this sanction was introduced, stakeholders advised that this would act as a strong incentive to comply with the statutory requirements and certainly resolve any issues that were found to be in breach. This is addressed in the recommendations.

9.5.6 A number of other points were suggested by stakeholders through the consultation responses to improve the sanctions regime in place in the LCF. This included the proposal of a rating system that provided information to any possible funders of the regulator's current involvement with an EB. This would provide information regarding the compliance of an EB to those organisations that are considering providing funding. This would ensure that the funding is awarded to organisations that are not in breach of the governing regulations.

9.5.7 It was advised by a couple of respondents that caution should be used in advertising 'Removal of Accredited status' as a sanction, as it depends on an organisation having achieved accredited status to be used. At present there are relatively few accredited EB and this sanction could be interpreted as an incentive not to pursue accredited status.

Project: Endcliffe Park Playground, Sheffield.

Description: Creation of a visually pleasing and physically challenging playground that caters for children of all abilities. Located in a popular Sheffield park, the new equipment replaces older pieces.

Supported through: Veolia Trust



10 Recommendations

- 10.1** ENTRUST needs to ensure its sanctions framework is in accordance with best practice and that it reduces non-compliance. One of the strongest incentives for compliance mentioned by stakeholders would be reports back to the LO of non-compliance.
- 10.2** There is support for naming and shaming as an appropriate sanction, and for reporting non-compliant EB to funding LO.
- 10.3** Recommendation 1: ENTRUST implements naming and shaming for non-compliance. This naming and shaming should be by ENTRUST, and should be to anyone via the ENTRUST website, and to funding LO in respect of non-complaint EB.
- 11** Fining follows the example of other statutory returns such as personal tax returns and company accounts. It would not be popular with EB, but this is hardly surprising, but there was some support albeit with qualifications. The very high level of non-compliance with the Form 4 is set out in paragraph 5.2. The comments made by EB in consultation that special circumstance might apply for small EB or when EB change staff, and similar comments made to ENTRUST staff by EB shows that very significant action needs to be taken to emphasise that Form 4 returns should be treated no differently than other statutory returns required. A fine for late submission in line with other statutory returns would seem appropriate. Given that small EB and often unfunded EB are the worst offenders, and all EB are charitable organisations a low level fine of £100 would be appropriate in the first instance for a late return of the statutory Form 4.
- 11.1** Recommendation 2: A fine of £100 would be appropriate in the first instance for late submission of the Form 4.
- 12** Consideration needs to be given to ensuring compliance with other returns. It is recommended that this is considered in the light of experience of fining for Form 4s, as this may have an effect on the return of other forms.
- 12.1** Recommendation 3: The extension of fining to the late return of other forms should be considered in the light of experience of fining for Form 4s.

Project: McTaggart Leisure Centre, Bowmore, Isle of Islay, Argyll & Bute.

Description: To utilise waste energy from Bowmore Distillery to heat the community swimming pool.

Supported through: SCORE.



- 13** Given the number of errors in Form 4s a decision would need to be made whether a fine would apply if the form is in on time but incorrect. It is recommended that this is not done in the first year, but a review is held in the light of experience in the first year.
- 13.1** Recommendation 4: Consideration is given to the extension of fining to the submission of incorrect form 4s in the light of experience.
- 14** A review of the impact of fining could then consider if there should be a scaled set of fees depending on the size of the EB. If larger EB do show a less marked improvement in compliance compared to small EB it might be because the level of fine is not significant enough to change behaviour.
- 14.1** Recommendation 5: Consideration is given to a scaled set of fees depending on the size of the EB, if justified by a review of the impact.
- 15** There will be some EB who default on their fine and a decision will need to be taken as to how these should be managed. It would seem appropriate to revoke EB who have no funds and do not pay their fine within 6 months of it being issued, as it is likely that they are dormant and ENTRUST would spend a disproportionate amount of time in trying to bring them to compliance. If ENTRUST has the power to compulsorily revoke these organisations and HMRC were appointed as the body to hear any appeal this may resolve this issue.
- 15.1** Recommendation 6: ENTRUST is given the power to revoke EB who have no funds and do not pay their fine within 6 months of it being issued, and HMRC would hear any appeal.
- 16** For EB who do have funds and do not pay fines ENTRUST could take action against the EB. Alternatively Directors of the EB could be made to have personal responsibility. It is recommended that there is further discussion with HMRC on this point.
- 16.1** Recommendation 7: There is further discussion with HMRC on how EB who have funds and do not pay their fines are treated.
- 17** The EB comments regarding the need to ensure EB are fully aware of the sanctions framework and any changes agreed needs to be communicated through bulletins, and be the subject of training in the training strategy.
- 17.1** Recommendation 8: To ensure EB are fully aware of the sanctions framework and any changes agreed communication needs to be through ENTRUST e-bulletins, and training events.

18 Impact Assessment

18.1 EB

- 18.1.1** It is not possible to ascertain what the introduction of naming and shaming and a fine will be on EB. It can be anticipated that a fine which bites on smaller EB will have some affect on returns. Smaller EB may need to change their working practices to ensure that they can meet the deadline in order to avoid naming and shaming and a fine.

18.2 ENTRUST

- 18.2.1** ENTRUST will need to ensure there is absolute certainty of information before implementing the sanctions suggested.
- 18.2.3** If ENTRUST implements a fine at the level of £100, it is likely that the income would be required to fund the costs of issuing the fines, chasing up payment, and reporting to HMRC.



Project:Whitchurch Well

Description:Restoration of historic well head.

Supported through:Trust for Oxfordshire's Environment

A Summary of the Consultation Paper and Focus Group Responses.

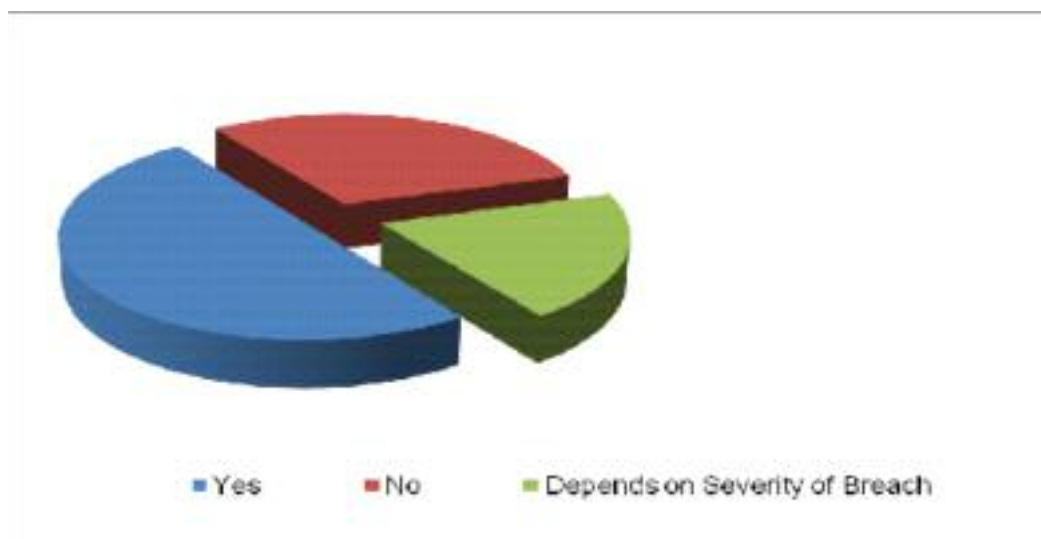
- 1 Do you feel that the sanctions in use in the LCF could be improved? If so, how?**
 - 1.1** The majority of respondents considered that sanctions in use in the LCF could be improved. This was in terms of the range of sanctions available to the Regulator and their application.
 - 1.2** It was felt that at present, the regulator was currently restricted through a number of reasons:
 - the “loose” nature of the 1996 Act as written;
 - the adverse impact this had on compiling the Regulations empowering ENTRUST;
 - the sharing of “sanctions responsibility” with HMRC;
 - the potential risks and costs of litigation and fear of judicial reviews brought about; and
 - by the defects in the original 1996 Act undermining ENTRUST powers.
 - 1.3** It was stressed that the terminology used through the application of sanctions must be clarified to ensure that, for instance, ‘Revocation’ is separately interpreted with regards to the organisations that voluntarily leave the LCF and those that are forcibly revoked by the Regulator.
 - 1.4** A respondent advised that one significant step to simplify the regulation of the LCF would be to remove the currently enrolled EB that were not actively receiving and spending LCF monies. This would allow the Regulator to concentrate on those organisations with funds and activity.
 - 1.5** It was proposed that this simplification could be achieved through the removal of those organisations that did not submit an Annual Return by a required date.
 - 1.6** Rather than having these organisations officially revoked from the LCF, it was recommended that the possibility of ‘rescinding the enrolment’ of these organisations should be explored. This would require all organisations to, in effect, renew their enrolment through returning the forms.
 - 1.7** Concern was raised not at the range of sanctions available, but the speed with which they are used by the Regulator. It was stressed by a couple of respondents that the sanctions need to come into force as soon as a breach is identified.
 - 1.8** It was reported by two respondents that the present sanctions are considered to be clear, fair and attainable.

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2 Do you feel it could be appropriate to publicise those organisations that did not fulfil their regulatory requirements? If not, why not?

2.1 The responses received from respondents with regards to whether it is appropriate to publicise organisations failing to fulfil their requirements is outlined in Figure 1 below

Figure 1: The percentage of respondents that felt it was appropriate to publish organisations failing to fulfil their regulatory requirements.



2.1.1 As outlined in Figure 1, half of the stakeholders responding in the consultation agreed that publicising those organisations that failed to meet their regulatory requirements was appropriate. Approximately 30% advised that it was not appropriate, with the remainder advising that it would depend on the severity of the breach in question;

2.1.2 Of those respondents that did not feel it was appropriate to publish the non-compliant organisations, it was generally accepted that if the list of transgressions was published anonymously, i.e. without the name of the offending organisations, then it would act as useful guidance to the stakeholder community; and

2.1.3 As an argument against the publishing of bodies that have breached their regulatory requirements, it was stressed that in the case of inexperience or staff turnover, a breach may result. In these cases it was argued to be inappropriate to publicise the breach to all stakeholders.

2.1.4 A respondent advised that they did not support publicity until the stage of revocation. It is important to be aware of the potential damage to the LCF as a whole if many breaches are publicised.

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2.1.5 It was strongly stressed by the majority of respondents that publicising the breach should not be used as a generic enforcement tool but should only be used when it is considered to be an appropriate and reasonable response. There is more support from stakeholders for the use of the publicity option in cases involving a severe breach. This again refers to the required appropriate and proportionate usage of the sanctions.

2.1.6 One stakeholder advised that if the system of publicising those in breach of the Regulations were to be adopted and used on a large funder of LCF projects, it would tarnish worthwhile, effective projects that are undertaken by the same funder.

3 Would you support a proposal to operate an administrative penalty system (e.g. fines) for organisations that fail to meet their statutory reporting requirements? If not, why not?

3.1 It was stressed that a number of established parameters would have to be in place to confirm that the fines system could be considered to be reasonable. The following points were raised by respondents.

- Reporting Requirements to be reasonable;
- Early Warning Process;
- Number of offences to be taken into consideration;
- Mitigating circumstances taken into account via a right of appeal;
- If a DEB, the donor Landfill Operator to be notified;
- Confirmation of who would receive the fines and how it would be used;
- Allowance for payment of fines to be considered compliant expenditure under the LCF; and
- The fines proportionate to the resources of the organisation rather than to a standard level.

3.2 The majority of respondents advised that they did not consider the imposing of fines to be an appropriate sanction. A number of arguments were made against the introduction of a system of administrative penalties, including the fact that the fines would ultimately be paid using LCF monies and therefore would not benefit the communities for whom the money is held.

3.3 This was stressed due to the fact that EB often operate on a voluntary basis or have charitable status. In these cases a breach will usually be caused by inexperience or carelessness, as opposed to malice. This would be an unnecessary additional burden on the individuals running the organisation.

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- 3.4** One respondent advised that in the case of a single project EB which had already entered into a contract to undertake works, additional unforeseen expenditure to pay an administrative fine may undermine the whole organisation and put the successful completion of the project at risk.
- 3.5** Another respondent advised that while a financial penalty such as a fine may provide an inducement to remain compliant, a more effective method may be to rescind the enrolment of the organisation in question.
- 4 One sanction currently available is the removal of an organisation's status as an EB (i.e. being revoked), preventing the directors of the organisation from being involved in the management of other current or future enrolled organisations. Do you feel this is an appropriate sanction?**
- 4.1** Again, respondents stressed that the appropriateness and suitability of this sanction depended on whether the breach in question justified its use. In each case confirmation was sought from respondents that the breach would be individually assessed when considering the most appropriate sanction.
- 4.2** There was considerable support for this sanction, due in part to the fact that it was well publicised to organisations upon joining the LCF and that preventing directors revoked from the LCF from being involved again in the future benefitted the LCF as a whole.
- 4.3** A number of stakeholders expressed concern if this sanction, when an organisation is revoked from the LCF and the directors are prohibited from being involved in the future, were to be used without sufficient justification and warning to the EB. Providing these were met, it was argued that the sanction could be justified.
- 4.4** This was underlined further by a respondent that suggested this sanction can only be justified when used as the last resort and when all other sanctions have been exhausted. This sanction is not suitable for what could be considered to be 'lesser' breaches of the Regulations
- 4.5** One point raised argued that this sanction should only be used if it can be shown that the board of the EB in question were aware of the issue that led to the sanction.
- 5 Do you feel that entrust operates its sanctions toolkit with sufficient justification and transparency?**
- 5.1** Stakeholders advised that they do not have experience of the sanctions toolkit being used except only at the lowest level. Therefore it is difficult to comment on the justification and transparency used by ENTRUST.

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5.2 ENTRUST is perceived by stakeholders to be sometimes slow in taking early remedial action.

5.3 Stakeholders highlighted the fact that ENTRUST's sanctions procedure and framework needs to be better advertised. This would allow the regulator to demonstrate transparency and justification.

5.4 It was also suggested that examples should be publicised of breaches taking place and the sanction that resulted. This would illustrate the sanctions process in action to stakeholders.

5.5 The sanctions used must be specific on the action required and the timescales must be reasonable.

6 In your opinion, what other sanctions should be included in the current set?

6.1 The following points were suggested by stakeholders:

- More frequent auditing for repeat offenders;
- Mandatory training in the case of breaches;
- A program of targets to target compliance;
- Additional supervision, for which the transgressing body must meet full ENTRUST costs;
- Notify an EB funders in cases where a breach occurs; and
- Notify all members of the management committee directly of the breach.

6.2 It was argued by a respondent that the current set of sanctions should be used with greater speed to revoke organisations that are at risk of bringing the LCF into disrepute through breaches of the governing Regulations.

6.3 Raised through the consultation responses and also at the focus group, was the principle of informing a contributing Landfill operator or DEB of an organisation's breach. This would act to advise the funder that the organisation to which they were contributing was subject to sanctions from the Regulator.

6.4 It was suggested by one respondent that the contributing Landfill operator is advised at the present 'Enforcement Letter' stage.

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- 7 Please outline any other points/suggestions you feel should be considered in ENTRUST's review of the LCF sanctions framework. this could include experiences with other regulatory bodies under different regimes.**
- 7.1** It was proposed that a 'status rating' system could be employed which would allow EB to be identified that are either not fit for purpose or currently failing to meet the statutory requirements. This would provide added assurance to Landfill Operators and funding EB. Reviewing the rating of an organisation before agreeing to provide funding would assist in ensuring that the LCF monies are managed by those EB that are not subject to sanctions within the LCF.
- 7.2** A key point from the consultation responses is the requirement for transparency and that no sanction should come as a surprise to an EB. This therefore requires the sanctions process to be well publicised and the appropriate warnings given, before the imposition of sanctions.
- 7.3** It was suggested that an annual report be published by ENTRUST outlining breaches in good practice. This would act as a guide to ensure other organisations do not make the same mistakes.
- 7.4** It was also suggested that ENTRUST publish a toolkit of policies and procedures to be applied by EB managing LCF monies. These would outline the requirements of the Regulations and therefore act to reduce the requirement for sanctions.
- 7.5** Caution should be exercised with regards to using 'Removal of Accredited Status' as a sanction. At present there are relatively few accredited EB and this sanction could be interpreted as an incentive not to pursue Accredited status.

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