

**Consider a response to Defra's Financial Administrative Penalty advice.**

Background

Tim Robbins wrote to Defra in 2017 seeking clarification on whether the Authority could use the monies received from accepted Financial Administrative Penalties (FAP) to offset the legal costs incurred during the investigation. On 3<sup>rd</sup> May 2018, Defra responded and confirmed that all monies collected via FAP payments by the Authority should be paid into the Consolidated Fund under section 1 Civil List Act 1952.

This is disappointing but it should not come as a shock given this matter was recorded in Defra's report presented to Parliament in March 2015 entitled 'Inshore Fisheries and Conservation Authorities – Conduct of Operation 2010-2014'. In the report, paragraphs 43-45, addresses the implication of The Sea Fishing (Penalty Notices) (England) Order 2011 on IFCA's. The report at paragraph 44 recognised that the IFCA's would not be able to recover costs as they would following successful prosecution in Court. It was also recognised that the standard of evidence for offering a FAP must be as good as any prosecution taken through the Courts.

In addition, the decision making process taken by the Authority and CIFCA is that all such investigations are independently assessed under the Code for Crown Prosecutors by the Authority's prosecuting agent. An independent assessment of whether the evidential test and public interest test are satisfied is undertaken. This generates a cost to the Authority of between £300 and £500.

Where the Authority undertakes compliance activity, it works in accordance with the Hampton Principles of Better Regulation as set out in the Regulators' Compliance Code and the Legislative and Regulatory Reform Act 2006 (as amended). In carrying out its functions, the Authority will ensure, *inter alia*, that its actions are consistent, in that it should make similar (but not necessarily the same) decisions about activity in similar circumstances, in accordance with its delegated responsibilities, statutory objective and guidance.

The FAP scheme was introduced to provide a further alternative to the Authority when considering how to dispose of cases. The FAP scheme also benefited the offender. The acceptance of a FAP does not give the offender a criminal record. If there are multiple offenders, different owner and master, then the penalty only needs to be paid by either the owner or the master. If there is an admission of guilt and the FAP is accepted it also removes the need for a prolonged and more expensive Court process (for both sides).

If the FAP is not accepted the Authority will start court proceedings. If there is insufficient evidence to justify a prosecution or it is not in the public interest to institute criminal proceedings a FAP should not be issued in the first place.

The Authority has and will continue to issue simple cautions, generally where there is an admission of guilt but there has been no monetary gain from the illegal activity. Where the Authority issues a simple caution there is no way to recover the costs of the investigation.

It is clear that there is unanimous agreement among IFCA's that recovery of costs against accepted FAPs is very important and solutions should be sought.

## Options

One approach would be to prosecute more cases where the evidential test and public interest test are satisfied. The benefit of this approach is that the Authority can be awarded costs relating to the investigation by the Courts.

There are two key issues that this approach raises. Firstly, and most importantly, at the core of the Authority's enforcement work, is the fact that the way the Authority deals with offenders should be in the interests of Justice. The decision on how to deal with offenders should not be influenced by the financial impact this may have on the Authority.

The Authority's decision making process removes the risk of intellectual dishonesty where the decisions on how to dispose of cases is made on identifying the outcome which most benefits the Authority. This would occur if the choice on how to proceed was made primarily on maximising the chances of recovering the costs of the investigations

Court cases are far more expensive for both sides and one court appearance is likely to generate prosecution costs that run into many £1,000s. The Courts have been awarding substantial costs to the Authority and in most cases this has covered at least all the Authority's legal costs. However, recovery of those costs is slow and there are many cases whereby the offenders have not paid the agreed costs and the officers are pursuing these issues with the Courts along with CIFCA, which are having similar problems. Additionally, although legal costs can be covered administrative costs are almost never covered and the impact upon officer's time resources can be significant. These 'costs' therefore have to be borne by the Authority.

Another approach would be to raise the issue with Defra and seek further new Burden Money to cover these costs of IFCAs meeting their obligations under The Sea Fishing (Penalty Notices) (England) Order 2011. Although the level of financial assistance by Defra via the new burdens money route is not likely to increase, the way the money is distributed among IFCAs could be reviewed to reflect where money is most needed. Unfortunately, there was no appetite for such change in Defra when the Authority requested a review of new Burdens Money due to the imbalance it felt there was in the amount of MPA work that it needed to undertake compared to other IFCAs.

In Defra's letter it was clear that an express statutory provision could be made through an amendment to Statutory Instrument. Officers are also confident that the Authority can set out clear reasons to HM Treasury in support of the amendment. Such an approach will take more time to achieve but it is likely to be, for the reasons set out above, the most likely route to the Authority keeping receipts from FAPs. The issue that would need to be addressed if this option was chosen is that the level of some FAPs will be in excess of the costs of the investigations. The highest FAP accepted following an investigation carried out by the Authority's officers so far is £2,000 but FAPs can be issued to a maximum of £10,000. The Authority should not benefit financially from the acceptance of a FAP beyond demonstrable expenses that it incurred whilst undertaking the investigation.

It is clear that there is no easy option other than to accept that the enforcement work of the Authority will incur unrecoverable costs from investigations where a FAP is accepted.

**It is recommended that the Authority explore with DEFRA, perhaps in conjunction with CIFCA, whether an amendment to The Sea Fishing (Penalty Notices) (England) Order 2011 would deliver the outcome the Authority seeks.**