

1.3 Enforcement by Environmental Protection

Executive Summary

- Environmental Protection benefits from a ten year history of developing and undertaking enforcement.
- Environmental Protection has defined and agreed enforcement policies and procedures that ensure transparency and consistency.
- Detailed monitoring and recording system for all pollution incidents.
- 100% success rate in prosecution cases.

1. Overview of enforcement by Environmental Protection

The Planning and Environment Department recognises that securing compliance with the various laws that Environmental Protection administers and using enforcement powers including prosecution is an important part of protecting the Island's environment.

Enforcement refers to the use of appropriate statutory powers to safeguard the Island's natural environment and resources. The natural environment includes the flora and fauna that depend upon it and their habitats.

Environmental Protection achieves this by:

- Ensuring that preventative or remedial action is taken expeditiously to protect the natural environment.
- Securing compliance with a regulatory regime.
- Providing, through the Courts, appropriate sanctions for criminal offences.

2. Legislation

2.1 Laws administered by Environmental Protection

Environmental Protection administers and enforces the following legislation:

- i. Weeds (Jersey) Law, 1961
- ii. Water (Jersey) Law 1972, as amended
- iii. Pesticides (Jersey) Law, 1991
- iv. Water Pollution (Jersey) Law, 2000
- v. Plant Health (Jersey) Law, 2003
- vi. Waste Management (Jersey) Law, 2005
- vii. Water Resources (Jersey) Law, 2006

Associated legislation administered by other sections within the Planning and Environment Division and other States of Jersey Department is given in Section 1.1 An overview of Environmental Protection .

2.2 The Water Pollution (Jersey) Law 2000

The most pertinent legislation to the regulation and monitoring of marine and coastal waters is the Water Pollution (Jersey) Law 2000. The Law provides for the control of pollution in Island waters and implements provisions of the OSPAR Convention for the protection of the marine environment of the North-East Atlantic.

This Law reflects the approach to water pollution control and prevention adopted in all Member States of the European Union.

The Law contains two important definitions:

‘Controlled waters’ are the Island’s waters which need to be protected from pollution. They are the territorial seas of the Island, coastal waters such as bays and inlets, natural and artificial inland waters, such as ponds, reservoirs, streams and lavoirs, and groundwater. The protection is also extended to the foreshore, the bottoms, beds and channels of inland waters and surface water sewers.

‘Pollution’ is defined in two parts. First, it has its ordinary meaning, which includes the introduction into controlled waters of any poisonous substance.

It also has an extended meaning, as defined in the OSPAR Convention. This extended definition covers the introduction into controlled waters, directly or indirectly, of any substance or energy that results or is likely to result in a hazard to human health, in harm to living resources or aquatic ecosystems, in damage to amenities or interference with legitimate use of controlled waters. This would cover the introduction into controlled waters of any substance or energy that contributes to pollution, such as a substance that combines chemically with something else in the water to cause pollution.

It should be noted, however, that this Law only ‘bites’ where the introduction of a substance or energy into ‘controlled waters’ causes or would cause a problem. It is not a Law to control discharges per se, but to protect the quality of the receiving waters.

3. Enforcement policies and guidance documents

Environmental Protection operates its enforcement activity to agreed approaches and standards as defined within policy documents. These documents set out the general principles which Environmental Protection intends to follow in relation to enforcement of the Laws it administers and when referring cases to the Law Officers Department for potential prosecutions.

These policy documents were recently updated to take into account the extended legislation and responsibilities of Environmental Protection (including pollution prevention and control, waste management regulation, the management of water resources, drinking water quality regulation, plant protection and pesticide control). Previously these documents related solely to regulation under the Water Pollution (Jersey) Law, 2000.

The revised policy documents are currently being reviewed by the Attorney General.

These are:

- i. Enforcement and Prosecution Policy (Appendix 1)
- ii. Internal Guidance for the Implementation of the Enforcement and Prosecution Policy Relating to Environmental Protection (Appendix 2)
- iii. Code on the Decision to Recommend Prosecution- Environmental Protection (Appendix 3)

4. Enforcement procedures

4.1 Investigations manual

As well as the general policy and code documents above, Environmental Protection has developed an operational investigations manual. This provides advice and practical guidance for officers on the conduct of investigations, the procedures to be followed and the subsequent steps to be taken to achieve the appropriate level of enforcement.

The chapters include:

- i. setting up an investigation
- ii. notebooks
- iii. general power of entry and investigation
- iv. police procedures and criminal evidence law and regulation of investigatory practises law
- v. evidence guide
- vi. the preparation of witness statements
- vii. interviewing suspects
- viii. preparing case files
- ix. legal procedures
- x. tape issue and storage
- xi. Notices/anti-pollution measures
- xii. cost recovery

4.2 Investigations procedures

Notifications of pollution incidents mainly come through the pollution hotline number tel: 709535.

Five Officers operate the 24-hour duty cover for water pollution incidents (Appendix 4- duty rota). Any calls outside of normal office hours are attended on a voluntary basis. In addition, one officer covers Waste Law infringements, whilst another covers Water Resources Law issues. Calls coming into the hotline become the responsibility of the duty officer (unless special conditions exist, for example, the polluter is known to the officer).

The voluntary 24-hour call-out includes weekend provision. The voluntary nature of the out of hours system relies on officer goodwill and has continued on this basis for more than ten years. The office hours for reporting incidents is 8.30am-5.00pm. Outside of this time calls are relayed to an officers at home via the Department's Meteorological Office.

Environmental Protection work closely with external stakeholders such as the States of Jersey Fire and Rescue Service, Sates of Jersey Airport, Jersey Water, Jersey Harbours etc and pollution incidents are also reported to the duty officer via this route of communication.

Once in receipt of an incident report or phonecall the duty officer firstly undertakes a desk study. Knowledge of any historic pollution incidents and the location of receptors (such as registered/licensed boreholes and wells in the vicinity, or surface water courses) helps to inform the officer prior to attending the incident.

The officer then uses a fully equipped 4x4 land rover to attend the incident. A trailer with more 'heavy duty' pollution prevention equipment is available. The officer will liaise with other States of Jersey emergency services/departments as required.

For example, a boat which has sunk will require harbours involvement, and pollution to a beach will necessitate tourism and health protection to be notified (amongst others).

Protocols exist for taking of, and submission to the States of Jersey Official Analyst of samples that may be required as evidence (including use of a chain of custody form – Appendix 6).

Officers discuss incidents during team meetings and are required to discuss and sign-off incidents after completion (see Appendix 5, for example of polrep report for signing off). This helps ensure consistency of enforcement approach (for example; general advice letter through to prosecution).

2. Reporting

All water pollution, waste and water resource law incidents reported to Environmental Protection are recorded within a 'polrep' database that has been developed and enhanced over the years by the IT section of the States of Jersey. The database is specific to the needs of Environmental Protection and has streamlined the recording and reporting of information.

The number, type and category of incidents are closely monitored so that preventative action can be taken (for example, targeted areas of pollution prevention advice through groups such as the oil care group).

The number, type and category of pollution incidents are reported annually each year in the States of Jersey web site and within the statistical document 'Jersey in Figures'. The database is also used for searches and information requests for property transactions, housing development and Environmental Impact Assessments etc.

Environmental Protection has developed spatial mapping layers on GIS so that pollution incidents can be displayed across the Island. Thus, if a large pollution incident is reported it can be plotted on a map alongside important receptors (such as surface waters drains, boreholes, streams etc). Equally pollution noted in the sea or stream can be traced back to its source.

Environmental Protection has developed a reporting system to the Attorney General. Each quarter a separate report of pollution incidents/ waste and water infringements caused by States of Jersey departments is forwarded. In this way, assurance is provided that Environmental Protection administers its Laws to the States of Jersey Departments and the public in a consistent manner.

A covering letter to the Attorney General accompanies the report by which officers can clarify or ask advice regarding enforcement approaches (for example, prosecution advice following exceedences of the discharge permit operated by the sewage treatment works).

3. Training

Environmental Protection officers must have an honours degree in an Environmental discipline or similar. They must also be graduate or full members of a Chartered society (either Chartered Institute for Water and Environmental Management, CIWEM or the Chartered Institute for Waste Management, CIWM)

Environmental Protection officers are trained in enforcement skills and techniques.

Training includes:

- i. fulfilment of training progression criteria that include providing evidence of competencies in witness skills, interviewing under caution and case file preparation
- ii. a defined enforcement competency addressed during annual and six-monthly PR&As
- iii. cross-team working for incidents where case files need to be developed
- iv. regular discussion, training with the Law Officers Department, other States of Jersey regulatory departments (for example, the Planning enforcement team)
- v. regular team updates and practise sessions among the team
- vi. attendance of 'witness skills' and 'interviewing techniques' training courses run by the States of Jersey
- vii. attendance at 'enforcement techniques course' run by the State of Jersey

Officers from Environmental Protection provide advice to other sections within Planning and Environment to assist with their case file preparation.

4. Budget, manpower and resources considerations

The budget (excluding manpower) for pollution control is £14,000. This includes lease/fuel for the pollution control vehicle, pollution control material (for example, absorbent mats) and a small contingency for any initial response to a large pollution incident where the polluter is unidentifiable and the department needs to instigate immediate action to limit the pollution. However, the current budget does not contain any provision for the Department to take action under Articles 36 and 37 of the Water Pollution Law (WPL), following the issue of a Statutory Notice in the case of a major pollution incident or where a significant risk of pollution is identified.

Costs for pollution incidents that use a large quantity of pollution materials are sought from the polluter, where possible, in accordance with Article 6 of the WPL.

5. Constraints

The out of hours call out service is operated voluntarily by officers as no budget is available. Out-of-hours calls relies on officer goodwill and an officer being available. Funding for the call-out system has been investigated however no solution has been found.

Officers only attend large incidents out of hours. However, the size and impact is often difficult to gauge over the phone and most incidents are attended. There is a risk that a large pollution incident may go unattended if an officer cannot be contacted due to their being no formal rota in place.

Only one officer is available to attend waste Law infringements. Once waste licenses are approved under the Waste Management (Jersey) Law 2005 work in this area is likely to substantially increase.

As previously mentioned, the current budget does not contain any provision for the Department to take action under Articles 36 and 37, following issuing a statutory notice in the case of a major pollution incident or where a significant risk of pollution is identified.

6. Addressing of constraints by Environmental Protection

In May 2008, Environmental Protection staff undertook a business planning workshop. The purpose was to critically review and rationalise existing activities to enable cost effective protection of the Island's environment given available resources.

The workshop recognised the importance of developing and implementing environmental legislation, MoUs and EU Directives to an appropriate and consistent standard.

A driver for the workshop was the historic and necessary emphasis on top-down enforcement and regulation that was placing a strain on reducing resources and increased areas of other work within Environmental Protection.

The workshop recognised the need and importance of continued strict and consistent enforcement of environmental legislation. Education and awareness campaigns were viewed as vital to reduce the number of pollution incidents and hence the continued long-term high resource requirement by Environmental Protection.

The pollution prevention campaign has seen a small rise in the number of pollution incidents attended by officers. The section has adequately accommodated this increase. This has been possible through:

- i. the creation of a fourth category of pollution incident which allows the officer to not attend and simply write an advice letter. For example, a few litres of oil leaking onto concrete with the tank area being cleaned by the fuel company.
- ii. the use of template letters to polluters
- iii. the automation of the polrep database to allow for the automatic printing of template reports for sign-off.
- iv. regular updates to team members. This results in a consistent approach and minimal wasted time/work
- v. a team approach to prosecution cases, whereby team members assist their colleagues thus also gaining experience/practise.

Appendix 1 Enforcement and Prosecution Policy

Minister for Planning and Environment

Planning and Environment Department, Environmental Protection

Enforcement and Prosecution Policy

April 2010

1. Introduction

- 1.1 The aim of Environmental Protection is to safeguard the Island's natural environment and resources, whilst contributing to the future well-being and economy of Jersey and its trading partners. The natural environment includes the flora and fauna that depend upon it and their habitats.
- 1.2 Environmental Protection will achieve much of this through education and awareness programmes, providing advice and by regulating the activities of others.
- 1.3 Securing compliance with the various laws that Environmental Protection administers and using enforcement powers including prosecution is an important part of achieving this aim.
- 1.4 The functions of Environmental Protection are extensive and diverse. They include pollution prevention and control, waste management regulation, the management of water resources, drinking water quality regulation, plant protection and pesticide control.
- 1.5 To ensure effective and consistent environmental protection and regulation, Environmental Protection liaises and consults with other organisations including; Health Protection, Transport and Technical Services, Jersey Water and other relevant non-governmental organizations. Environmental Protection will implement Memoranda of Understandings where considered necessary.
- 1.6 Environmental Protection regards prevention as better than cure in relation to the protection of the environment. It offers information and advice to those it regulates and seeks to ensure co-operation avoiding bureaucracy or excessive cost. It encourages individuals and businesses to put a high priority on the environment and to integrate good environmental practices into normal working methods.
- 1.7 This Policy document sets out the general principles which Environmental Protection intends to follow in relation to enforcement of the laws it administers and when referring cases to the Law Officers Department for potential prosecutions. The implementation and effectiveness of the Policy will be regularly reviewed.

2. Purpose and Methods of Enforcement

- 2.1 The primary purpose of enforcement is to ensure that preventative or remedial action is taken to protect the environment or to secure compliance with a regulatory regime. The need for enforcement may stem from an 'incident' or from a breach of a regulated activity. Although Environmental Protection expects full voluntary compliance with relevant legislative requirements, it will not hesitate to use its

enforcement and prosecution powers where it considers that to be necessary.

- 2.2 The powers available include the issue of Notices where contravention can be prevented or needs to be remedied, suspension or revocation of Licenses and Permits, variation of License or Permit conditions, the seeking of injunctions and the carrying out of remedial work. Where Environmental Protection has carried out remedial work itself, it will seek to recover the full costs incurred from those responsible.
- 3 Where a criminal offence has been committed, in addition to any other enforcement action, Environmental Protection will consider recommending a prosecution or issuing a formal written warning.

3. Principles of Enforcement

- 3.1 The Environmental Protection policy will be to apply firm but fair regulation. Underlying this policy are the principles of;
 - **proportionality** in the application of the Laws and in securing compliance
 - **consistency** of approach
 - **transparency** about how the Environmental Protection operates and what those who are being regulated may expect
 - **targeting** appropriate enforcement action.
- 3.2 In general, the concept of **proportionality** is included in much of the regulatory system through the balancing of action to protect the environment against risks and the costs involved.
- 3.3 Some incidents or breaches of regulatory requirements cause or have the potential to cause serious environmental damage; others may interfere with people's enjoyment or rights. Environmental Protection's primary objective will be to prevent harm to the environment or a hazard to human health from occurring or continuing. The enforcement action to be taken by Environmental Protection will be proportionate to the risks posed to the environment and to the seriousness of any breach of the Law.
- 3.4 **Consistency** means taking a similar approach in similar circumstances to achieve similar ends. Environmental Protection aims to achieve consistency in the advice which it tenders, its use of enforcement powers and its decisions on whether to recommend prosecution.
- 3.5 Environmental Protection recognises that **consistency** does not mean uniformity and Officers will have to use their professional skill and judgment and to take into account many variables including the scale of environmental impact, the attitudes and actions of offenders and the history of previous incidents or breaches.

- 3.6 **Transparency** is important in maintaining public confidence in EPs ability to regulate. It means helping those regulated and others to understand what is expected of them and what they can expect from Environmental Protection. It also means making clear why an Officer intends to, or has taken, enforcement action.
- 3.7 **Transparency** is integral to the role of Environmental Protection's officers and it will develop its procedures to ensure that:-
- where remedial action is required, it is clearly explained why the action is necessary and when it must be carried out.
 - where urgent action is required, a written explanation of the reasons and the actions taken or evidence removed will be given as soon as is reasonably practicable after the event.
 - a written explanation of any rights of appeal against formal enforcement action will be given at the time.
- 3.8 **Targeting** means making sure that the regulatory effort is directed primarily towards those whose activities give rise to a risk of serious environmental damage, where the risks are least well controlled or against a deliberate criminal offence. Action will be focused on those who contravene the law or those who are directly responsible for the risk and who are best placed to control it.
- 3.9 Environmental Protection has systems for prioritising regulatory effort. They include the response to complaints from members of the public, the assessment of the risks posed to the environment and the gathering and acting on information received concerning potentially illegal activities.
- 3.10 In the case of regulated businesses, management actions are important. Repeated incidents or breaches of regulatory requirements may be an indication of an unwillingness to change, or an inability to achieve sufficient control over a process and may require a review of the regulatory requirements and even additional investment. A relatively low hazard site or activity which is poorly managed may have the potential for greater risk to the environment than a higher hazard site or activity where proper control measures are in place.

4. Prosecution

- 4.1 The use of the criminal process to institute a prosecution is an important element of enforcement. It aims to punish wrongdoing, to avoid a recurrence and to act as a deterrent to others. It may be appropriate to use prosecution in conjunction with other available methods, for example, the issue of a formal notice or suspension of a permit. Where however circumstance warrant it, for example, where

there has been a flagrant and serious breach of the Law, a recommendation by Environmental Protection to the Law Officers Department for prosecution, without prior warning, may be appropriate.

- 4.2 Environmental Protection recognises that the instigation of a prosecution is a serious matter that should only be taken after full consideration of the circumstances of each individual case and of the consequences involved.
- 4.3 A prosecution will not be commenced or continued unless the Law Officers are satisfied that there is sufficient, admissible and reliable evidence that the offence has been committed, that there is a realistic prospect of conviction and that it is in the public interest to proceed (as defined by the 'Code on the Decision to Prosecute' issued to Centenier by the Attorney General).
- 4.4 Where the same conduct gives rise to the possibility of a prosecution under more than one law, the Section will liaise appropriately to ensure effective co-ordination, avoid inconsistencies and duplication.

5. Companies, Firms and Individuals

- 5.1 Criminal proceedings will be recommended only against those persons responsible for the offence.
- 5.2 Where a Company or Firm are involved, it will be the usual practice to recommend prosecution of the Company or Firm, where the offence resulted from the activity of the Company or Firm concerned.
- 5.3 However, Environmental Protection will consider any part played in the commission of the offence by the Senior Officers of that Company or Firm, including its Directors, Managers and Company Secretary. Action may be taken against such Officers (as well as the Company or Firm) where *prima facie* the offence was committed with their consent or connivance or was due to their neglect.
- 5.4 Moreover, Environmental Protection will also consider any part played in the commission of an offence by the employees of a Company or Firm (including its operatives). Action may be taken against such employees in their individual capacities (irrespective of any action taken under 5.2 and 5.3 above) where *prima facie* they were themselves culpable or were operating outside the scope of their employment (such as acting contrary to the Company/Firm's relevant procedures).

6. Penalties

- 6.1 The Laws administered by Environmental Protection give the Courts considerable scope to punish offenders including, in some cases unlimited fines and imprisonment for up to 2 years. Environmental Protection will work to raise the general awareness of the gravity of the environmental offences involved.
- 6.2 Environmental Protection will, wherever appropriate, seek to recover the costs of remediation and Court proceedings.

Appendix 2 Internal Guidance for the Implementation of the Enforcement and Prosecution Policy Relating to Environmental Protection

Planning and Environment Department

Environment Department – Environmental Protection

Internal Guidance for the Implementation of the Enforcement and Prosecution Policy Relating to Environmental Protection

May 2010

[A] INTRODUCTION

Environmental Protection's "Enforcement and Prosecution Policy" document sets out the principles on which Environmental Protection will make its enforcement and prosecution decisions. Environmental Protection's "Code on the Decision to Recommend Prosecution" in turn sets out the principles on which decisions will be made by Environmental Protection on whether or not to recommend a prosecution in a particular case.

This Guidance document:

- Explains how that Policy and Code will respectively be implemented in practice.
- Seeks to achieve a consistent approach across all Environmental Protection's enforcement activities.

[B] ENFORCEMENT

(1) The Purpose

Enforcement, for the purpose of this Guidance document, means the use of appropriate statutory powers to safeguard the Island's natural environment and resources. The natural environment includes the flora and fauna that depend upon it and their habitats.

This will be achieved by:

- Ensuring that preventative or remedial action is taken expeditiously to protect the natural environment.
- Securing compliance with a regulatory regime.
- Providing, through the Courts, appropriate sanctions for criminal offences.

(2) The Powers

Environmental Protection's powers are extensive and fall into two broad categories. Those for:

1. Prevention/remediation of harm to the natural environment -

- Access to relevant documents and records
- Provision of information
- Notice to carry out works
- Notice to remediate pollution
- Environmental Protection's powers to carry out work and recharge
- Injunctions

2. Enforcement responses to potential criminal offences-

- A recommendation for prosecution
- Warning

A "warning" consists of one or more of the following:

1. Site Advisory Notice – given 'on site' by the investigating officer and recorded either on the site inspection report or on a special form designed for the purpose (and duly acknowledged by the recipient).
2. Advisory letter – 'follow up' written advice in letter form.
3. Warning letter – 'follow up' written warning in letter form.
4. Formal Warning letter – 'follow up' written formal warning in letter form.

Other ancillary powers, which support Environmental Protection's role, include powers to enter and search land, premises and vehicles and to collect evidence for Court proceedings.

(3) The Use of Powers

Where a situation occurs which requires enforcement action, consideration must be given to the use of appropriate preventative/remedial powers to stop harm to the natural environment from continuing. If, after taking legal and other advice, it is considered that the "normal" powers available under the Law are likely to be or prove ineffective, consideration should be given to seeking an Injunction, especially where there is *severe impact* on the natural environment.

Where a *prima facie* criminal offence has also been committed, then in addition to any preventative/remedial action, one of the enforcement responses to potential criminal offences should be pursued, unless otherwise stated in this Guidance document.

The need for enforcement action can arise from 4 types of event:

- Unauthorised activity e.g. polluting controlled waters.
- Breach of the conditions of a permit or licence.
- Breach of a statutory Notice requiring or prohibiting action.
- Other infringement e.g. obstruction of an Officer or supplying false information.

(4) Notification of Remedial Action

Where *urgent* remedial action is required, the Officer concerned should:

- Explain fully the reasons for requiring the action.
- Discuss what needs to be done.
- Confirm when the action should begin and when it should be completed.
- Make clear whether the action is required to comply with the Law, or whether it is required as a matter of good practice or a combination (explaining which situation applies).
- Explain the consequences of not carrying out the action, including the possibility of further steps such as the issue of a statutory Notice and, for offences, possible prosecution.
- That "compliance" does not preclude the *possibility* of further enforcement.

A written explanation for *non-urgent* remedial action will normally be required and should always be provided if requested. It will usually be given by letter or a specially designed form, and will set out -

- What action is required to be undertaken.
- Why it is necessary.
- When it must be carried out including, where appropriate, a start and completion date.
- Whether the action is best practice and/or a legal requirement.
- The consequences of failure to take the action required, in particular any further formal action such as the issue of a statutory Notice.
- That "compliance" does not preclude the *possibility* of further enforcement.

(5) The Use of statutory Notices

Where Environmental Protection proposes to issue a statutory Notice requiring preventative or remedial work or action, the Officer concerned should:

- Discuss and explain what provisions of the Law appear to have been breached.
- Explain the reasons for the proposed Notice.
- Explain what must be done to comply with the Notice.
- If appropriate, explain 'the means' by which the action required by the Notice is to be achieved.
- Discuss what (if anything) should also be done as a matter of good practice.
- Confirm when the action required should start and be completed.
- Advise when it is intended to issue the Notice.

These discussions should be confirmed in writing if requested. Otherwise, the Officer concerned should make a note of them as part of Environmental Protection's records.

In the majority of instances, the rights of appeal to the Royal Court are set out in the statutory Notice itself. However, where they are not so set out, a written explanation of any such rights should be given when enforcement action is taken.

A written explanation of rights of appeal should:

- Explain the grounds upon which an appeal can be made.
- Include the address where notice of the appeal should be sent.
- State the time period within which the appeal should be made.
- Confirm whether or not the statutory Notice and the action required by it is suspended whilst the appeal is determined.

(6) Records

A "record" will be kept of all statutory Notices, warnings and prosecutions. In reaching a decision on the most appropriate enforcement action, consideration will be given to all previous warnings, statutory Notices, recommendations for prosecution and prosecutions brought.

(7) Obstruction of Staff

There may be occasions when enforcement staff are prevented from carrying out their duties or encounter abusive, threatening or violent behaviour. In such circumstances, the safety and well-being of the staff concerned will be the paramount consideration. In such a case, it may be appropriate to obtain police assistance with the investigation.

Where offences involving obstruction of or violence towards staff are committed, they will be dealt with in the most severe manner; prosecution being the most probable course of action.

[C] ENFORCEMENT ACTION FACTORS

The seriousness of offences under the Laws administered by Environmental Protection can vary greatly. At one end of the scale, an action could lead to severe pollution of the natural environment and thereby threaten human health and natural eco-systems. At the other end, there can be breaches of 'administrative' conditions in permits and licences e.g. failure to submit returns in the correct format, where there are no direct consequences for the natural environment. Therefore, in reaching a decision on the most appropriate enforcement action, account will be taken of *all the relevant circumstances* including:

1. Environmental Impact

The magnitude of the environmental impact can be an indicator of the degree to which the offender has failed to put in place, maintain, adhere to and/or foresee the consequences of not having suitable procedures or systems to prevent the incident. In general, the greater the impact or potential impact, the higher the probability that prosecution will be recommended.

2. Nature of Offence

The type of offence may be so serious in its nature or impact on Environmental Protection's ability to regulate effectively that it will normally be dealt with by a recommendation for prosecution.

3. Intent

Offences that are committed deliberately, recklessly or for a malicious reason will normally be dealt with by a recommendation for prosecution. On the other hand, it may be appropriate to consider lesser enforcement action where Environmental Protection is satisfied that the offence was committed unintentionally, or was the result of a genuine mistake and no or minimal environmental harm was caused.

4. Previous History

Although the action to be taken will depend upon the particular circumstances of each case, consideration should be given to the type, seriousness, number and frequency of previous enforcement action taken against the offender concerned.

For persons who have previously received written formal warnings, subsequent offences (except for minor ones) would normally be dealt with by a recommendation for prosecution.

5. Attitude of the Offender

A recommendation for prosecution will normally be pursued, where available, if the offender:

- Refused to accept alternative enforcement action.
- Made no attempt to minimise or rectify the impact or potential impact of the offence.
- Obstructed the investigations.
- Disregarded advice or formal guidance in relation to the commission of the offence.
- Has deliberately or knowingly broken the Law.
- Acted dishonestly or improperly in relation to the matter.

NB: Co-operation with Environmental Protection, prompt reporting of an incident, prompt and effective preventive / remedial action and assistance with any investigation are all factors that will be taken into account by Environmental Protection when considering what level of enforcement action is appropriate for any particular incident.

6. Deterrent Effect

Prosecution will normally be recommended if it is likely to be a necessary and effective way of preventing repetition of the offence by the offender.

Prosecution may also be recommended if it is likely to act as a deterrent to others against committing similar offences (which, individually, may have a relatively minor impact on the natural environment but which, cumulatively, over time or within a particular locality, may have a more serious impact on the natural environment or its amenity).

7. Offender's Personal Circumstances

A lesser form of enforcement action (as opposed to a prosecution) may be appropriate where there are *exceptional* relevant "personal circumstances" e.g. offender suffering from serious illness.

8. Foreseeability

Where the offence and/or its environmental consequences were predictable, but no avoiding and/or preventative measures were undertaken by the offender, a recommendation for prosecution will normally follow. However, other enforcement action may be considered if the offence:

- Occurred despite appropriate preventative measures.
- Could not reasonably have been foreseen.
- Was the result of defective machinery / equipment which could not reasonably have been known or anticipated (e.g. by a proper system of maintenance).
- Was caused by the intervention of a third party which could not have been guarded against.

Where the offence has had an environmental impact and there was a failure to adhere to the conditions of a permit or licence, statutory guidance, industry or other codes of practice or advice from Environmental Protection, prosecution will normally be recommended.

[D] Categories of enforcement action – offences

a. Categories of pollution

Category 1 (serious)

Where there has been a *serious* impact on the natural environment, then (subject to consideration of the "factors" set out in Section [C] above) a recommendation for prosecution will normally result.

Category 2 (moderate)

Where the impact has been *moderate but less serious than a category 1 offence*, then the normal course of action will be to recommend a prosecution. The ultimate decision will depend on the "weight" to be attached to the factors set out in Section [C] above, such as co-operation of the offender, remedial works undertaken and any 'history' of offending. Prosecution will, however, normally be recommended where a previous written formal warning has been given.

Category 3 (minor)

Where there has been minimal impact on the natural environment, then the issue of a written "warning" will be the normal course of action unless other circumstances make firmer action more appropriate (e.g. lack of co-operation with Environmental Protection or repeated offence).

Category 4 (no detectable impact)

Where there has been no detectable impact on the natural environment, then a written advisory letter may be the normal course of action unless other circumstances make firmer action more appropriate (e.g. lack of co-operation with Environmental Protection or repeated offence).

(b) Operating without a permit or licence

Where an activity is operated which would require a permit or licence and pollution or derogation of the natural environment occurs a recommendation for prosecution will normally be pursued. For first offences involving no or minimal impact on the natural environment, and where an application for a permit or licence is made within a reasonable timescale of the incident, a warning will be the normal course of action. However, in certain circumstances (e.g. lack of co-operation with Environmental Protection) then firmer action may be more appropriate.

NB: In cases where activities are discovered which need permits or licences and are therefore in contravention of the Law, applications should be encouraged by Environmental Protection.

(c) Breach of Conditions of permits or licences

Where the breach leads to a *serious* impact on the natural environment, then a recommendation for prosecution will normally result.

When the breach leads to a *moderate* (but less serious than above) impact on the natural environment, then the normal course of action would be to recommend prosecution. The decision will depend on the "weight" to be attached to the "factors" set out in Section [C] above such as the co-operation of the offender, remedial works undertaken by him and any 'history' of offending. Prosecution will normally be recommended where a previous written formal warning has been given.

Where a permit or licence has been breached and has resulted in *minimal* impact on the natural environment, the issue of a warning will normally be the most appropriate action, unless the circumstances make a firmer course of action necessary (e.g. repeated offence, lack of co-operation with the Section or deliberate breach).

Where a permit or licence has been breached and has resulted in *no detectable* impact on the natural environment, the issue of an advisory letter will normally be the most appropriate action, unless the circumstances make a firmer course of action necessary (e.g. repeated offence, lack of co-operation with the Section or deliberate breach).

NB: Prosecution will normally be recommended in respect of those type of breaches where the operator has had a history of non-compliance sufficient to call into question the effective management of the site/operation or to prevent effective regulation.

(d) Non-compliance with statutory Notices

Prosecution will normally be recommended for failure to comply with a statutory Notice. A lesser form of action may, however, be considered where there are *exceptional* circumstances, which have made compliance extremely difficult or even impossible.

**Appendix 3 Code on the Decision to Recommend Prosecution-
Environmental Protection**

Planning and Environment Department

Environment Department – Environmental Protection

Code on the Decision to Recommend Prosecution

- Environmental Protection

May 2010

1. Introduction

- 1.1 The decision to recommend prosecution under the Laws administered by Environmental Protection is a serious step. However, fair and effective prosecution is essential to the implementation of the Laws. A prosecution has serious implications for all involved particularly the defendant. Environmental Protection will apply this Code to ensure that it makes fair and consistent decisions before recommending prosecutions to the Attorney General or Centenier (as the case may be).
- 1.2 This Code contains important information for those who will enforce the Laws. It will assist Environmental Protection to ensure fairness and consistency of approach.

2. General Principles

- 2.1 Each case is different and must be considered on its own merits. There are, however, general principles that apply in all cases.
- 2.2 It is important that the right person is prosecuted for the correct offence and that all the relevant facts are presented to the Court.
- 2.3 In the application of this Code, Environmental Protection must be fair, independent and objective. Officers must not allow their own personal views of the ethnic or national origin, sex, religious beliefs, political views or sexual preferences of the offender or witnesses to influence their decisions. Moreover, they must not be influenced by improper or undue pressure from any source.

3. The Code Tests

- 3.1 There are two stages in any decision to prosecute. The first stage is the **evidential test**. If the case does not pass the evidential test, it cannot go ahead, no matter how important or serious it may be. Environmental Protection has a vital role to play in the collection of the necessary evidence.
- 3.2 The second stage is the **public interest test**. This will be determined by the Centenier or Crown Officer (as the case may be). In any decision by them not to prosecute, appropriate discussions will take place with Environmental Protection, before a final decision is reached.

4. The Evidential Test

- 4.1 Centeniers or Crown Officers (as the case may be) must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each defendant. They must consider what the defence's case may be and how that is likely to affect the prosecution's case.
- 4.2 A realistic prospect of conviction is an objective test. It means that a Magistrate, Jury or Bench of Jurats properly directed in accordance with the law is more likely than not to convict the defendant of the charge.
- 4.3 When deciding whether there is sufficient evidence to prosecute, Centeniers / Crown Officers will consider whether the evidence can be used in Court and is reliable. There will be cases in which the evidence does not give any cause for concern but there will be others where the evidence may not be as robust as it first appears.
- 4.4 For further information on the 'Evidence Test', the "Code on the Decision to Prosecute" issued to Centeniers by the Attorney General should be consulted.

5. The Public Interest Test

- 5.1 In 1951, Lord Shawcross (Attorney General for England) made a classic statement on public interest which has been supported by Attorneys General ever since:

"It has never been a rule in this country – I hope it never will be – that suspected criminals must automatically be the subject of prosecution"
- 5.2 The "public interest" must therefore be considered in each case where there is enough evidence to provide a realistic prospect of conviction.
- 5.3 The decision on whether to proceed with a prosecution or not on public interest grounds will be decided by the Centenier or Crown Officer (as the case may be). If the intended decision is not to proceed, discussions will take place with Environmental Protection.
- 5.4 The more serious the offence, the more likely it is that a prosecution will be needed in the public interest. For example, a prosecution is likely to be needed if a conviction is likely to result in a significant sentence, the offence was committed against a person serving the public or there is a "history" of similar offences.
- 5.5 For further information on the "Public Interest Test", the separate 'Code on the Decision to Prosecute' issued to Centeniers by the Attorney General should be consulted.

6. Power of the Attorney General to overrule a Centenier's decision

Normally, if a Centenier decides that there will not be a prosecution that is the end of the matter. However, the Attorney General is the ultimate authority in respect of all prosecutions on the Island and has the power to overrule a Centenier's decision not to prosecute, and will do so in appropriate instances.

















7. Summary

- 7.1 This Code is designed to ensure that everyone knows the principles that apply when Environmental Protection decides whether or not to recommend a prosecution.
- 7.2 By applying this Code, those Officers of Environmental Protection are assisting the criminal justice system to prosecute defendants fairly and effectively.

NB: Copies of the "Code to Centeniers" (referred to above) is issued by the Attorney General and is available from all Parish Halls, The Law Officer's Department at Morier House, St Helier JE1 1DD and the States of Jersey Police Headquarters.

Appendix 4 Example of the duty rota, August 2010

Duty Rota for August 2010

Date	Name				
Mon 2	TDF	KR	 pm	Bathing Waters	
Tues 3	SH	AS		Bathing Waters	
Wed 4	AS	SH		SSI	
Thurs 5	KR	TdF		DPPP/Dipping	
Fri 6	SH	AS		Dipping	
Mon 9	AS	AS		Bathing Waters	
Tues 10	SH	KR		Bathing Waters	
Wed 11	SH	AS		DPPP+	
Thurs 12	KR	SH	 	Dipping	
Fri 13	AS	TDF			
Mon 16	KR	KR		Bathing Waters	
Tues 17	SH	AS		Bathing Waters	
Wed 18	JR	JR		DPPP	
Thurs 19	AS	SH			
Fri 20	JR	SH			
Mon 23	JR	JR		Bathing Waters	
Tues 24	AS	KR		Bathing Waters	
Wed 25	SH	TdF		Outfalls	
Thurs 26	TdF	AS		DPPP	
Fri 27	TdF	JR	 pm  		
Mon 30	Bank Holiday				
Tues 31	SH	JR		Bathing Waters	

 TDF
 JR
 SH

 CH
 KR
 AS

Flexi
Holiday
Course
Meeting

Appendix 5 Example of a pollution report template

Pollution Incident Report

Report Number

Officer In Charge

Date Reported to EP Time Reported

Time Action Commenced

Response Time

Name / Location of Incident

Telephone Number

Mobile Number

Polluter Name / Address

Incident Type

Incident Category

Controlled Water Affected

Enforcement Action

Reason for Decision

Report Signed by

Date 1:

1:

Report Signed by

Date 2:

2:

Report Signed by

Date 3:

3:


Incident Log

Incident log follows here, including dates, times and actions, samples and photographs taken, and results.

Summary and Conclusion

Recommendation

Appendix 6 Chain of Custody Form for the States of Jersey Official Analyst

	Environmental Protection Transport Report and Chain of Custody Record	Pollution Report Number Order Number		
Matrix (Enter in Column A) 1. Surface Water 2. Ground Water 3. Sea Water 4. Leachate 5. Effluent 6. Soil 7. Other (specify in column A) Type of Sample (Enter in Column B) 1. SSi Monitoring 2. Macro Monitoring 3. Outfall Monitoring 4. Bathing Water Monitoring 5. Pollution Incident 6. Other Regulatory 7. Groundwater Monitoring 8. Crabbe Monitoring 9. Other (Specify in column B)	Samples collected by: Time _____ Date _____ Samples delivered to States of Jersey Official Analyst by: Name: _____ Signature _____ Time _____ Date _____ Samples received at States of Jersey Official Analyst by: Name: _____ Signature _____ Time _____ Date _____			
About the Samples				
Sample Reference	A (Matrix)	B (Sample Type)	*Analysis to be performed	Lab Reference & Notes

*See over for standard analysis suites

<u>Suite 1 (outfalls & WRS ssi)</u> Cod / mg/l Suspended solids / Mg/l Ammonia / mg/l (NH4) Chloride / mg/l (Cl) Nitrite / mg/l (NO2) Nitrate / mg/l (NO3) Phosphate / mg/l (P) Sulphate / mg/l (SO4) Sodium mg/l (Na) Potassium mg/l (K) Magnesium mg/l (Mg) Calcium mg/l (Ca) Total coliforms / cfu/100ml Faecal coliforms / cfu/100ml Faecal streptococci / cfu/100ml
<u>Suite 4 Bathing Water</u> Total coliforms / cfu/100ml Faecal coliforms / cfu/100ml Faecal streptococci / cfu/100ml

<u>Suite 2 (Borehole Monitoring)</u> Chloride / Mg/l (Cl) Nitrate / mg/l (NO3) Phosphate / mg/l (P) Sulphate / mg/l (SO4) Sodium mg/l (Na) Potassium mg/l (K) Magnesium mg/l (Mg) Calcium mg/l (Ca) Manganese µg/l (Mn) Iron µg/l (Fe) Total coliforms / cfu/100ml Faecal coliforms / cfu/100ml Faecal streptococci / cfu/100ml
<u>Suite 5 Drinking Water</u> Total Petroleum Hydrocarbons with a detection limit of ? 10µg/l

<u>Suite 3 (Crabbe)</u> Suspended solids mg/l COD mg/l Ammonia / mg/l (NH4) Arsenic µg/l (As) Lead µg/l (Pb)
<u>Suite 6 Surface Water for the Abstraction of Drinking Water</u> Total Petroleum Hydrocarbons with a detection limit of ? 0.2mg/l