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ICEL EPA Environmental Law Conference 2016

**ADMINISTRATIVE AND CRIMINAL
SANCTIONS – AN INTEGRATED
APPROACH**

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Key challenges

- Range of circumstances of breaches
- Range of sanctions available
- Evidence as to effect of sanctions
- Ensuring choice of sanction is not distorted by non relevant factors
- The role of independent courts/tribunals
- Issues of regulatory governance

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The Regulatory Liability Spectrum

(e.g. financial gain, environmental damage)

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Range of Sanctions

- Criminal (fines, imprisonment)
- Court imposed Publicity Orders
- Rehabilitation orders
- Administrative Financial Penalties
- Administrative Orders
 - Remediation notices
 - Enforcement notices
 - Removal of licence
- Warnings/ cautions
- Agreed undertakings between regulator and regulated body

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CRIMINAL and ADMINISTRATIVE SANCTIONS COMPARED - CANADIAN HEALTH and SAFETY

Source Brown (1992) Osgood Hall Law Journal	ONTARIO criminal	B.COLUMBIA admin. since 1979
% inspections leading to sanction	0.9%	1.8%
Average penalty	same	same
Not guilty or appeals	60%	45%
Time between violation and trial/appeal	500 days	70 days

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Guiding Principles for Environmental Sanctions

- A Sanctioning System should....
 - Aim to change behaviour
 - Aim to eliminate financial gain if applicable
 - Be responsive
 - Be proportionate
 - Help compensate or restore the harm caused if applicable
 - Deter future non-compliance

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Principles of REGULATORY GOVERNANCE

- Why it matters
- Potential for abuse
- Confidence from regulated community and public
- Extending sanction powers (including avoidance of courts) makes it doubly important
- Remove or minimize factors that distort choices
- Evaluation of effectiveness

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Core Governance Principles

- Co-ordinating Criminal and Administrative responses
- Published Enforcement Policy
- Published calculation model for administrative financial penalties
- Revenues streams
- Reports on Outputs
- Reports on Outcomes
- Appeal mechanisms including burden of proof

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OUTPUT MEASURES

- Trends
- Regional/Area variations
- Explain discrepancies
- Targets
- Procedure for choosing

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OUTCOME MEASURES

- Less easy
- Consult on options
- Be wary of becoming target driven

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Enforcement Undertakings 2016 – Producer Packaging

Company	Action taken	Donation
Balhsen	Registered with scheme Internal compliance programme	£20K Woodland Trust £19.8K Wildlife Trust
Cobell Trust	Registered with scheme New procedures & responsible person designated	£33K Woodland

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POOR PRACTICE 2008 General Office of Accounting on US EPA Performance Measures

- Overstates value of penalties by reporting penalties assessed rather than actually received
- Doesn't adjust penalties for inflation over time (undervalues past achievements)
- 3 exceptionally large penalties distorted figures
- Estimated quantities of pollutants reduces mixes up hazardous and non-hazardous

The DIFFICULT QUESTIONS

- Is it possible to prove causality?
- Is it possible to assign credit to particular functions or programmes with regulator?
- Is it possible to measure prevention?

Sparrow Character of Harms (2008)
