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Re: Ibec submission under EPA Consultation on the Agency's Draft Better Regulation Policy and Draft Compliance & Enforcement Policy

Dear Isobel,

Ibec is grateful for the opportunity to submit its views on the Environmental Protection Agency's recently published Draft Better Regulation Policy and Draft Compliance & Enforcement Policy.

In furtherance of a fair, efficient and competitive enforcement and regulation regime that balances environmental protection with cost effective compliance Ibec, through consultation with its Environment Policy Committee, offer the following observations, concerns and suggestions.

1. Views respective of both Draft Policies

Ibec members welcome the publication of these Draft Policies. If properly conceived and clearly presented, these Policies will establish a well-considered foundation for other Agency policies, guidance and advice based on proportionality, consistency, transparency, accountability, necessity, efficacy, and in accordance with applicable law and best practice in terms of risk analysis and other key areas.

- 1.1. It is notable that the Draft Policies were published simultaneously but as separate documents. While it is clear that the Policies have different aims and subjects, there is nevertheless a considerable degree of overlap between how the Policies are structured. These differences and similarities should be further considered and the Policies refined so as to avoid conflicts of interpretation or application.

At the very least, redundancies between the Drafts should be removed and the particular parties subject to each Policy should be enumerated. For example, the core principles of Better Regulation are almost identical to the principles of Compliance and Enforcement. This similarity makes it all the more striking thus, that "necessity" is not identified as a core principle of Compliance and Enforcement.

With respect to who the Policies seek to cover, while the Draft Compliance and Enforcement Policy seems targeted principally at licencees, the Better Regulation Policy appears (appropriately) targeted at the Agency itself. This could be made clearer, not only in terms of how each of the Policies' subjects are sought to be regulated, but also in terms of how deviations from the Policies may be determined and addressed, as well as by whom, and in

what manner or form. Additionally, where the Better Regulation Policy would focus extensively on customer service, how is it expected to function in relation to the Agency's existing Customer Charter?

- 1.2. The Policies should clearly set out their legislative origins and higher-level policy rationales. References to such sources should direct readers to the specific relevant statutory instrument, policy, plan or other document.

Without more, Ibec queries why the Agency has decided to update and replace its 2003 Enforcement Policy. Similarly, why has the Agency decided that now is the time to introduce a policy on Better Regulation? How do these Policies fit with other Agency policies, guidance documents or advice? How will conflicts between these Policies and other such publications be addressed?

- 1.3. The Agency should fully detail the consultation process to be followed in relation to each draft Policy, up to and including the manner and expected date of finalization by the EPA Board. The Agency should further clarify whether submissions such as this one will be made public as part of the consultation process and what further responses or additional seeking of stakeholder input the Agency intends to issue. Will either Draft Policy be subjected to a Regulatory Impact Analysis or similar undertaking?
- 1.4. Neither Policy sufficiently describes how its application will be measured for effectiveness, nor what scope or timeframe governs any requisite revision. While the Agency reserves its rights to depart from, amend or revoke and replace each of the Policies, the statutory basis for these rights may also speak to the manner in which said departure, amendment, revocation or replacement must occur. As such, citations to the relevant statutory basis for these rights should be included in the text.

2. *Ibec views specific to the Draft Compliance and Enforcement Policy*

Ibec members have noted the following observations, concerns and suggestions specifically in relation to the Draft Compliance and Enforcement Policy.

- 2.1. With respect to the Policy's Objective as set out on Page 2 of the Draft, is EPA's objective to protect people and the environment the only objective of the Agency that is pertinent to enforcement? What are the Agency's other objectives and how do they relate to this one? For example, what objectives, if any, do EPA have with respect to Irish economic competitiveness and job creation?
- 2.2. With respect to the "guidance" and "advice" referenced on Page 2 of the Draft, what specific guidance or advice is implicated in the promotion of compliance where criminal or civil sanctions may not be appropriate?
- 2.3. The Enforcement Powers listed and described on Page 4 of the Draft are not accompanied by any citations to the legislation establishing those Powers. Also, it is commonly understood that EPA's enforcement powers are not always stand-alone or exclusive to the Agency. This section of the Draft Policy should clearly set out the various means through which EPA cooperates with other arms of the State (such as an Garda Síochána) and other bodies in the exercise of its enforcement powers.
- 2.4. The Enforcement principles listed and described in Section 3 of the Draft Policy do not appear to be set out in any logical order or in terms of how they relate to one another. If it is possible

that one principle could be held higher than another, then the Policy should establish a prioritization or hierarchy akin to that of the Enforcement Powers listed in the previous section.

It is also worth noting that these principles appear somewhat redundant alongside the Principles of Better Regulation set out in Section 2 of the Draft Better Regulation Policy. A noticeable difference between the two sets of principles is that “Necessity” is not an Enforcement principle. Is enforcement always necessary? Could the Agency’s choice to enforce ever be considered unnecessary?

- 2.5. With respect to the principle of “Transparency and accountability,” the Draft Policy sets out two reasons why EPA might not make information available to the public. Are there any other reasons why EPA might not make information available to the public? What is the statutory basis for any and all such reasons?
- 2.6. The Draft Policy does not set out what restrictions, if any, the Agency places on the publication of information with respect to avoiding prejudice or offending commercial sensitivity. Indeed, on many occasions the Agency has publically identified certain licensees as non-compliant or otherwise offending of environmental or EPA rules, such as to effectively sanction these licensees. What rules, if any, govern when the Agency may resort to such “name-and-shame” practices? Such rules should be set out in this Policy.
- 2.7. The discussion of the Polluter Pays principle on Page 6 of the Draft makes clear the Agency’s commitment to compliance and enforcement in this area. Yet the Policy falls short of describing how EPA polices polluters and offenders of other environmental laws who are outside the EPA Licensee cohort, particularly where such activities may be allegedly rogue or criminal. This Policy should clearly delineate between how the Agency enforces environmental law with respect to its licensees and with respect to non-licensed actors.
- 2.8. Section 4 of the Draft Policy sets out factors that the Agency considers when deciding upon a particular enforcement action to take. However, the policy falls short of actually giving any indication of what “breaches” may underlie such decisions. This Policy would benefit from, at the very least, a high-level list of the various types of breaches that may warrant enforcement action, with each type accompanied by a citation to its relevant statutory or other basis.

Such a list should also set out any relevant procedural aspects of an Agency enforcement action, including, but not limited to, the comparative degree of hazard underlying each type of breach, the administrative or procedural rules around how breaches are challenged in the first instance and on appeal, as well as any statutory limitations on the Agency’s power to allege, determine or sanction such breaches.
- 2.9. Section 5 on Enforcement actions is generally vague and should include complete lists of enforcement tools instead of select examples. Likewise, the reference to “administrative penalties” should be replaced or followed by a clear and completely enumerated list of any such penalties.

3. *Ibec views specific to the Draft Better Regulation Policy*

Ibec members have noted the following observations, concerns and suggestions specifically in relation to the Draft Better Regulation Policy.

- 3.1. Ibec members are grateful for the Agency’s commitment to reducing the administrative burden on business through the adoption of efficient business processes in licensing, inspection and

enforcement tasks and other regulatory functions. We consider this commitment an essential counterpart to the goals of environmental and radiological protection and are pleased to note the Agency's own consideration of same.

Ibec further appreciates the Agency's consideration of recently voiced industry views on a range of licensing and enforcement issues. An Agency policy on Better Regulation should only increase and strengthen this cooperation.

- 3.2. One key difference between the Draft Better Regulation Policy and the Draft Compliance and Enforcement Policy is that the former has no stated Objective. The setting of objectives is a worthwhile and important step in the formulation of policy. There is also value in standardizing the format of Agency policy statements and other documents.
- 3.3. Section 2: Principles of Better Regulation initially identifies four central components to the Agency's approach to Better Regulation: proportionality, consistency, transparency and risk-based orientation. However, the table on the following page of the Draft Policy contains six core principles, four of which are identical to these four components. (What is more, as described above, five of these six core principles are essentially the same as the five principles of enforcement set out in Section 3 of the Draft Compliance and Enforcement Policy.)

The Draft Policy does not suggest that there is a material difference between central components and core principles. If this is indeed the case, then these lists should be made consistent and any description or further elaboration of these principles or components should be grounded in this consistency.

Also, as with the enforcement principles in the Draft Compliance and Enforcement Policy, some thought should be given to how this Policy's principles or components relate to one another, particularly in terms of hierarchy.

Finally, Ibec appreciates the Agency's recognition of key Better Regulation projects and strategies at national, European and international levels. This Policy and any subsequent revisions should be designed to fit comfortably within such frameworks.

- 3.4. With respect to transparency as described on Page 3 of the Draft, Ibec stresses the importance of good data management, particularly where Freedom of Information and Access to Environmental Information rights may be pertinent.
- 3.5. Section 3's passage on Inspections and Enforcement refers to a model of enforcement "which rewards compliance." Industry welcomes any such model and encourages EPA to clarify the specific reward and incentive structures within both its licensing and enforcement regimes. Any such structures should be described in this Policy.
- 3.6. Ibec appreciates EPA's recognition "that environmental standards need to be underpinned by a scientific basis that stands up to scrutiny." Ibec recommends further that EPA establish a protocol for regularly reviewing guidance, advice and policy on this basis so as to ensure these do not rely on incorrect or outdated standards or understanding.
- 3.7. With respect to the Agency's commitment to transparent communication, Ibec members challenge the Agency to consider that the EPA website may not be the only tool capable of reaching the Agency's widest audience, and may not always be the best tool. A good communications policy clearly shows that the Agency has sufficiently considered its audiences and the best means of communicating with them. This Policy should list all of the Agency's

communication tools and describe what types of information are disseminated via which channel, to what audience, and according to what timeframe.

Likewise, a critical element of good regulation is good consultation. In a number of recent instances, the manner in which key consultation documents were brought to the attention of key stakeholders has been poor. Likewise, consultation times, submission and response protocols have been inconsistent and often insufficient, particularly when compared to those of other public bodies.

As with and as part of an Agency communications policy, a clear and well-considered Agency consultation policy will go far in promoting positive Agency-stakeholder engagement and in turn better regulation. Such a policy should set out the Agency's consultation processes with respect to channel of communication, audience, and timeframes for submissions and responses.

4. Conclusion

Ibec appreciates EPA's clear commitment to improving regulation and to a risk-based and outcome-focused enforcement model, along with a proactive and cooperative approach to ensuring compliance, as expressed in these Draft Policies.

We consider Policies such as these critical components of a wider regulatory regime executed on the basis of proportionality, consistency, transparency, accountability, necessity, applicable law and best practice.

Ibec is committed to positive engagement with EPA and as such appreciates the Agency taking into account the views expressed herein.

Should you have any questions or concerns about this submission, or should you wish to arrange a meeting to explore these views further, please do not hesitate to contact me.

Yours sincerely,



Morgan Baker
Environment Policy Executive

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