Annex 5a

Civil sanctions for environmental offences

The Environmental Civil Sanctions Order 2010 & The Environmental Sanctions (Miscellaneous Amendments) (England and Wales) Regulations 2010

Guidance to regulators on how the civil sanctions should be applied – draft version for consultation

July 2009
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Civil sanctions for environmental offences

1.1 The Government believes that environmental regulators should have access to effective sanctions that are flexible and proportionate and that ensure the protection of the environment and human health when tackling non-compliance. These sanctions should be flexible enough to reflect the regulatory needs of those who comply with the law, as well as being able to ensure that those who have saved costs through non-compliance do not gain an unfair advantage over those who have complied.

The civil sanctions include:

**Compliance notice:** A requirement to take specified steps within a stated period to secure that an offence does not continue or happen again.

**Restoration notice:** A requirement to take specified steps within a stated period to secure that the position is, so far as possible, restored to what it would have been if no offence had been committed.

**Variable monetary penalty:** A requirement to pay a monetary penalty of an amount determined by the regulator reflecting the circumstances of the offence.

**Enforcement undertaking:** These enable a person, which a regulator reasonably suspects of having committed an offence, to give an undertaking to a regulator to take one or more corrective actions set out in the undertaking.

**Fixed monetary penalty:** A requirement to pay a monetary penalty of a fixed amount.

**Stop notice:** A requirement for a person to stop carrying on an activity described in the notice until it has taken steps to come back into compliance.

1.2 The Regulatory Enforcement and Sanctions Act 2008\(^1\) contains enabling powers to introduce these civil sanctions across a number of different spheres. In the environmental sphere civil sanctions are introduced by\(^2\):

- The Environmental Civil Sanctions Order 2010
- The Environmental Sanctions (Miscellaneous Amendments)(England and Wales) Regulations 2010

1.3 These Statutory Instruments make the civil sanctions available for certain specified offences for use by:

- The Countryside Council for Wales
- The Environment Agency

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\(^1\) The RES Act does not cover offences created in legislation that is created under the European Communities Act therefore the European Communities Act is to be used to introduce RES style civil sanctions in regulations that implement requirements of EU Directives.

\(^2\) The RES Act only allows civil sanctions for existing offences. Therefore, new legislation will consider the potential for using civil sanctions separately.
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- Natural England

The Government intends to consult on further proposals to make civil sanctions available for use by Local Authorities.

1.4 In using the civil sanctions regulators must apply a criminal standard of proof: i.e. they must be satisfied ‘beyond reasonable doubt’ that an offence has been committed before using them, except for enforcement undertakings and stop notices (see paragraph 2.8).

Background and objectives of civil sanctions

1.5 The Macrory Review of regulatory enforcement\(^3\) and a Defra review of environmental enforcement\(^4\) both concluded that the current sanctioning framework for dealing with environmental offences was capable of improvement. The problems identified were that:

- Regulators often have to choose between issuing a warning letter or caution and taking criminal proceedings without easy access to proportionate intermediate sanctions that act as a deterrent, leading to a ‘compliance deficit’
- The current enforcement system therefore relies heavily on criminal sanctions and this is sometimes disproportionate
- Fines do not always cover the costs to society of harm from non-compliance and therefore do not always act as an appropriate deterrent, contributing to a shortfall in compliance
- Environmental damage and its effects are often not put right
- Overall, the current system does not adequately encourage or take account of a generally good approach to compliance, or deter non-compliance, with environmental regulations. Potentially it gives those who do not comply with regulations a competitive advantage which is unfair to those who do comply.

1.6 In response to these shortcomings the Government [proposes to introduce] civil sanctions for environmental offences. The regulators will be able to use them when more appropriate to achieving enforcement objectives and proportionate than relying at existing enforcement mechanisms. The introduction of these new sanctions should lead to wider benefits for the protection of the environment. However, regulators will still have the discretion to use existing mechanisms, and any other sanctioning powers they may have where it is appropriate and proportionate to do so. Advice and guidance will remain the normal response to many cases of non-compliance.

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1.7 At the same time the Government [proposes to introduce] new powers to assist the courts in structured, proportionate, and effective sentencing of the especially serious environmental offence that will continue to come before them.

1.8 The aim of these measures is to create a better graduated enforcement system and, more widely, a level playing field in removing competitive advantages for non-compliant companies and to be fairer overall.

About this document

1.9 This document is non-statutory guidance which sets out how the Secretary of State for the Environment Food and Rural Affairs and Welsh Assembly Government Ministers consider these civil sanctions will be applied in practice. It sets out government policy and is intended to make clear that there is a fair process for the civil sanctions and to ensure consistency across regulators.

1.10 The RES Act\(^5\) requires regulators to consult on and publish guidance about the new sanctions (‘Sanctions Guidance’) as well as how they will enforce offences (‘Enforcement Policy’). These documents will provide the regulated community and members of the public with a clear indication of what they can expect from regulators when they are responding to non-compliance. They are referred to in this document as ‘guidance from regulators’.

1.11 The document has been developed by the Government working with the regulators (including representatives of Local Authorities), the Tribunal Service and representatives of businesses and non-governmental organisations. It applies to the Countryside Council for Wales, the Environment Agency and Natural England and will also apply to Local Authorities when civil sanctions are available to them. Regulators will be guided by this document in developing their own guidance.

1.12 This document is correct at time of publication and will be kept under review and revised from time to time. It is freely available in Adobe Acrobat format. A printed copy of the guidance is available on request by writing to:

<table>
<thead>
<tr>
<th>FBEE team</th>
<th>Welsh Assembly Government</th>
</tr>
</thead>
<tbody>
<tr>
<td>Department for Environment, Food and Rural Affairs</td>
<td>(details to be confirmed)</td>
</tr>
<tr>
<td>Area 5A, Ergon House</td>
<td></td>
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<tr>
<td>Horseferry Road</td>
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<tr>
<td>London</td>
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<td>SW1P 2AL</td>
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</tbody>
</table>

1.13 The table below provides a brief summary of other documents and guidance that are closely related.

### Figure 1: SI guidance and related documents

<table>
<thead>
<tr>
<th>Document</th>
<th>Issued by</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Code for Crown Prosecutors</td>
<td>The Crown Prosecution Service</td>
<td>This sets out the general principles Crown Prosecutors should follow when they make decisions on cases.</td>
</tr>
<tr>
<td>Compliance Code</td>
<td>Department for Business, Skills and Innovation</td>
<td>The Code sets out what regulators should consider when determining policies, setting standards or giving guidance in relation to their duties. It is based on the better regulation principles in the Hampton Report.</td>
</tr>
<tr>
<td>RES Act</td>
<td>Department for Business, Skills and Innovation</td>
<td>Legislation containing enabling powers for Ministers to introduce civil sanctions for relevant regulators and relevant offences. The scope is determined by schedules 5 to 7 of the RES Act.</td>
</tr>
<tr>
<td>RES Act guidance</td>
<td>Department for Business, Skills and Innovation</td>
<td>Government guidance on how civil sanctions are expected to work across all forms of regulation.</td>
</tr>
<tr>
<td>Statutory Instruments</td>
<td>Department of Environment, Food and Rural Affairs and Welsh Assembly Government</td>
<td>Legislation granting the Countryside Council for Wales, Environment Agency and Natural England the powers to use civil sanctions for certain offences.</td>
</tr>
<tr>
<td>Guidance on the Statutory Instruments</td>
<td>Department of Environment, Food and Rural Affairs and Welsh Assembly Government</td>
<td>Guidance to regulators on how civil sanctions in the SIs should be applied (this document).</td>
</tr>
<tr>
<td>Regulator Sanctions Guidance and Enforcement Policy</td>
<td>Environment Agency, Natural England and Countryside Council for Wales</td>
<td>Guidance from regulators to those they regulate on how they will apply and enforce civil sanctions, referred to in this document as 'guidance from regulators'.</td>
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**2. Using civil sanctions**

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6 http://www.cps.gov.uk/publications/code_for_crown_prosecutors/index.html
General approach to using civil sanctions

General principles

2.1 Some general overarching principles should guide how regulators respond to environmental offending. First, it is worth noting the Hampton principles set out in the Regulators’ Compliance Code\(^{10}\), which are:

- Regulators should recognise that a key element of their activity will be to allow, or even encourage, economic progress and only to intervene when there is a clear case for protection.
- Regulators, and the regulatory system as a whole, should use comprehensive risk assessment to concentrate resources in the areas that need them most.
- Regulators should provide authoritative, accessible advice easily and cheaply.
- No inspection should take place without a reason.
- Businesses should not have to give unnecessary information or give the same piece of information twice.
- The few businesses that persistently break regulations should be identified quickly and face proportionate and meaningful sanctions.
- Regulators should be accountable for the efficiency and effectiveness of their activities, while remaining independent in the decisions they take.

Some additional principles which apply to the use of civil sanctions for environmental offences are that the approach should:

- Ensure restoration of environmental damage and certain adverse effects on local communities;
- Ensure ‘polluters’ pay the cost to society of the impacts of their non-compliance;
- Remove financial benefit from non-compliance;
- Encourage compliance and deter non-compliance in the future;
- Avoid prosecution in suitable cases when a civil sanction can achieve enforcement objectives equally effectively and therefore reserve prosecution for the most serious offences\(^{11}\)

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\(^{11}\) Section 3 provides a more detail on the factors that point to when prosecution is appropriate.
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2.2 The decision on which enforcement option is appropriate in a particular case is an operational matter for regulators. Regulators take such decisions following consideration of the specific facts of the case and in line with the regulator’s published enforcement policy. Their approach will be consistent with the principles above and the guidance in section 3.

2.3 More generally regulators should endeavour to apply civil sanctions in a way that is consistent across different geographical regions, across offences and across those they regulate. Regulators should also endeavour to ensure that offenders are not penalised twice for the same offence by different regulators. A central purpose of this document and the guidance from regulators is to promote consistency across regulators.

2.4 It is worth drawing attention to paragraph 8.2 of the Compliance Code which states that, except where immediate action is required, ‘regulators should, where appropriate, discuss the circumstances with those suspected of a breach and take these into account when deciding on the best approach’.

2.5 The guidance from regulators will set out the process for considering relevant factors and making enforcement decisions. This will ensure a clear and transparent process for both existing sanctions and the new civil sanctions outlined in this document.

Availability of civil sanctions

2.6 A civil sanction is only available for a particular offence where it is specified in the Statutory Instruments (see paragraph 1.2) that that civil sanction is available for the particular offence. Annex 1 summaries which civil sanctions can be used for which offences. The civil sanctions in the Statutory Instruments are to fill gaps in existing legislation and do not replace any existing sanction.

2.7 Civil sanctions can be applied to any person who causes a relevant offence, including for example: businesses, landowners, individuals, public organisations and non-governmental organisations.

Standards of proof

2.8 The standards of proof for using the civil sanctions is as follows:

- To use a compliance notice, restoration notice, variable monetary penalty or a fixed monetary penalty, regulators must be satisfied beyond reasonable doubt that an offence has been committed.
- An enforcement undertaking may be accepted where the regulator has reasonable grounds to suspect that the person has committed an offence.
- A stop notice may be served where a regulator reasonably believes that the activity as carried on, or likely to be carried on, by that person involves or is likely to involve:
  - the commission of an offence by that person specified in Schedule 6 of the Environmental Civil Sanctions Order 2010.
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ii. significant risk of serious harm to human health or the environment

Criminal proceedings

2.9 In general criminal proceedings will not be taken where a civil sanction has been served. Exceptions to this are where:

- A restoration notice, compliance notice or enforcement undertaking is used without the addition of a variable monetary penalty (VMP) and the person fails to comply with the notice or undertaking. In this case regulators can prosecute for the original offence. Where a person has complied partly but not fully with an enforcement undertaking the regulator should take that into account in deciding whether or not to prosecute.
- A stop notice is served; as failure to comply with a stop notice is a criminal offence in itself.

Revenue from penalties

2.10 All revenue from penalties are paid into the Government’s main bank account (known as the Consolidated Fund) and is not available to the regulators who impose the penalties.\(^\text{12}\)

Fair process

2.11 Fair process is essential to the effective use of civil sanctions. Section 6 provides detail on the arrangements for representations and appeals.

Existing enforcement mechanisms

2.12 Environmental regulations require individuals, businesses, landowners and others to do certain things and avoid doing others to protect and improve the environment. Not complying with these requirements is typically an offence.

2.13 Regulators currently have a variety of ways of responding to these offences depending on the facts of the case and seriousness of non-compliance. These include:

- Advice and guidance to encourage future compliance which will continue to be the standard response in many cases and may be provided with or without a sanction depending on the circumstances;
- Warning letters for lower level cases;
- Fixed penalty notices in certain cases;
- Administrative powers and duties to take enforcement action, including where enforcement notices, works notices and abatement notices are available. The powers and duties in the Environmental Damage Regulations 2009 to serve notices to require the prevention and remediation of significant cases of damage to the environment is one such example. There are offences for not complying with these notices.

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\(^{12}\) This is required in section 69 of the RES Act and [paragraph] 5 of The Environmental Civil Sanctions Order 2010.
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- Modification, suspension, changes to conditions or revocation of permits and authorisations where they exist or refusal to grant them;
- Cautions where the regulator considers that the public interest requires a criminal sanction but prosecution is not appropriate and the offender admits the offence;
- Prosecution for the most serious cases.

2.14 The wide range of regulator enforcement powers has grown up over a long period through different proposals and pieces of legislation. This has left important gaps in enforcement powers and left regulators over-reliant on prosecution. Consideration should therefore be given to using the civil sanctions introduced in this section where they provide a more appropriate and proportionate response to the offence.

Compliance notices, restoration notices and variable monetary penalties

2.15 Compliance notices target the non-compliance itself and its causes, restoration notices target the effects of non-compliance and VMPs aim to remove any advantage from non-compliance.

2.16 Regulators are able to use them either independently or in any chosen combination to tailor the sanctions imposed to deal with the different consequences of the offence in the most suitable way. This will enable them to achieve a constructive enforcement outcome that remedies the consequences of an offence and, as far as possible, promotes good working relationships between regulator and the regulated community; an outcome that is often not served by prosecution.

Compliance notices

2.17 A compliance notice is a written notice issued by the regulator which requires a person to take specified steps within a stated period to ensure that an offence does not continue or happen again.

When is a compliance notice appropriate?

2.18 In some cases, an offence may be ongoing in nature or the circumstances that have given rise to it may persist so there is a risk that the offence may recur. In these cases a compliance notice may be appropriate to require specified action to be taken to stop the offence or to address its underlying causes.

What steps might a compliance notice require?

2.19 Compliance notices might, for example, require:

- Specific investment such as to build a concrete floor and bund to prevent leaks from tanks of chemicals entering the environment;

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13 These three types of civil sanctions are labelled discretionary requirements in the RES Act.
• A system of maintenance for critical equipment;
• Change or updating of a particular process;
• Training of relevant staff.

**Restoration notices**

2.20 A restoration notice is a written notice issued by the regulator which requires a person to take steps to restore harm caused by non-compliance, so that the position is restored, so far as possible, to what it would have been if no offence had been committed.

**When is a restoration notice appropriate?**

2.21 Some offences will result in environmental damage; in these cases a restoration notice may be appropriate to require specific action to be taken to address that damage. Damage to the environment may involve a temporary or sustained loss of environmental quality (for example in air, water or soil quality) or, more widely, in the resources and services provided by ecosystems. Restoration notices would not be appropriate where action is taken under the Environmental Damage Regulations 2009; this will generally apply to the most serious cases.

**What steps might a restoration notice require?**

2.22 Restoration notices would normally achieve the objective of restoration (to restore to the position that would have persisted if no offence had been committed) by restoring the affected resources and services directly. What is possible will depend on the circumstances of the case. In certain cases it may also be possible to restore the position by taking actions to improve the same types of resources or services more widely than at the site of the damage itself. For example, if damage reduces the population of a species by a proportion it may be appropriate to take actions somewhere other than at the site to restore the position the population would have been in.

2.23 Typical restoration actions might, for example, include:

- Removal and/or treating contaminants to reduce impacts on natural resources or local communities;
- Removing or protecting against other pressures on natural resources and services or local communities (e.g. other obstructions, non-native species and/or development-related pressures);
- Re-stocking or re-introductions of damaged species (e.g. fish);
- Seeding, planting or replanting vegetation;
- Providing conservation staff resources to manage or maintain sites or introducing conservation measures or management to a site;
- Developing and implementing strategic management plans;
- Implementing restrictions to access, or improvements to access;
- Providing monitoring capacity.

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2.24 In some cases local communities may be affected by an offence where it is possible to take some restorative action, for example where there is loss of amenity, damage to protected habitats or where there is nuisance with impacts such as the spread of dust or soot. Restoring these impacts (for example by restoring levels of amenity, habitat restoration and removing the soot or dust) will be an important aspect of restoration.

2.25 A restoration notice should clearly identify the losses. It should also identify the actions required to restore the position. The regulator may wish to specify the outcomes to be obtained.

**Variable monetary penalties (VMPs)**

2.26 A VMP is a proportionate monetary penalty which the regulator may impose for a moderate to serious offence where the regulator decides that prosecution is not in the public interest.

**When is a VMP appropriate?**

2.27 VMPs are used:

   a) to remove any financial benefit that may exist from non-compliance; and
   b) to adequately deter future non-compliance.

They are for use in cases where any other costs to the offender of co-operating with enforcement action for the offence (such as the costs of complying with compliance notices, restoration notices and third party undertakings along with any ancillary costs) do not already achieve these two objectives. Compliance with the law, restoration of harm, and compensation to affected parties thus all take priority over financial penalties.

**How should the level of VMP be determined?**

2.28 There are three steps to working out the penalty. This section introduces these steps and how they are to be worked out. The steps are:

   i. **The regulator estimates the financial benefit from non-compliance.** This is, as a first step, to remove any financial benefit (in terms normally of costs avoided) associated with the specific case.

   ii. **Add an appropriate deterrent component.** Removing the financial benefit associated with the specific cases of non-compliance, and requiring compliance and restoration where appropriate, will often not be sufficient to deter offending. This is largely because non-compliance is not always detected and enforcement action not always taken. Therefore some proportion of the time businesses and others who do not comply will retain some financial benefit. It is not feasible to base this component on probability of detection directly. There are, however, factors which point to what effort the person has invested to prevent the non-compliance and what action has been taken to address non-compliance where it does
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happen. These factors will be taken into account in determining the deterrent component.

iii. **Deduct any other costs incurred by the offender.** The first two steps above aim to approximate the total costs necessary to deter non-compliance. The purpose of a VMP is, in situations where the other costs an offender faces as a result of offending do not already reach this level, to apply an additional penalty to increase the costs to a level sufficient to deter non-compliance. This step ensures that the penalty reflects the difference between costs already incurred and the total costs necessary to deter non-compliance. However, the costs that may be deducted would not include the cost of works done to such an unsatisfactory standard that they have to be replaced rather than modified to achieve compliance.

i. **Estimate the financial benefit from non-compliance**

2.29 The financial benefit is compared with a situation where the offender would not have caused the offence. This will normally be:

- **The costs of any actions that can reasonably be considered necessary to have avoided the non-compliance.** This would include, for example, the costs of any fees not incurred, the costs of any investments considered necessary to avoid non-compliance and the costs of staff resource considered necessary to carry out the actions considered necessary to avoid non-compliance. The estimation of financial benefit should also include potential financial return on sums that have not been expended.

ii. **Add an appropriate deterrent component**

2.30 The deterrent component is additional to the amount required to remove financial benefit. It is derived by taking a sum as a starting point and applying a multiplier to it, on the basis of the presence or absence of particular factors.

2.31 The starting sum can be:

- **Restoration costs.** The regulator’s estimate of the costs required to comply with a restoration notice; or
- **The financial benefit.** The regulator’s estimate identified in paragraph 2.29 where the regulator considers this is significant; or
- **The maximum criminal fine a magistrates court could impose** for the specific offence where there is neither significant restoration or significant financial benefit.

2.32 The regulator will choose the starting sum and may, subject to paragraph 2.31, choose the one with the highest value.
2.33 First a maximum multiplier that can be applied is determined on the basis of factors that indicate what effort the person has invested in avoiding the non-compliance or its effects. The regulator will consider the following four factors:

- The degree of blameworthiness
- Previous failure or failures to comply
- The extent to which prompt action has not been taken to eliminate or reduce the risk of damage resulting from regulatory non-compliance;
- The extent to which the regulator, or other regulators, have taken previous actions to help the offender into compliance

Where none of these factors is present, there would be no deterrent element.

2.34 The maximum multiplier cannot exceed four. The guidance from regulators must set out how the maximum multiplier will be determined on the basis of the four factors.

2.35 The regulator can apply a factor lower than the maximum where the person has invested effort to address the non-compliance. It is at the regulator’s discretion to determine what reduction to make. Factors that regulators will consider include, for example:

- Voluntary reporting of regulatory non-compliance
- Actions taken to repair the harm done by regulatory non-compliance; and
- Co-operation with the regulator in responding to the non-compliance

iii. Deduct any other costs incurred by the offender

2.36 This is all the regulator’s estimates of the costs the offender has incurred as a result of the offence and will include:

- The costs of complying with the compliance notice. This is the costs of any actions to comply with a compliance notice. The costs could include, for example, the costs of capital investment, contracted services and staff input. Offenders should be encouraged to provide evidence of costs. Where they do not, regulators should use judgement on the basis of the evidence available. This may include obtaining estimates from relevant contractors.
- The costs of complying with the restoration notice. This is the cost of any actions to comply with a restoration notice. The costs could include, for example, the costs of actual restoration works, any administrative costs and the costs of monitoring. Offenders should be encouraged to provide evidence of costs. Where they do not, regulators should use judgement on the basis of the evidence available. This may include obtaining estimates from relevant contractors.
- The costs recovered through a regulatory cost recovery notice.
- An appropriate amount to reflect a third party undertaking. The regulator will decide what proportion of the costs of a third party undertaking to deduct. This may, for example, depend on how closely the TPU relates to the effects of the case.

1515 Note that the regulator will consider prosecution where more serious degrees of unacceptable behaviour are present. See table B after paragraph [x]
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- **An amount to reflect any other costs resulting from the offence the regulator considers are justified.** This might for example include the costs of any actions taken voluntarily in response to the offence. Persons will generally have to provide documentary evidence of costs.

Where the total costs in this paragraph exceed the sum of the financial benefit and the deterrent element then no VMP is served.

2.37 While regulators should follow the steps outlined above it should be emphasised that there will often be uncertainty in establishing the advantage from non-compliance precisely and ultimately regulators will need to exercise their reasonable judgement on the appropriate level of penalty on the basis of the evidence available to them. The effort that regulators invest in assessing it should be proportionate to the circumstances.

2.38 There will be varying degrees of uncertainty. In those cases where it is clear that a penalty additional to the costs already incurred is needed to remove the advantage but unclear precisely what level of penalty is required, it should be considered better to impose some penalty even if the uncertainty merits using a cautious level. This is because it is better to move closer towards a situation where the advantage of not complying is removed. In other cases where it is not clear that a penalty additional to the costs already incurred is needed to remove the advantage from non-compliance, regulators are advised against using them.

2.39 Where an offence is triable summarily only (i.e. may only be heard in the magistrate’s courts), and is punishable by a fine, the maximum level of fine is set in the relevant legislation and is often £5,000 but may higher, for example: £50,000.

**Example to illustrate calculation of VMP: Water pollution**
(see scenario 3 in annex 2 for further background)

The incident results from the failure of poorly maintained equipment at a site. Pollution has been caused. The regulator decides to serve a VMP and works out the penalty as follows:

1. **Estimate financial benefit from non-compliance.** The regulator identifies the measures it considers were necessary to have avoided non-compliance. This includes regular maintenance inspections, servicing and replacement of parts where necessary and implementation of internal monitoring procedures. It establishes that these measures have not been taken over the previous four years since new plant had been built. It obtains independent estimates of these costs over the four years from engineering contractors which, including a notional rate of return on avoided costs, is £25k. These costs represent the financial benefit that the company has enjoyed from not taking the measures considered necessary by the regulator.

2. **Add an appropriate deterrent component.** The regulator uses the estimated financial benefit as the starting sum for calculating the deterrent component. It then considers what the maximum multiplier should be and decides on 2.5. In deciding this it notes that the company is blameworthy (the risk of
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pollution was foreseeable without a scheduled maintenance system being in place), that the company has a generally good record of compliance with cases of minor non-compliance in the past, that prompt responsive action has been taken and that the regulator has not previously taken action to help the company in its compliance. The regulator then reduces the multiplier to 1.5 to take account of the actions the company took to quickly address the non-compliance. The deterrent component is therefore £37.5k. This is added to the financial benefit producing a figure of £62.5k.

iii) Deduct any other costs incurred by the offender. The regulator then deducts:

- The costs that the company incurred to control the pollution. The company provided evidence that these were £20k.
- The regulator’s costs of £1.5k which are recovered through a regulatory cost recovery notice.
- 50% of the costs of the third party undertaking, which is a further £2.5k.

The deductions total £24k. The regulator therefore serves a VMP for £38.5k.

Process for using compliance notices, restoration notices and VMPs

Notice of intent

2.40 Before imposing a compliance notice, restoration notice and/or VMP, the regulator must first serve the person with a ‘notice of intent’ telling it what is proposed. The notice must contain certain information including:

- the grounds for proposing to impose the requirement;
- the right to make the representations and objections and the period within which they may be made – the period must be 28 days beginning with the day the notice is received;
- the circumstances in which the regulator is not allowed to impose the requirement (for example where a person has a defence); and
- the fact that offenders may offer enforcement or third party undertakings.

Written representations

2.41 The person will then have the right to make written representations and objections to the regulator about the proposal to impose the requirement. The person may also raise any defences to the proposed sanction. The regulator must decide whether to impose the requirement (with or without modification) or, where he has the power, to impose a different discretionary requirement. The regulator will do this as quickly as possible after the end of the period for making representations and objections, consistent with appropriate consideration of the issues.

Reviewing decisions

2.42 In order to ensure that sanctioning is in line with good practice, the regulator should have arrangements in place to review or monitor individual decisions. This will ensure that there is confidence in the regulatory system from the regulated community and the wider public. Such arrangements could, for
example, provide that a senior officer (for example, an area manager) within the regulator reviews whether the case should progress to a final notice taking into account the representations and objections made by the person. In order to provide a degree of independence, those involved in the review process should not have been involved in the original decision to issue the notice of intent but should work or have worked in the relevant area of regulation. In order to provide consistency across regions, this process should be overseen at national level within regulators. The guidance from regulators will set out the review process in more detail.

Final notices

2.43 If it decides to impose a requirement, the regulator must serve a further notice, a ‘final notice’, which contains certain information as to the following:

- the grounds for imposing the requirement;
- if a variable monetary penalty is imposed, how payment may be made, the period within which it must be made and, where they exist, any early payment discounts or late payment penalties;
- rights of appeal; and
- the consequences of failing to comply with the requirement.

It is good practice for regulators to inform offenders when they are satisfied that the requirements of notices have been discharged. In some cases, for example where restoration takes place over a long period of time, this may be an extended time period.
Third party undertakings

2.44 When a person has received a notice of intent to impose a compliance notice, restoration notice or a variable monetary penalty, they are able to offer a third

16 No early payment discount is proposed for VMPs, or any penalty for late payment – please see consultation document, Annex 1 paragraph 12.24. For completeness, the flow chart shows where they would have fitted in.
party undertaking (TPU). A TPU involves taking action to benefit a third party affected by the offence. Where such an undertaking is offered, it will be up to the regulator to decide whether to accept it, and how to take the undertaking into account in making his sanctioning decision. For example, a regulator could issue a notice of intent to a person, notifying it of its intention to issue a variable monetary penalty. The person could then offer to pay compensation to persons affected by the offence, and the regulator, if it saw fit, could reduce the amount of the VMP to take account of the compensation offered. Such undertakings cannot, however, be offered by a person after a final notice has been imposed. A TPU may not always be appropriate: the civil courts are likely to remain the means by which affected persons obtain compensation when appropriate for damage to health or substantial economic interests.

2.45 A TPU would normally be an appropriate option where there is identifiable harm to local people or communities. Harm may include:

- Loss of amenity
- Nuisance with no concrete effect (e.g. odour)
- Nuisance with impacts (e.g. dust, soot)
- Damage to local economic activity

2.46 Measures offered in a TPU could for example:

- Directly reduce or restore the harm caused
- Compensate for the harm by providing or making improvements to the local environment or amenities
- Reducing other pressures on local communities, for example by helping to reduce other sources of nuisance
- Involve financial payment of compensation

2.47 As far as possible a TPU should relate to the harm caused, benefit the same people who have suffered as a result of the harm and be proportionate to the harm. The regulator will take this into account in deciding whether to accept it and how to take it into account in making his sanctioning decision.

2.48 The person offering a TPU may therefore wish to undertake a quantitative assessment of the scale of harm to determine the scale of measures to be provided. This might involve a resource-to-resource or service-to-service equivalency approach or a monetary valuation. It is expected that assessments undertaken would be relatively simple while sufficiently transparent and robust to demonstrate the proportionality of measures to the regulator.

2.49 A third party undertaking could be accepted in conjunction with the imposition of a compliance notice. This would allow a person to offer to compensate people or

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17 A resource-to-resource or service-to-service equivalency approach would involve assessing the quantity of environmental resources of services lost as a result of the harm and then the quantity of alternative resources or service that would have to be provided by measures to be equivalent to the losses. Economic valuation would involve identifying and quantifying the economic losses associated with the harm in monetary terms and then providing measures of similar value. See Annex 2 paragraphs 20 to 28 of the guidance at the following link: http://www.defra.gov.uk/environment/liability/pdf/indepth-guide-regs09.pdf
communities affected by non-compliance, but it would not lessen the action needed to comply with the law. The purpose of a TPU is not to give communities rights to require redress but to provide for proportionate sanctions. In some cases regulators may wish to take account of the views of local communities in deciding whether to accept TPUs.

2.50 A person can also offer an enforcement undertaking at the stage that they receive a notice of intent. This is where the person wishes to volunteer action to address the non-compliance entirely for example, taking action to come back into compliance, restoring damage and/or giving up a financial benefit. If this is accepted then no other civil sanction will be served. The subsection below covers enforcement undertakings.

**Enforcement undertakings**

2.51 An enforcement undertaking is a voluntary agreement by a person to take steps that would make amends for non-compliance and its effects. It is for the regulator to decide whether to accept it in a particular case.

2.52 No other civil sanction may be imposed if the regulator accepts the enforcement undertaking.

**When is an enforcement undertaking appropriate?**

2.53 An enforcement undertaking is appropriate where an offender wishes to take a proactive approach and is able to suggest measures that proportionately and appropriately addresses the non-compliance and the issues it raises. Enforcement undertakings are generally for use where a person realises that they have committed a relevant offence and brought it to the attention of the regulator or where the regulator otherwise suspects that a relevant offence has been committed. Enforcement undertakings can also be offered, if sufficiently full and unreserved, at the stage when the regulator issues a Notice of Intent to impose a civil sanction.

2.54 For a regulator to accept an enforcement undertaking there must be clear recognition of any failings or harm caused by the relevant person. Where relevant, the regulator will look for director or board level commitment to restoration and future compliance. This could initially be set out in a letter and developed into a formal action plan by the relevant person in consultation with the regulator.

2.55 Enforcement undertakings are not always appropriate; for example, where the presence of factors identified in table B in section 3 of the guidance suggests that prosecution is more appropriate.

2.56 The Government proposes to allow regulators to accept an enforcement undertaking for a wide range of offences so as to give the regulated community maximum flexibility. This is expected to fit well with the self-regulatory approach of operators who actively manage risk and compliance. Offering an enforcement undertaking provides a further opportunity for responsible business to stand apart from others and more quickly restore their reputation.
2.57 The availability of enforcement undertakings is also expected to promote
dialogue between the regulator and regulated, improving trust and confidence. It
is also expected to encourage more open volunteering of information to the
regulator when a problem is discovered because the regulated community will be
more confident of a proportionate response.

**What might an enforcement undertaking consist of?**

2.58 An enforcement undertaking will be a written agreement by the offender to take
action to make amends for the non-compliance and its effects: to return to
compliance, to restore harm, and to compensate those adversely affected.

2.59 Where appropriate, restoration of harm should include steps to make amends to
individuals or communities or others adversely affected by the non-compliance. This
may include monetary compensation or practical action. Practical steps
could include for example, cleaning up when non-compliance has caused
nuisance in the form of dust or dirt, or restoring or providing alternative amenities
where these have been damaged. Where restoration of the actual harm is not
possible, the Government expects that responsible businesses will consider
making equivalent restoration in some alternative way.

2.60 Where a person offers to restore harm as part of an undertaking they will want
either to demonstrate that the measures they are proposing fully restore the
harm (or are equivalent to full restoration) or demonstrate what proportion of the
harm their proposals restore. They should therefore undertake a quantitative
assessment of the scale of harm to determine the scale of measures to be
provided or what proportion of the harm any restoration measures address. As
for TPUs this might involve a resource-to-resource or service-to-service
equivalency approach or monetary valuation.

2.61 The agreement will need to be sufficiently detailed to allow the regulator to
decide when the undertaking has been carried out, or whether the offender is
defaulting on the undertaking and enforcement action is needed. The regulator is
not expected to enter into negotiations over an enforcement undertaking in some
cases the regulators may wish to seek clarification from operators.

**Process for using enforcement undertakings**

2.62 A regulator should be able to accept an undertaking from a person in any case
where it has reasonable grounds to suspect that the person has committed an
offence. The actions that the person can offer to undertake must include one or
more of the following:

- secure that the offence does not continue or recur;
- secure that the position is restored, so far as possible, to what it would have
  been if the offence had not been committed, including making amends to
  individuals or communities affected (e.g. restoring local amenities; or
  cleaning up after a dust cloud);
- benefit (compensate) an person affected by the offence including individuals,
  groups of individuals and/or communities; or
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- where restoration of actual harm is not possible, make equivalent restoration to another environmental resource or service.

2.63 If the regulator is satisfied that the enforcement undertaking has been fulfilled then it should issue a completion certificate. The person may apply for a completion certificate once it has completed all the actions agreed in the enforcement undertaking. If a person makes such an application, the regulator must make a decision as to whether to issue one within 28 days of the request.

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**Fixed Monetary Penalties (FMPs)**

2.64 An FMP is a relatively low level fixed penalty which the regulator may impose for a specified minor offence.

2.65 An FMP is a standalone civil sanction and cannot be used in conjunction with any other sanction.

**When is a fixed monetary penalty appropriate?**

2.66 FMPs are appropriate for relatively minor offences where, for example, there is a failure to meet requirements to monitor or document activities and where the regulator may, in a proportionate way, still want to signal the need for compliance. They are for specific and clear-cut offences or defined aspects of offences identified in Annex 1 this document. FMPs are normally appropriate
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only where advice and guidance has already been given and has not been complied with.

2.67 FMPs are not appropriate for more serious cases of non-compliance, for example where: the impact of non-compliance is significant or where there is evidence of intent.

2.68 Examples of when FMPs may be appropriate include:

- An initial failure to provide monitoring data when required to do so;
- Failure to record required information;
- Failure to notify works under FEPA.

2.69 Fixed Monetary Penalties (FMPs) are similar in many ways to Fixed Penalty Notices (FPNs) which are already available for some environmental offences. Where FPNs are already available, FMPs have not been introduced.

Process for using FMPs

2.70 The regulator must start by serving a notice of intent to impose the penalty, including:

- The grounds for proposing to impose the penalty
- The amount to be paid
- The effect of paying a ‘discharge payment’
- The right to make representations and objections against the proposed penalty
- The circumstances in which the regulator is not allowed to impose the FMP: where a person has a defence, as set out in the legislation that created the offence
- The period of time a person has to make representations and objections, which is 28 days and
- The period of time which liability for the FMP may be discharged which will be 28 days

2.71 After the 28 day period within which the recipient of the notice of intent must make representations or objections and raise any defences, the regulator must decide whether or not to impose a final notice of the penalty. This must include:

- The grounds for imposing the notice
- The amount to be paid
- How the payment may be made
- The period of time within which the full amount will be due
- The period after which the late payment penalty will be incurred
- The rights of appeal
- The process for making an agreement
- The consequences of failing to pay the penalty

2.72 Annex 1 of this document identifies the level of fine for each offence. The level of FMPs is generally:
• £100 for individuals
• £300 for all other persons

2.73 The level of FMP will be varied as follows:

• Reduced by half for a Discharge Payment made within 28 days following receipt of the Notice of Intent to impose the FMP
• Reduced by half for payment within 28 days of a FMP being confirmed by the regulator but only where the person has made representations
• Increased by half for payment more than 56 days after an FMP has been confirmed by the regulator ("late payment charge")
Stop notices

2.74 A stop notice is a written notice which prohibits a person from carrying out an activity which is causing (or is likely to cause) serious harm or presents (or is likely to present) a significant risk of causing serious harm until the steps specified in the notice to remove the risk of serious harm or fully return to compliance with the law have been taken. The notice can require a person to stop carrying out certain processes and will relate to the activities or part of activities that are responsible for the risk or harm.

2.75 A stop notice may be issued with any other civil sanction except an FMP. Stop notices can also be served in combination with a criminal prosecution.

When is a stop notice appropriate?

2.76 A stop notice may only be served if a person is carrying on (or is likely to carry on) an activity that the regulator reasonably believes:

- is causing (or will cause) serious harm or presents (or will present) a significant risk of causing serious harm to human health or the environment (including the health of animals and plants)
- involves (or will involve) or is likely to involve (or will be likely to involve) committing an offence specified in schedule 6 of The Environmental Civil Sanctions Order 2010.

Compensation

2.77 A regulator must compensate a person if as the result of the service of the notice or the refusal of a completion certificate that person has suffered loss, and:

- A stop notice is subsequently withdrawn or amended by the regulator because the decision to serve it was unreasonable or any step specified in the notice was unreasonable;
- The regulator is in serious default of its statutory and/or common law obligations;
- The person successfully appeals against the stop notice or refusal for a completion certificate. This would not be appropriate where the appeal is successful on a minor technicality

2.78 Compensation should cover any loss including exceptional costs resulting from the serving of the stop notice (e.g. legal or expert advice). It will be for the person on whom the stop notice was served to justify the losses in writing.

2.79 The regulator should not have to pay compensation if it acted reasonably on the basis of the information provided by the person at the time when the notice was served. Where the person takes action to do what is required of them and the stop notice is amended by the regulator but not withdrawn, then no compensation should be payable, as the basis for imposing the stop notice remains valid. The amending of the stop notice should be regarded as an essential part of the process by which the person works towards and gains its completion certificate.
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2.80 The compensation scheme is without prejudice to a person’s rights to seek redress through judicial review, ombudsman courts or civil litigation. A person will have the right to appeal against a regulator’s decision not to give compensation or as to the amount of compensation.

2.81 Regulators should consult on their arrangements for considering and providing compensation as part of consulting on their guidance (referred to in this document as ‘guidance from regulators’).

Process for using stop notices

2.82 The regulator serves a stop notice in the circumstances outlined above. There is no requirement to serve a notice of intent first. The stop notice must include:

- The actions the person must take to comply with the stop notice,
- The grounds for serving the stop notice,
- Rights of appeal, and
- The consequences of non-compliance.

Non-compliance with a stop notice is a criminal offence.

2.83 The person on whom a stop notice is served may then appeal against the decision to serve it within 28 days of receiving it. The stop notice would not be suspended on appeal unless the First-tier Tribunal directs otherwise.

2.84 If the regulator is satisfied after the stop notice has been served that the person has taken the steps set out in the notice then the regulator must issue a completion certificate. The person may also apply for a completion certificate at any time and the regulator must decide whether to issue one as soon as possible and at most within 14 days of the request.
Publicity

2.85 Regulators will be required to publish the details of any enforcement action taken using civil sanctions, i.e. where a civil sanction is imposed or where an undertaking is accepted. The Government considers it good practice for a regulator to maintain a public database of sanctioning decisions it has taken, as well as criminal convictions, on its website. The use of web-based registers is good practice.

2.86 Regulators will not publish the details of sanctions where the sanction has been overturned at appeal.

2.87 Regulators may also pursue more pro-active publicity options, such as issuing press releases. Whether a regulator decides to do this will depend on the circumstances of the case taking account, for example, of local interest, any health risks posed by the case and the behaviour of the offender.

2.88 The Government considers that including the offence publicly on the record is the most important aspect of an FMP as a marker that a degree of improvement is needed. The entries of FMPs on the public record should specify where the penalty has been discharged by payment of the penalty following the notice of intent and without further action being taken. Given that in the graduated system of sanctions, FMPs are for the least serious cases, active steps to publicise FMPs (for example case-specific press releases) would not normally be taken.
3. **Factors pointing to prosecution**

This section explains the way in which regulators typically approach decisions to prosecute at present and illustrates how they are likely to make decisions in the future with the expanded toolkit that will include civil sanctions. Regulators will have regard to this document when setting out their revised enforcement policies.

3.1 When considering prosecution, regulators must have regard to the Code for Crown Prosecutors (‘the Code’). This requires that prosecutors should only commence proceedings where there is sufficient evidence to provide a realistic prospect of securing a conviction. The Code makes clear that the decision to prosecute is a serious matter and that cases should only be prosecuted where it is considered to be in the public interest. The Code also emphasises that each case is unique and must be considered on its own facts and merits. However, general principles apply. Each regulator also sets out in their enforcement and prosecution policy what factors they will have regard to in assessing when prosecution is in the public interest, in particular when prosecution is proportionate.

3.2 Under their present enforcement policies, environmental regulators take a range of factors into consideration when deciding the appropriate enforcement response and whether prosecution is justified in the public interest. For clarity, these may be grouped into 4 broad categories: offence, offender, impact, and possible wider consequences.

3.3 These same kinds of factors will continue to be relevant with the introduction of a wider toolkit of sanctions. However, the introduction of new civil sanctions will make it possible for regulators to achieve results in new ways. In particular, bringing an offender into compliance, securing restoration of damage, removing financial benefit, and securing long term protection of the environment may in many cases effectively be delivered through the imposition of a civil sanction as an alternative to prosecution.

3.4 Deciding on the appropriate enforcement option is not simply a matter of adding up the number of factors for or against prosecution. The extent to which a particular factor is considered significant may vary depending on the particular circumstances of the case in question. Environmental regulators must balance all relevant factors in the circumstances of each case and make an overall assessment as to the most appropriate course of action.

3.5 It would therefore be inappropriate to place undue emphasis on any one factor, or set of factors, when considering how sanctioning is likely to change with the introduction of civil sanctions. However, it is helpful to provide an indication of relevant factors, under the categories identified above, that the Government

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18 The Code for Crown Prosecutors is a public document, issued by the Director of Public Prosecutions, that sets out the general principles prosecutors should follow when they make decisions on cases. The Code may be viewed at http://www.cps.gov.uk/publications/code_for_crown_prosecutors/index.html
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considers will in future normally suggest to a regulator that a prosecution is the proportionate action - Table B below.

**Table B Public interest factors in favour of prosecution:**

<table>
<thead>
<tr>
<th>Factors relating to</th>
<th>Factor suggesting prosecution is appropriate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offence</td>
<td>• long-term or continuing breach</td>
</tr>
<tr>
<td></td>
<td>• significant deviation from legal requirement or permit conditions</td>
</tr>
<tr>
<td></td>
<td>• operating without a licence or permit</td>
</tr>
<tr>
<td>Offender</td>
<td>• has committed an offence intentionally or with recklessness or negligence</td>
</tr>
<tr>
<td></td>
<td>• has a history of offending</td>
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<tr>
<td></td>
<td>• has failed to comply with a previous civil sanction</td>
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<tr>
<td></td>
<td>• is shown to be dishonest or deceiving</td>
</tr>
<tr>
<td></td>
<td>• has failed to report non-compliance</td>
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<tr>
<td></td>
<td>• has not cooperated with investigations</td>
</tr>
<tr>
<td></td>
<td>• has failed to comply with restoration or other notice requirements</td>
</tr>
<tr>
<td></td>
<td>• the offence involved obstruction</td>
</tr>
<tr>
<td></td>
<td>• the incident was foreseeable</td>
</tr>
<tr>
<td></td>
<td>• the offence has been committed with the consent, connivance or neglect of senior officers of a corporate body</td>
</tr>
<tr>
<td>Impact</td>
<td>• serious environmental impact or risk of impact, including impact on the local community</td>
</tr>
<tr>
<td></td>
<td>• serious impact on compliant business, competitors undermined</td>
</tr>
<tr>
<td></td>
<td>• the offence undermines the regulatory system(^{19})</td>
</tr>
<tr>
<td>Possible wider consequences</td>
<td>• significant potential long-term effect</td>
</tr>
<tr>
<td></td>
<td>• potential impact on the wider population</td>
</tr>
</tbody>
</table>

3.6 In the absence of factors such as those above, an offender might expect the regulator to respond with civil sanctions, or in some cases just a warning. Advice and guidance alone will remain the regulator’s response in many cases. It should be noted that the factors identified are not exhaustive and the final decision will be made at the discretion of the regulator, based on the assessment of all factors and their relative importance for the non-compliance under consideration.

3.7 Table B sets out a number of aspects of the behaviour of an offender that may point to prosecution. The regulator will also take into account steps that an offender takes to mitigate the non-compliance, especially:
• voluntary, timely and full disclosure of non-compliance
• active steps to restore harm caused, compensate those affected, and declare any financial benefit from non-compliance
• full and open co-operation with the regulator’s investigation

\(^{19}\) eg management failure to have regard to advice of competent persons, which defeats the purpose of the requirement to have a competent person.
Degree of environmental damage

3.8 As set out above, regulators will take a number of factors into account in deciding whether to prosecute in any specific case. However, it will be helpful to consider in particular the way actual environmental damage may affect regulators’ decisions.

3.9 Serious environmental risk or damage would normally tend to point to prosecution as this will often involve significant failure to comply with important requirements to prevent or minimise risk. Even then a regulator may sometimes find evidence that shows to its satisfaction that the risk of damage was not foreseeable, in which case the regulator may still wish to consider imposing civil sanctions.

3.10 It might be felt that any substantial environmental damage is always deserving of prosecution, irrespective of whether it is aggravated by other factors. The Government considers this is too rigid a position, particularly where offenders are strictly liable for certain kinds of environmental damage. Strict liability is applied when it is necessary for effective environmental regulation – it ensures that offenders are readily accountable to society for damage caused by their activities, subject where appropriate to certain defences. At present, offenders who typically comply with the law and those who flout the law can both find themselves in the criminal courts on the same strict liability charge. The introduction of civil sanctions will allow regulators to make fairer distinctions between offenders in strict liability cases, having regard to the factors set out above.

3.11 However, if any one or more of the other factors set out in Table B aggravated a case of environmental damage, the circumstances would be likely to suggest to the regulator that prosecution would be more appropriate.

3.12 When appropriate, civil sanctions would provide an effective alternative enforcement response. Civil sanctions would provide the regulator with the ability to impose substantial and proportionate financial penalties on offenders for the more serious offences\(^{20}\), and new or existing notice powers can require restoration of damage caused. In some cases, enforcement undertakings might provide the best outcome for the environment where a company voluntarily commits to rectifying the damage that has been done and to ensuring future compliance in a manner that is acceptable to the regulator.

3.13 Transparency will be important to public confidence in regulator use of civil sanctions, especially when environmental damage has been caused or local communities have been adversely affected through nuisance or loss of amenity. Section 5 discusses more fully the need for adequate public information about enforcement action that regulators take.

3.14 The Government therefore considers that, depending on the circumstances of the individual case, regulators could use civil sanctions to effectively and

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\(^{20}\) Offences which may be tried in a Crown court as well as in magistrates courts, called “either way” offences.
proportionately address cases of substantial environmental damage that have not been aggravated by other factors.

Scenarios

3.15 The decision-making factors set out above are designed to ensure that important outcomes will be achieved: in fairer treatment of offenders who take a responsible approach to compliance; for the environment; and for local communities. The scenarios set out in annex 2 illustrate what people might expect from a reformed enforcement system. Please note that these examples draw on regulators’ experience but they are not real cases. Real cases would often be more complicated and may involve regulators in considering a wider range of factors.
Enforcing Civil Sanctions

This section explains how regulators will seek to ensure that offenders comply with the requirements of civil sanctions.

4.1 The enforcement process will differ from sanction to sanction. The Statutory Instruments (see paragraph 1.2) specify the procedures and powers available to regulators when offenders fail to pay monetary penalties or comply with RES Act notices.

VMP, FMP or other monetary penalty

4.2 Where a fixed or variable monetary penalty is imposed and the offender fails to pay it, no prosecution can be brought for the original offence. Unpaid penalties will instead be enforced through the civil courts. The Statutory Instrument will allow the regulators to recover unpaid sums as if ‘on the order of’ a county court or the High Court, as this course of action is normally quickest. The regulator will be able to recover unpaid regulatory cost recovery notices in the same way.

Enforcement Undertakings

4.3 Should a person fail to comply with the terms of an enforcement undertaking or only partly comply, the regulator will have the choice of whether to extend the period of the enforcement undertaking, impose a different civil sanction or to pursue a criminal prosecution for the original offence. Any partial compliance would be taken into account in the imposition of any criminal or civil sanction. If a person provides misleading or inaccurate information in relation to the undertaking, then the person will be deemed to have not complied with the undertaking and the regulator can decide whether to impose a different civil sanction or pursue a criminal prosecution.

Restoration notice or compliance notice imposed without a VMP

4.4 Failing to comply with either of these notices would normally point to prosecution unless there are strong mitigating factors. Where these mitigating factors exist, a non-compliance penalty notice (NCP) can be served. An NCP is a written notice issued by the regulator imposing a monetary penalty (see below for more details). As the original restoration notice (RN), compliance notice (CN) or third party undertaking (TPU) remain outstanding, should the offender continue with their non-compliance then the regulator will be able to prosecute, whether or not the NCP is paid.

Restoration notice or compliance notice imposed with a VMP, or a third party undertaking accepted by the regulator

4.5 When a person fails to comply with a restoration notice or a compliance notice that is issued with a VMP, no prosecution is allowed: the VMP gives immunity from prosecution. The regulator can instead impose an NCP. A NCP would also
be needed if the offender has failed to fulfil a third party undertaking it has made. The restoration notice, compliance notice or third party undertaking would remain in force and the NCP could be repeated until the RN, CN or TPU are complied with.

**Stop notices**

4.6 Given the serious nature of stop notices, non-compliance should normally result in criminal prosecution.

**Regulatory cost recovery notices**

4.7 The unpaid notice will be pursued through the civil courts.

**How do non-compliance penalties work?**

4.8 An NCP can be up to 100% of the cost of any works/measures required by the notice that had not been completed or 100% of the benefit/compensation the offender agreed to provide in its undertaking that remains unpaid. The regulator will determine the level depending on the circumstances of the case. The regulator will not be able to retain the monies from a NCP; these will need to be paid into the Consolidated Fund.

4.9 If the regulator decides to impose a NCP, it must serve a notice, containing the following information:

- the grounds for imposing the notice;
- the amount to be paid
- how payment may be made and the period within which it must be made;
- rights of appeal; and
- the consequences of failing to comply with the notice
- provide a revised time period in which the original notice must be complied with.

4.10 The offender will have 28 days to pay the NCP unless the regulator stipulates a longer period. Should the CN, RN or TPU be complied with during the NCP payment period then the penalty would be halved. There will be no late payment charges. The regulator should have the power to withdraw or vary the notice if it finds grounds to do so. There will be no notice of intent as the consequences of non-compliance with the original civil sanction would have described when the ‘final notice’ was served.

4.11 As with unpaid monetary penalties, if a person fails to pay a NCP for non-compliance with a RN, CN or TPU combined with a VMP, then regulators may enforce through the civil courts.
4. Costs

This section explains which costs can be recovered from offenders in different circumstances and how regulators will recover costs.

Regulatory cost recovery notices (RCRN)

5.1 Section 53 of the RES Act gives regulators the power to recover certain costs when imposing a sanction. This power is limited to VMPs, compliance notices, restoration notices or stop notices. The recoverable costs include the regulators' investigation and administration costs as well as any related costs for obtaining legal or other expert advice. An RCRN is the mechanism that regulators will use to recover costs. Regulators will not be able to use RCRNs to recover costs for FMPs or EUs.

5.2 The regulator should serve the RCRN at the same time as the civil sanction is imposed, unless there are practical reasons that prevent this. It should specify the type of costs incurred by the regulator and the amount to be paid in relation to each cost. Although the RES Act says that the offender should be able to request a detailed breakdown of the costs it would be good practice for the regulator to provide this information automatically.

5.3 The regulator will retain any money raised through the cost recovery provisions. As the notice reflects the actual costs the regulator has incurred in investigating and enforcing the offence it would not be appropriate to offer any discharge or early payment discount or late payment charge.

5.4 If the regulator decides to impose a RCRN, it must serve a notice, containing information as to the following:

- The grounds for imposing the notice;
- The amount to be paid
- How payment may be made and the period within which it must be made;
- Rights of appeal; and
- The consequences of failing to comply with the notice

5.5 The operator will have 28 days to pay the RCRN unless the regulator stipulate a longer period.
5. Representations and appeals

A fair process is essential to the effective use of civil sanctions. When a regulator intends to impose a civil sanction on a person, it must first consider any representations the person makes against the sanction. When a regulator imposes a civil sanction the recipient will be able to appeal. This section provides the detail.

Representations

6.1 Before appealing there is a prior stage at which persons can make representations and object to compliance notices, restoration notices, variable monetary penalties and fixed monetary penalties. Representations must be made within 28 days of receiving a Notice of Intent. This is set out in chapter 2.

When can appeals be made

6.2 Under the two Statutory Instruments (see paragraph 1.2) appeals can be made to the First-tier Tribunal against:

- Compliance notices
- Restoration notices
- Variable monetary penalties
- Fixed monetary penalties
- Stop notices
- Regulator’s decisions not to issue a completion certificate for a stop notice or enforcement undertaking
- Non-compliance penalties
- Regulatory cost recovery notices

6.3 Consistent with the RES Act 2008, the Statutory Instruments provide that, as a minimum, an appeal may be on the grounds that:

- the regulator based their decisions on an error of fact;
- the regulator based their decisions on an error of law;
- the decision was unreasonable; or,
- the amount of a financial penalty was unreasonable.

Process for appealing

6.4 The person on whom a regulator imposes a civil sanction will have 28 days in which to appeal if they wish to do so.

6.5 The composition of a tribunal is a matter for the Senior President of Tribunals to decide. It is anticipated that these appeals would be dealt with in the General Regulatory Chamber of the First-tier Tribunal, and rules of procedure for that Chamber will be made by the Tribunal Procedure Committee in time for the
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establishment of the Chamber in September 2009. The tribunal rules and the tribunal judges’ discretion will ensure that cases are dealt with in the interest of justice and minimising parties’ costs. What follows is to illustrate how tribunals typically approach cases.

6.6 The appellant would submit their case in writing and the regulator would respond in writing. Tribunals maintain the same standards of openness in their proceedings as a criminal court. Under Rule 34 in the draft Rules the tribunal would normally give 14 days notice of a hearing to consider disposal of proceedings. The effects of some environmental incidents may be such that members of the local community will wish to listen to proceedings. It will be for the Tribunal judiciary to decide whether or not public listing of cases is appropriate.

6.7 If an appellant asks the judge not to make public certain pieces of evidence or to exclude the public from a hearing, the judge will weigh the conflicting rights and private and public interests before making a decision as in any court.

6.8 In an appeal hearing, the regulator will carry the burden of proving its case. For example, the RES act sections 39(2) and 42(2) require the regulator to be satisfied beyond reasonable doubt that an offence has been committed before they may impose a fixed monetary penalty, variable monetary penalty, restoration notice or compliance notice. The Tribunal will take this into account. This is covered in section 10(2) of the Environmental Civil Sanctions Order 2010.

6.9 An operator may appeal against a decision of the First-tier Tribunal only on points of law. A further appeal of this kind would be heard by the Upper Tribunal.

6.10 Most tribunals do not normally award costs against a party, but the First-tier Tribunal does have the power to make such costs orders. Tribunal procedure rules may restrict this power, for example by allowing costs orders only where a party has acted unreasonably.

6.11 The Lord Chancellor has the capacity to consult on charging a fee for appeals to the First-tier Tribunal, for example an application fee. Following a public consultation, any such proposal would be subject to secondary legislation that would be debated and would need to be agreed by both Houses of Parliament.

Approach to deciding appeals

6.12 Rule 2 of the draft General Regulatory Chamber Rules states its overriding objective as being to deal with a case fairly and justly. This includes dealing with a case in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and resources of the parties. The Rules give the tribunal judge wide case management powers in order to achieve these objectives. In the interests of proportionate handling of cases, the judge may for example, hold a preliminary hearing (Rule 5); direct the parties as to which particular issues are to be resolved (Rule 6); decide to consider complex or technical cases in discussion with an expert (Rule ...); research a decision based on the written submissions alone (Rule 32) if both parties agree; or conduct a wider ranging hearing if that is necessary.
**Annex 1: Offences covered by civil sanctions**

This annex will contain the list (or table) of which offences are covered and which civil sanction can be used for each offence.

**Annex 2: Scenarios to illustrate using civil and other sanctions**

1. Please refer to section 3 of the guidance, which explains the way in which regulators typically approach decisions to prosecute at present and illustrates how they are likely to make decisions in the future with the expanded toolkit that will include civil sanctions.

<table>
<thead>
<tr>
<th>Scenario 1 – Waste Management Site:</th>
</tr>
</thead>
<tbody>
<tr>
<td>A business operating a waste management site has not applied for a permit and continues to operate illegally. It is not taking any measures to protect the environment. Waste is being burned openly on site. The business has not responded to advice from the regulator. The offender has a previous history of non-compliance.</td>
</tr>
<tr>
<td>Likely current enforcement response: prosecution</td>
</tr>
<tr>
<td>Likely future enforcement response: Prosecution. Companies that wilfully operate outside of the law with no intention of complying with legal requirements and whose activities damage the environment and undermine compliant business will continue to face prosecution. Consideration may be given to imposing a Stop Notice to bring an immediate halt to the activity where there was evidence it was causing, or there was a significant risk of it causing serious harm to human health (e.g. of local residents or passers-by) or the environment (e.g. contaminating land or groundwater).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Scenario 2 – Waste Management Site:</th>
</tr>
</thead>
<tbody>
<tr>
<td>A small privately owned waste management company which operates an exempt waste recovery site has recently expanded its business and unintentionally exceeded the maximum quantity of waste allowed under its exemption. It requires a permit to carry on its activities at this level. The business has no previous record of non-compliance. A consultant has come into the firm and identified the non-compliance during an audit. The firm has come to the regulator, is keen to put matters right and apply for a permit.</td>
</tr>
<tr>
<td>Likely current enforcement response: formal caution.</td>
</tr>
</tbody>
</table>
Likely future enforcement response: The regulator may consider imposing a variable monetary penalty which would remove the financial benefit the business has gained through non-compliance.

Scenario 3 – Water Pollution:

The failure of poorly maintained equipment at a site leads to a water pollution incident that exceeds the limits of its discharge consent. The company alerts the regulator to the incident and takes steps to control the pollution. Minor damage occurs for which the company voluntarily offers to compensate the local angling club. The offender has a generally good record of compliance although there have been cases of minor non-compliance in the past.

Likely current enforcement response: prosecution

Likely future enforcement response: compliance notice and variable monetary penalty. An incident that pollutes a water course is a serious matter, particularly given that it was caused by poorly maintained equipment. However, the fact that a company has a generally good compliance record, alerted the regulator to the incident, took measures to contain the pollution and offered compensation voluntarily (which may be under a third party undertaking) would be considered in mitigation. Given the availability of civil sanctions, prosecution would appear disproportionate.

Alternative scenario: If the company had not responded to previous advice, concealed the breach and took no measures to control the pollution, the case might be more suitable for prosecution.

Scenario 4 – Water Quality Monitoring:

A company fails to provide water quality monitoring data on time. The data is provided subsequently but it is not the first time there has been a late return and the company has been warned previously. The data, once provided, shows no problems.

Likely current enforcement response: formal caution or further warning

Likely future enforcement response: fixed monetary penalty. The failure to provide data is a relatively minor offence in itself. However, the company has failed to respond to previous warnings. A fixed monetary penalty is an appropriate sanction to address lesser non-compliance of this nature in this instance. Failure to reliably supply data undermines the regulatory system – the regulator advises that any further repetition could result in further enforcement action.

Alternative scenario: If the failure to provide the data concealed a more significant offence and the company failed to cooperate with the regulator, a different sanction reflecting the more serious nature of the offence might be appropriate, such as a variable monetary penalty or prosecution.
**Scenario 5- Dust nuisance:**

A company that runs a permitted waste site fails to prevent the escape of dust from its premises in breach of a permit condition. The dust covers a number of vehicles in the neighbouring premises. The company alerts the regulator to the incident. The company had taken measures to control the dust following a previous warning. On this occasion, the dust was caused by the failure of a driver to unload waste materials in the designated covered area. The company has a generally good compliance record and wishes to make amends to their neighbours.

Likely current enforcement response: formal caution or prosecution

Likely future enforcement response: enforcement undertaking. The regulator might consider the offer of an enforcement undertaking from the company, which had a good track record and had responded to previous warnings. The incident had been caused by the failure of a driver to follow procedures. The company might offer an undertaking to clean up the vehicles on the next door premises and provide a commitment to tighten its procedures. Failure to comply with the terms of the undertaking would open up the possibility of prosecution for the original offence. If no undertaking was offered, the regulator may need to issue a variable monetary penalty and restoration notice.

Alternative scenario: A blatant failure to comply with a permit condition over a period of months. Likely response: prosecution.

**Scenario 6 – Permitted process plant:**

An operator’s site normally meets requirements, but they have been defeated by an unlikely combination of circumstances. Substantial pollution has leaked into soil risking groundwater contamination. The operator has alerted the regulator and taken swift steps to start removing the pollutant and reducing the contamination risk. The operator offers a comprehensive enforcement undertaking, to ensure at their expense that pollution from the incident is cleaned up so far as possible, further pollution is prevented, and any necessary further precautions are put in place.

Likely current enforcement response: prosecution or formal caution

Likely future enforcement response: The regulator might consider the offer of an enforcement undertaking from the company, which had a good track record and has moved swiftly to restore the harm caused.

**Scenario 7 – Damage to a Site of Special Scientific Interest (SSSI)**

SSSIs represent England and Wales’ most important biodiversity and geological heritage. A landowner or manager has without notice or consent cleared 300m of a ditch adjacent to a wetland SSSI. The resulting extra drainage has caused drying and degradation of the wetland. The area of damage is relatively small, but a
requirement to restore is justified by uncertainties about the long-term viability of plant or animal populations on the SSSI. The landowner has volunteered to carry out restoration works by installing water control structures and backfilling the excavated materials.

Likely current enforcement response: A formal caution, provided voluntary restoration is completed to Natural England’s satisfaction.

Likely future enforcement response: restoration notice to ensure the necessary environmental outcomes for the site, as natural regeneration is not possible in this case; a variable monetary penalty may be imposed to remove any financial benefit from the non-compliance or to impose a penalty to deter future non-compliance. If for any reason, the damage at the original site cannot be fully restored, the landowner could be required to restore another area of SSSI wetland to the required state.

Note: this example assumes that the damage is not serious enough to fall within scope of the Environmental Damage Regulations 2009.

Scenario 8: Deliberate dumping of construction material at a Site of Special Scientific Interest (SSSI)

The landowner has deliberately dumped construction material in the channel and on the bank of a river SSSI. There has been extensive damage to the channel and vegetation on the bank. The spoil has smothered breeding grounds of bullhead and salmon, and destroyed an otter holt. The landowner is refusing to restore voluntarily.

Likely current enforcement response: prosecution. If a conviction is secured, the regulator asks the court to order the offender to restore the harm caused.

Likely future enforcement response – Prosecution. Under proposals set out in the consultation document, paragraphs 6.10 and 6.11 Natural England and the Countryside Council for Wales would have new powers to issue a notice requiring the harm to be restored - restoration could then be made to happen more quickly, while the regulator moves to bring a criminal prosecution. A restoration requirement alone would not be a proportionate response to this incident. (The restoration notice available under the Regulatory Enforcement and Sanctions Act 2008 would give immunity from prosecution if it is complied with).

Note: this example assumes that the damage is not serious enough to fall within scope of the Environmental Damage Regulations 2009.
Annex 3: Monitoring the civil sanctions

This annex will contain information about how the civil sanctions will be monitored. Defra and regulators are working together to develop a scheme for monitoring these civil sanctions.

Annex 4: Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeal</td>
<td>The opportunity provided for the operator to challenge a decision made by the regulator by appealing to the First-tier Tribunal.</td>
</tr>
<tr>
<td>Civil sanction</td>
<td>An administrative sanction imposed by the regulator enabled by the RES Act</td>
</tr>
<tr>
<td>Code for Crown Prosecutors or the Code</td>
<td>A public document issued by the Director of Public Prosecutions that sets out the general principles that prosecutors should follow when they make decisions on cases.</td>
</tr>
<tr>
<td>Completion certificate</td>
<td>Certificate issued by the regulator when they are satisfied the steps specified in the notice have been completed.</td>
</tr>
<tr>
<td>Compliance deficit</td>
<td>A compliance deficit results from cases where there has been belated compliance by the operator but the regulator has not had an appropriate and proportionate sanction with which to address the offence(s).</td>
</tr>
<tr>
<td>Compliance notice Or CN</td>
<td>A written notice issued by the regulator which requires an operator to take actions to comply with the law, or to return to compliance within a specified period.</td>
</tr>
<tr>
<td>Criminal standard of proof</td>
<td>Level of evidence needed to prove that an offence has been committed. The regulator must be satisfied ‘beyond reasonable doubt’ that an offence has been committed.</td>
</tr>
<tr>
<td>Discharge payment</td>
<td>Reduction of penalty for payments made within 28 days following a notice of intent for FMPs</td>
</tr>
<tr>
<td>Enforcement</td>
<td>Action taken in response to non-compliance.</td>
</tr>
<tr>
<td>Enforcement Undertaking or EU</td>
<td>A voluntary agreement by an operator to take steps that would make amends for non-</td>
</tr>
</tbody>
</table>
Civil sanctions for environmental offences: draft guidance for consultation

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>compliance and its effects.</td>
<td>It is for the regulator to decide whether to accept it.</td>
</tr>
<tr>
<td>Final notice</td>
<td>Notice served after the period for representations has ended.</td>
</tr>
<tr>
<td>Financial benefit</td>
<td>The costs of any actions that can reasonably be considered necessary to have avoided non-compliance and potential financial return on sums that have not been expended.</td>
</tr>
<tr>
<td>First-tier Tribunal or FTT</td>
<td>A new generic tribunal established by Parliament under the Tribunals, Courts and Enforcement Act 2007. The First-tier Tribunal's main function is to hear appeals against decisions of the Government where the tribunal has been given jurisdiction.</td>
</tr>
<tr>
<td>Fixed Monetary Penalty</td>
<td>Relatively low level fine fixed by legislation which the regulator may impose for a specified minor instance of regulatory non compliance.</td>
</tr>
<tr>
<td>Or</td>
<td>FMP</td>
</tr>
<tr>
<td>Fixed Penalty Notice</td>
<td>Low level fine fixed by legislation which if not paid will result in prosecution for the original offence.</td>
</tr>
<tr>
<td>Or</td>
<td>FPN</td>
</tr>
<tr>
<td>Late payment charge</td>
<td>Increase of penalty for payments made more than 56 days after the final notice for a FMP was issued.</td>
</tr>
<tr>
<td>Local Authority</td>
<td>The relevant District, London or Metropolitan Borough Council in England and the County or Borough Council in Wales</td>
</tr>
<tr>
<td>Non-Compliance Penalty Notice</td>
<td>A written notice issued by the regulator imposing a monetary penalty where a restoration notice or compliance notice has not been complied with.</td>
</tr>
<tr>
<td>Notice of Intent</td>
<td>A notice served before imposing a civil sanction including details of what is proposed, grounds for the action, the right to make representations and objections etc.</td>
</tr>
<tr>
<td>Offence</td>
<td>Breach of legislation</td>
</tr>
<tr>
<td>Offender</td>
<td>Person who has committed or suspected of</td>
</tr>
</tbody>
</table>
Person

Any person who may cause an offence. This could, for example, include a business, a landowner, a non-governmental organisation, a public sector organisation or a private individual.

Regulated community

Those who are subject to environmental regulation.

Regulators Compliance Code

Asks regulators to perform their duties in a business-friendly way, by planning regulation and inspections in a way that causes least disruption to the economy. Regulators should consider the Code when determining policies, setting standards or giving guidance in relation to their duties.

Regulatory cost recovery notice

A Regulatory Cost Recovery Notice would be a written notice issued by the regulator which requires a person to pay the regulator’s investigation, legal or administrative costs when these have been incurred in imposing a VMP, Restoration Notice, Compliance Notice or Stop Notice.

Restoration

Restore to the position that would have persisted if no offence had been committed.

Restoration notice

A written notice issued by the regulator which requires an operator to take steps, within a stated period, to restore harm caused by non-compliance. Steps may be required so that the position is restored, so far as possible, to what it would have been if no offence had been committed.

Standard of proof

Level of evidence needed to prove that an offence has been committed.

Stop notice

A written notice which requires an operator to cease an activity that is causing harm or presents a significant risk of causing serious harm.

Third Party Undertaking

An action offered by a business to benefit a third party affected by the offence, including the payment of compensation.

Triable summarily only

Cases that may only be heard in the magistrate’s court.
Variable Monetary Penalty (VMP)

A proportionate monetary penalty which the regulator may impose for a more serious offence when the regulator decides that prosecution is not in the public interest.

Written representations

Any written representations and objections made to the regulator about the proposal to impose the requirement. The person can raise any defences to the proposed sanction.

Annex 5: Contact information

This annex will contain relevant contact information and where to go for further information.