Fairer and Better Environmental Enforcement

Consultation on proposals to improve environmental enforcement

July 2009
Fairer and Better Environmental Enforcement

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1. Executive Summary

What are these proposals about?

1.1. Many aspects of the environment are protected by laws and enforced by regulators. Many persons, including businesses, public organisations, landowners or individuals comply with these laws, and most strive to do so. Those who do not comply put at risk or actually harm the environment, and spoil our quality of life. Non-compliant businesses undermine law-abiding businesses.

1.2. This consultation seeks your views on proposals for a more proportionate, fairer and more effective approach to enforcing environmental criminal offences in England and Wales. This covers enforcement of a wide range of existing legislation, including protection of water and wildlife, requirements for handling waste, and control of environmental risk through permits.

1.3. These proposals offer important benefits for business. A more proportionate system of sanctions will level the playing field for compliant business, as those who have failed to comply have to accept the same compliance costs as responsible competitors. Businesses who take a responsible and active approach to compliance will find in these proposals ways to stand apart from their less responsible competitors, with benefits to their reputation, when environmental protection measures fail despite a good approach to compliance.

1.4. Enforcement is a small part of regulation, but it has to effectively signal the need for compliance. These proposals will give regulators more flexibility to respond in ways proportionate to the seriousness of non-compliance. This will support the vision of risk-based regulation envisaged by Sir Phillip Hampton under the principles he recommended. These proposals also build on Professor Richard Macrory’s recommendations for more proportionate regulatory enforcement and sanctions. The Government fully accepted these recommendations – the Macrory principles and characteristics for sound use of sanctions are embodied in the Compliance Code for regulators.

1.5. The Government proposes that Environment Agency, Natural England and Countryside Council for Wales should be able to use the civil sanctions enabled by the Regulatory Enforcement and Sanctions (RES) Act 2008. “Civil sanctions” are sanctions that are imposed by the regulator in accordance with their published enforcement policy and more detailed guidance. These regulators will then have an effective alternative to criminal prosecution in appropriate cases. Typically these will be cases in which a person has a good record of operating within regulatory requirements. Civil sanctions will also allow a proportionate sanction in some cases where no such measure is available at

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1 Final Hampton report: http://www.hm-treasury.gov.uk/bud_bud05_hampton.htm
present, cases in which belated compliance alone is not a sufficient spur to complying with the law.

1.6. These proposals do not cover local authority enforcement. Defra is also working with LACoRS, the Local Better Regulation Office, and local authorities as part of a longer term project to consider the potential for local authorities to use civil sanctions enabled by the RES Act. Nevertheless, local authorities are encouraged to comment on the current proposals, which lay out broad principles that will be equally applicable to all regulators.

1.7. The proposed civil sanctions scheme is transparent and proportionate by design; it will be applied consistently and accountably under government guidance; it will aid regulators in targeting enforcement action on risk.

1.8. One of the underlying principles of the Macrory Review was that only those regulators that are 'Hampton compliant' should be given access to the new civil sanctioning powers and the Government agrees. The Better Regulation Executive (BRE) will assess whether regulators can be deemed to be Hampton compliant and, for national regulators, will base this decision on the regulator's Hampton Implementation Review (HIR)\(^5\), together with evidence of its progress in implementing the recommendations.

1.9. The Environment Agency's HIR, conducted in November 2007, found that overall the Agency 'has taken significant steps to implement the Hampton agenda' but that there was 'further progress to be made'\(^6\). Since then the Agency has been given access to civil sanctioning powers in limited areas. Before the wider new RES Act powers can be awarded to the Agency, the BRE will therefore need to assess whether the Agency has made sufficient progress in implementing the recommendations from its HIR for it to be deemed to be fully Hampton compliant. This decision will be informed by a further review of the Agency, to be conducted by an independent review team in the autumn of 2009. BRE will also assess in the autumn whether Natural England has made sufficient progress in implementing the recommendations from its HIR, which was conducted in March 2009.

1.10. The powers will not be awarded to Environment Agency and Natural England unless or until the BRE has deemed the organisations to be Hampton compliant.

1.11. Regulators will continue to place great emphasis on raising awareness of what people need to do to comply with the law. Regulators giving advice and guidance will remain the normal response to many cases of non-compliance. Sanctions, criminal or civil, will be used in a small proportion of the total contacts regulators have with business and others.

1.12. Section 4 sets out the proposals for regulator use of RES Act civil sanctions. These new powers will be put in place by two Statutory Instruments (SI) these are contained in Annex 2 and 3 of the consultation document. The Government plans to lay these before Parliament in January 2010 for them to be debated, with a view to them coming into force on 6 April 2010. Each SI sets out in detail the offences it covers and the

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civil sanctions to be applied to each. Annex 4 lists in full all the offences to which these proposals apply.

1.13. Section 5 sets out the purpose and key features and benefits of each of the new civil sanctions. Variable Monetary Penalties (VMP) and other civil sanctions will give regulators an effective alternative to criminal prosecution – VMP’s will be determined in a way that will ensure proportionality. Responsible businesses will be able to volunteer action to make amends for non-compliance by means of an Enforcement Undertaking, which regulators can consider accepting instead of prosecution or imposing civil sanctions. The proposals also include introducing the Compliance, Restoration and Stop Notices, and Fixed Monetary Penalties enabled by the RES Act to fill important gaps in regulators’ enforcement powers. Annex 1 sets out more information about the proposed civil sanctions scheme.

1.14. The proposed scheme has been developed in discussion with regulators and provides a framework within which regulators will develop and consult on their enforcement policies, and more detailed guidance on how civil sanctions will be used. Annex 5 sets out draft government guidance to regulators to assure broad consistency of approach while allowing regulators to tailor their policies and guidance to particular areas of regulation.

1.15. Regulators exercise discretion whether or not to prosecute, having regard to the Code for Crown Prosecutors. Section 3 of the draft government guidance sets out factors that would in future tend to point regulators towards prosecution instead of civil sanctions as the proportionate response, as well as factors that would be important in mitigating the non-compliance. The way these factors might work are illustrated by scenarios which are based on the experience of regulators.

1.16. With effective civil sanctions in place, the criminal courts will continue to play a vital part in punishing the worst cases and helping to deter non-compliance. Section 6 sets out initial proposals to strengthen the role of the criminal courts in sanctioning the worst cases, which will continue to be prosecuted. This includes new powers to assist the courts in proportionate and effective sentencing in environmental cases, to ensure environmental sanctions fit the crime. These measures would require short primary legislation. The Sentencing Guidelines Council has plans to consider possible sentencing guidelines for regulatory, including environmental offences.

1.17. The Impact Assessment in Annex 6 sets out the costs and benefits of these proposals for civil and criminal sanctions. Fairness in enforcement is a crucial aim of these proposals and cannot be expressed in pounds. More proportionate enforcement will bring important benefits to society from better protection of the environment, and will help to level the playing field for compliant businesses. The costs of the new enforcement system will be borne mainly by non-compliant persons, and most of these costs by those who are least responsible in complying with the law.

1.18. Section 7 sets out how use of civil sanctions will be fair:

7 “Person” refers to any business, landowner, public body, or individual who is subject to the requirements of environmental legislation

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• Civil sanctions will allow a fairer enforcement response to non-compliance by persons who have committed an offence despite a good general approach to compliance – the stigma of a criminal conviction will be reserved for the worst cases.
• Any person will be able to volunteer measures to address their non-compliance – these would be set down in an Enforcement Undertaking, for regulators to consider accepting. Enforcement Undertakings have the potential to make other sanctions unnecessary in many cases.
• Regulators will have to satisfy themselves beyond reasonable doubt that an offence has been committed before imposing a civil sanction (except a Stop Notice8).
• The regulator must issue a Notice of Intent to impose a civil sanction - they must then consider any representations the recipient wishes to make before imposing a sanction (except a Stop Notice9).
• The person on whom a civil sanction is imposed may appeal against it to the independent and impartial First-tier Tribunal10.

1.19. Section 8 sets out arrangements for making information about use of civil sanctions publicly available. Section 9 sets out the requirements placed on regulators to consult on and publish a revised enforcement policy, and also guidance on the way they will use civil sanctions. Section 10 sets out the proposed approach where more than one regulator enforces particular legislation. Section 11 outlines arrangements for monitoring the way civil sanctions are used and the impact they have, and for sharing this information with interested people and organisations. The new civil sanctions will be reviewed approximately three years after they are introduced.

1.20. Taken together, these proposals will enable regulators and the criminal courts to impose sanctions for non-compliance that will be better at changing non-compliant behaviour and ensuring environmental protection. These proposals will not change the existing offences, available defences, or bring any new regulation to be complied with.

8 A regulator may issue a Stop Notice if reasonably satisfied that an offence is being, or is likely to be committed, but only if there is serious harm, or a significant risk of serious harm.
9 Stop Notices will only be used where serious harm is occurring, or there is a significant risk of serious harm. The regulator will not have to issue a Notice of Intent to impose a Stop Notice or have to await representations in these serious cases.
10 The First-tier Tribunal has recently been established: http://www.tribunals.gov.uk/Tribunals/Firsttier/firsttier.htm
2. Introduction

2.1. This consultation document contains proposals to make enforcement in environmental cases in England and Wales fairer, more proportionate and more effective.

2.2. This document proposes a scheme for Environment Agency, Natural England, and Countryside Council for Wales to be able to use new civil sanctions that have been made available by the Regulatory Enforcement and Sanctions Act 2008.

2.3. This scheme will be implemented by proposed secondary legislation which accompanies these proposals. This draft legislation consists of:

- The Environmental Civil Sanctions Order 2010 (Annex 2)
- The Environmental Sanctions (Miscellaneous Amendments) (England and Wales) Regulations 2010 (Annex 3)

2.4. This document also includes initial proposals to strengthen the powers of the criminal courts to assist them in proportionate sentencing of the most serious cases, which will continue to come before them. These proposed sentencing powers would be subject to a further public consultation and, if agreed, would need to be introduced by means of primary legislation when an opportunity becomes available.

Who will be affected by these proposals?

2.5. This consultation document is directed at anyone with an interest in the way environmental regulation is enforced. This will include businesses, small and large, landowners, occupiers, public and third sector organisations, as well as regulators, and justice system and other professionals. The Government also recognises that a wide range of other people and groups have an interest in the way environmental regulation is enforced.

Timing and duration of this consultation

2.6. This consultation lasts for 12 weeks and ends on 14 October 2009.

How and where to respond to this consultation

2.7. Please return comments to:

By e-mail: FairerandBetterEnvironmentalEnforcement@defra.gsi.gov.uk

By post: Fairer and Better Environmental Enforcement team
5A, Ergon House
Horseferry Road
London
SW1P 2AL
Or in Wales:
By e-mail: waste@wales.gsi.gov.uk copied to Defra as above
By post: Fairer and Better Environmental Enforcement Project
Waste Regulation Policy Branch
Cathays Park
Cardiff
CF10 3NQ

If you have an enquiry relating to this consultation please call:
020 7238 6148
Or in Wales:
02920 826836

2.8. This document is available for download from the Defra website,
http://www.defra.gov.uk/environment/enforcement/index.htm For convenience, Annex 7 contains a list of specific questions we have asked throughout this document. The Government welcomes your response to this consultation in any form. However, your response can be processed more efficiently if, when answering specific consultation questions, your response is clearly marked with question numbers. To help put your response into context, you are also encouraged to indicate a) who you are; b) how many people or organisations you represent and who they are; and c) if there are particular kinds of activities that you are primarily concerned with.

Comments should be returned to Defra by 14 October 2009

Comments from Wales should be sent to the Welsh Assembly Government, copied to Defra, by 14 October 2009

Consultees should note that it may not be possible to consider responses that arrive after the deadline.

2.9. Defra’s policy on ensuring respondent’s confidentiality:
Ensuring your confidentiality

In line with Defra’s policy of openness, at the end of the consultation period, copies of the responses we receive may be made publicly available through the Defra Information Resource Centre, Lower Ground Floor, Ergon House, 17 Smith Square, London SW1P 3JR. This information they contain may also be published in a summary of responses.

If you do not consent to this, you must clearly request that your response be treated confidentially. Any confidentiality disclaimer generated by your IT systems in email responses will not be treated as such a request. You should also be aware that there may be circumstances in which Defra will be required to communicate information to third parties on request, in order to comply with its obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations.

The Information Resource Centre will supply copies of consultation responses to personal callers or in response to telephone or email requests (tel: 020 7238 6575 or email defra.library@defra.gsi.gov.uk). Wherever possible, personal callers should give the library at least 24 hours’ notice of their requirements. An administrative charge will be made to cover photocopying and postage costs.

Responses provided to WAG will be published. Normally, the name and address (or part of the address) or its author are published along with the response, as this gives credibility to the consultation exercise. If you do not wish to be identified as the author of your response, please state this expressly in writing to us, and your response will be published anonymously.

Next steps

2.10. A summary of the responses to this consultation will be published by Defra at http://www.defra.gov.uk/environment/enforcement/index.htm and by WAG at www.countryside.wales.gov.uk. Each response will be considered. The Government will publish a response to consultees’ views in the autumn. Depending on the outcome of the consultation, the Government intends in 2010 to lay before Parliament the draft Order and draft Regulations needed to introduce civil sanctions.
2.11. This paper has been produced by following the consultation criteria of the Cabinet Office Code of Practice\textsuperscript{11} on written consultation, and also meets WAG practice. The consultation criteria in the Code are as follows:

- Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy;
- Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses;
- Ensure that your consultation is clear, concise and widely accessible;
- Give feedback regarding the responses received and how the consultation process influenced the policy;
- Monitor your Department’s effectiveness at consultation, including through the use of a designated Consultation Co-ordinator;
- Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

\textsuperscript{11} \url{www.berr.gov.uk/bre/consultation%20guidance/page44459.html}
3. Protecting the environment

Why is protecting the environment important?

3.1 Protecting the environment brings a wide range of benefits, for the economy, for people’s quality of life, and for communities.

3.2 In its strategy for pursuing sustainable development\textsuperscript{12}, the Government emphasised the need to ensure that natural resources that are unimpaired remain so, and that damaged resources are improved. Sustainable development also requires a strong, healthy and just society that is fair, inclusive and cohesive. Fairness to society at large demands that those who damage the environment or the quality of life of neighbouring people are made to restore the harm they have caused.

3.3 The well-being of communities depends heavily on the quality of the local environment. A local area which offers clean air and clean streets, and attractive green areas for recreation will contribute a sense of well-being and to good health – pollution may harm people’s health. Fly-tipping, for example, undermines people’s enjoyment of life and may increase fear of crime\textsuperscript{13}.

3.4 In economic terms, government may need to intervene where markets fail to protect the environment. The environment is at particular risk from market failure, in part because it can be easy for criminals to profit from environmentally damaging activities, for example illegally dumping building waste, or washing toxic chemicals into a river. Where regulation is necessary, it is designed to overcome such market failures.

3.5 Two principles are fundamental in environmental regulation: that harm should be prevented or minimised, and that the “polluter pays” for harm they cause. Under the “polluter pays” principle, the environmental and social costs of failing to prevent or control risks to the environment should fall on those who are responsible for them. When operators fail to comply with the law, enforcement may be needed to achieve this objective.

3.6 More specifically, the main purposes of environmental enforcement are to:

- prevent continuing environmental risk or harm;
- secure improvements leading to compliance;
- ensure environmental damage is put right;
- remove any financial benefit from non-compliance;
- make restitution to adversely affected communities;
- punish behaviour that seriously undermines regulation, at its worst intentional, reckless or grossly negligent non-compliance.

3.7 If enforcement achieves these purposes, it will help to secure important results:

\textsuperscript{12} Sustainable Development Strategy: http://www.defra.gov.uk/sustainable/government/publications/uk-strategy/

- deter future non-compliance with environmental requirements; and
- prevent environmental harm from occurring in the first place

3.8. The proposals set out below are designed to ensure that proportionate environmental enforcement and sanctions are effective in pursuing these principles and purposes.

**How do regulators protect the environment now?**

3.9. Many individuals, businesses, landowners and other bodies comply with environmental protection laws, and most strive to do so. Environmental regulators see giving easily accessible advice and guidance on how to comply, especially to small businesses, as a priority for them to be effective.

3.10. Regulation may place direct requirements on operators to ensure they bear the costs they would otherwise place on society. Environmental regulation can take different forms depending on the nature of the activity and the risks involved. For example, anybody who is contracted to remove and dispose of waste must be a registered and licensed operator. Sometimes certain activities at a particular site may only be undertaken with a permit issued by the regulator, with conditions designed to ensure risks to the environment and people’s health are properly prevented or controlled.

3.11. Sometimes compliance with the law or permit conditions needs to be enforced if regulation is to be effective. Failing to comply with environmental requirements is often made a criminal offence as the immediate or cumulative impact of non-compliance on the environment and society can be severe.

3.12. Regulators may sanction such offences using warning letters, cautions, and they may prosecute. In deciding whether to prosecute, regulators have regard to the Code for Crown Prosecutors: the regulator should only prosecute if there is sufficient evidence to provide a realistic prospect of conviction, and prosecution is in the public interest. If the offender admits the offence, and the regulator considers that the public interest requires a formal criminal sanction falling short of prosecution, the regulator may caution the offender. Regulators’ enforcement policies set out public interest factors particularly relevant to regulatory cases. Regulators take these factors into account when determining what enforcement action would be appropriate and proportionate in a particular case.

3.13. Some regulators already have powers to issue administrative sanctions, for example enforcement notices, without the need to secure a criminal conviction. Enforcement notices typically require the operator to comply with certain requirements, to put right damage they have caused, carry out certain works, or to stop an activity that is causing or risks causing serious harm to the environment or people’s health. An abatement notice may be issued when an operator or private individual is causing nuisance to local people, through excessive noise, bad smells, or dust - the abatement notice requires the nuisance to be stopped.

3.14. In some legislation failure to comply with an enforcement notice is an offence in itself since flouting such formal requirement risks undermining regulation and the authority of the regulator.
3.15. Some regulators may issue fixed penalty notices for certain offences. For example, the Environment Agency can issue fixed penalty notices for various waste offences e.g. under the Hazardous Waste (England and Wales) Regulations 2005.

3.16. Where the operator needs to have a permit to carry on an activity, the regulator may also have powers to modify the permit conditions, suspend or revoke a permit in certain circumstances.

3.17. 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. Paragraphs 3.18 – 3.30 set out the particular problems these proposals are designed to overcome.

### What scope is there for improving environmental enforcement?

3.18. The reports by Sir Phillip Hampton\(^{14}\) and Professor Richard Macrory\(^{15}\), and Defra work specifically on environmental enforcement have identified ways in which the existing system should be improved.

3.19. In the 2004 Budget the Chancellor asked Phillip Hampton to lead a review into regulatory inspection and enforcement with a view to reducing the administrative cost of regulation to the minimum consistent with maintaining the UK’s excellent regulatory outcomes.

3.20. The Government accepted the Hampton report’s vision of regulation that was comprehensively risk based. But the Hampton report concluded that sanctions were not yet a deterrent to serious non-compliance and needed to be toughened – there needed to be a review of regulatory sanctions and this was carried out for the Government by Professor Richard Macrory.

3.21. The Macrory report, “Regulatory justice: Making sanctions more effective”, found that the regulatory system placed too heavy a reliance on prosecution, which was often a disproportionate response. While the most serious offences merited criminal prosecution, it may not be an appropriate route to achieving a change in behaviour and improved outcomes for a large number of businesses where the non-compliance was not truly criminal in its intention. He also found that many regulators lacked an alternative means of sanctioning breaches of regulation, which gave rise to a “compliance deficit” of cases that were not being addressed by effective enforcement. Macrory concluded that civil sanctions\(^{16}\) would be effective in suitable cases instead of prosecution, providing a proportionate approach and helping to close the compliance deficit.

3.22. The Macrory report also concluded that the criminal courts needed guidelines and additional powers to help them deliver proportionate sanctions. Too often there were cases

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\(^{14}\) Final Hampton report: [http://www.hm-treasury.gov.uk/bud_bud05_hampton.htm](http://www.hm-treasury.gov.uk/bud_bud05_hampton.htm)


\(^{16}\) “Civil sanctions” are sanctions that are imposed by the regulator in accordance with their published enforcement policy on when the sanctions would be used, and guidance on how the sanctions will be determined. Civil sanctions provide an alternative to criminal prosecution. The civil sanctions in these proposals are those available under the Regulatory Enforcement and Sanctions Act 2008.
where offenders are left with financial benefit from non-compliance, undermining compliant businesses. Too often there was no requirement on offenders to restore damage their non-compliance had caused.

3.23. The Macrory report identified six principles that should underpin any regulatory sanctioning regime. Sanctions should:

- Aim to change the behaviour of the offender;
- Aim to eliminate any financial gain or benefit from non-compliance;
- Be responsive and consider what is appropriate for the particular offender and the regulatory issue;
- Be proportionate to the nature of the offence and the harm caused;
- Aim to restore the harm caused by the regulatory non-compliance, where appropriate; and
- Aim to deter future non-compliance.

3.24. The Macrory report also set out important characteristics for sanctions. In particular, perverse incentives that might influence a regulator’s choice of sanctioning response should be avoided. Regulators should therefore gain no revenue from civil sanctions. Enforcement decisions should be based on published policies and guidance.

3.25. The Government accepted the Macrory recommendations in full. The Regulatory Enforcement and Sanctions (RES) Act 2008 took forward the Macrory recommendations relating to civil sanctions. The RES Act now enables Ministers to introduce such sanctions as a major step towards an improved enforcement system.

Defra-led review of environmental enforcement

3.26. Defra’s Review of Enforcement in Environmental Regulation examined the available evidence on how the system of environmental enforcement was working. The review identified problems in the system and possible solutions in collaboration with interested people and organisations.

3.27. The review found that the courts took environmental cases seriously and considered the key sentencing factors. But it was not possible to see a clear enough link between sentences and the facts of the particular case. Sentencing was heavily influenced by past cases, which could undermine proportionality in the sanctions that were imposed.

3.28. Overall, the purposes of enforcement were not consistently and proportionately achieved. As Macrory found, there were environmental cases in which restoration was practicable but was not secured, and financial benefit from non-compliance that was not

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17 The principles and characteristics of good regulation and enforcement set down in the Hampton and Macrory reports are contained in the Compliance Code. All regulators must have regard to this Code: [http://www.berr.gov.uk/files/file45019.pdf](http://www.berr.gov.uk/files/file45019.pdf)

removed. In most environmental cases, the courts lacked a key power to order environmental restoration.

3.29. The review also concluded that information that could show whether proportionate sanctions were being consistently applied was not being collected, or made available publicly. Without easily accessible public information, those who are in a position to exert pressure for improvement (e.g., customers in a supply chain) are not able to do so - sanctions could not have the full deterrent impact that was expected.

3.30. There is scope for consolidation, simplification, and filling gaps in the availability of enforcement notices. Enforcement notices are a valuable tool for proportionate enforcement, often in place of any other sanction. But, in environmental regulation they are little used in some sectors, or not available in others. A better graduated enforcement system in which restoration is given a greater priority calls for wider use of enforcement notices to ensure timely and appropriate action on compliance and restoration.
4. The proposals

Introduction

4.1. It is Government’s intention that regulators should have a broader, more proportionate toolkit to deal with the full range of non-compliance, from minor non-compliance through to the most serious cases where prosecution will remain appropriate. These proposals will enable the Environment Agency (EA), Natural England (NE), and Countryside Council for Wales (CCW), to enforce more effectively, and more fairly. The proposals include allowing these regulators to use civil sanctions enabled by the Regulatory Enforcement and Sanctions (RES) Act 2008, as well as initial proposals for new powers to assist the criminal courts in proportionate and effective sentencing of the worst cases, which would still be prosecuted.

4.2. The Environment Agency and Natural England are planning to phase in their proposed use of civil sanctions in selected regulatory areas so as to allow experience to be assessed and lessons learned. The Environment Agency will engage with key stakeholders as their plans develop and will consult on their revised enforcement policy and sanctions guidance which will set out their approach.

4.3. These proposals do not cover local authority enforcement. Defra is also working closely with the Local Better Regulation Office on developing and improving delivery through local authorities. This includes working with LACoRS and local authorities as part of a longer term project to consider the potential for local authorities to use civil sanctions enabled by the RES Act as a possible means to more flexible and proportionate enforcement. Nevertheless, local authorities are encouraged to comment on the current proposals, which lay out broad principles, and include guidance that will be equally applicable to all regulators.

4.4. The RES Act does not make civil sanctions available for police and CPS to use, but improved criminal sentencing in environmental cases would help to increase the impact their investigations and prosecutions have on countering wildlife crime and organised environmental crime.

4.5. Regulators will continue to provide advice and guidance in order to encourage compliance. Advice and guidance, and sometimes warnings will continue to be the normal response to many minor cases of non-compliance. Regulators will only impose civil sanctions when they are necessary and proportionate. Civil sanctions will be in addition to current sanctioning options, which will remain available to regulators, including existing enforcement notices, formal cautions, prosecution, or action to vary, suspend or withdraw permits.

4.6. The proposed scheme will cover a wide range of existing environmental regulation in England and Wales, including for example waste, water and land quality, freshwater fisheries, flood risk management, and wildlife and protected sites. The proposals do not cover any legislation to do with land-use planning, or consumer protection.

19 The proposed civil sanctions will not be used generally in cases that fall in scope of the Environmental Damage Regulations (EDR) 2008 and The Environmental Damage (Prevention and Remediation) (Wales)
4.7. The Government also proposes to introduce the civil sanctions scheme described below for environmental permitting as well as for other environmental regulation. Defra has consulted on extensive simplification of permitting arrangements under the Environmental Permitting Programme. The Government proposes to implement the second phase of this important simplification through the draft Environmental Permitting Regulations (EPR) 2010. It is intended that the revised EPR would be laid before Parliament at the same time as the draft Order and Regulations that would implement these proposals on use of civil sanctions. Introducing the civil sanctions scheme for permitting will therefore require the Government to lay a further Regulation at a future date. Annex 4, which sets out the offences covered by these proposals, includes the EPR offences.

4.8. Regulators will be able to apply the new civil sanctions to any person who has to comply with environmental regulation or causes environmental damage covered by these proposals.

4.9. The potential for using the civil sanctions will be considered separately when new legislation is proposed. For example, the Marine and Coastal Access Bill, which is now in its Parliamentary stages, includes powers to introduce some types of civil sanctions from those available under the RES Act. The scheme proposed here would form the basis for any proposed use of civil sanctions in other areas of environmental legislation, adapted as necessary to meet particular requirements, and subject to further public consultation as appropriate.

4.10. A fair process for using the new civil sanctions is an essential part of these proposals. When a regulators intends to impose a civil sanction on a person, the regulator must first consider any representations the person makes against the sanction. When the regulator imposes a civil sanction the recipient will be able to appeal to the independent and impartial First-tier Tribunal—a member of the Tribunal judiciary will consider the appeal.

4.11. One of the underlying principles of the Macrory Review was that only those regulators that are ‘Hampton compliant’ should be given access to the new civil sanctioning powers and the Government agrees. The Better Regulation Executive (BRE) Regulations 2009. These regulations transpose into English and Welsh law, the provisions of the Environmental Liability Directive. The EDR require those who cause especially serious environmental damage (termed “significant” in the regulations) to restore the harm they have caused. EDR provides a range of enforcement notices that regulators can use to help secure restoration in such cases. In some cases a proportionate sanction and proper deterrence may require prosecution for related requirements – alternatively it may be appropriate to use a civil Variable Monetary Penalty, described in paragraphs 5.2 – 5.30 below.

20 For these purposes, “person” includes any business, organisation, sole trader, landowner, occupier or individual.
21 Except a Stop Notice – the regulator would normally need to impose such a notice urgently. Paragraphs 5.78 – 5.83 give more details.
22 The First-tier Tribunal, and the Upper Tribunal (which hears appeals on points of law) have been established under the Tribunals, Courts and Enforcement Act 2007. Appeals are discussed in paragraphs 7.2 – 7.15 below. More information can be found at http://www.tribunals.gov.uk/Tribunals/PlannedChanges/grcconsultation.htm

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will assess whether regulators can be deemed to be Hampton compliant and, for national regulators, will base this decision on the regulator’s Hampton Implementation Review (HIR)\textsuperscript{23}, together with evidence of its progress in implementing the recommendations.

4.12. The Environment Agency’s HIR, conducted in November 2007, found that overall the EA ‘has taken significant steps to implement the Hampton agenda’ but that there was ‘further progress to be made’ \textsuperscript{24}. Since then the Agency has been given access to civil sanctioning powers in limited areas. Before the wider new RES Act powers can be awarded to the Agency, the BRE will therefore need to assess whether the Agency has made sufficient progress in implementing the recommendations from its HIR for it to be deemed to be fully Hampton compliant. This decision will be informed by a further review of the Agency, to be conducted by an independent review team in the autumn of 2009. BRE will also assess in the autumn whether Natural England has made sufficient progress in implementing the recommendations from its HIR, which was conducted in March 2009.

4.13. The powers will not be awarded to Environment Agency and Natural England unless or until the BRE has deemed the organisations to be Hampton compliant.

4.14. Defra’s 2008 Simplification Plan “Better Regulation, Better Business” sets out how the department is reducing the burdens it imposes on businesses and this project contributes to that Plan.

4.15. The proposals do not duplicate any existing requirements or introduce any new ongoing burdens on business beyond familiarisation with the new system. One of the main aims of the proposals is to improve the transparency and coherence of environmental enforcement by:

- enabling regulators to respond more fairly with civil sanctions in suitable cases to businesses and individuals that have a generally good approach to complying with the law, instead of having to rely too much on criminal prosecution
- providing a framework for fair and proportionate use of civil sanctions so that prosecution is normally reserved for the worst offenders; and
- assisting the courts in proportionate and effective sentencing of the worst offenders.

4.16. The proposals also seek to address a number of irritation factors by:

- creating a framework for more proportionate enforcement that will promote consistency
- through Enforcement Undertakings, enabling responsible businesses and individuals to volunteer to address the non-compliance and its effects, avoiding the need for other sanctions in many cases;

\textsuperscript{23} Hampton Implementation Reviews: http://www.berr.gov.uk/whatwedo/bre/inspection-enforcement/implementing-principles/reviewing-regulators/page44054.html

• giving priority to restoration of environmental harm and adverse effects on local communities, instead of fines, which is good for the environment, for society and for the reputation of business
• removing benefits gained from non-compliance thus creating a more level playing field for typically compliant businesses.

4.17. In a tough economic climate business may find it harder to thrive. The Government expects that the improved civil and criminal sanctions will be fairer because:

• There will be a better graduated enforcement system in which sanctions more closely reflect the seriousness of the non-compliance
• Proportionate and effective sanctions will do more to level the playing field for compliant businesses, removing economic advantage from those who fail to comply with the law
• Many environmental offences carry strict liability for environmental damage to provide for ready accountability of polluters - operators with a good general approach to compliance will have the opportunity to make amends for their non-compliance without getting a criminal record
• Responsible businesses and others value their reputation, and civil sanctions will carry proportionately less stigma, and should have less impact on business reputation than criminal sanctions
• Operators will be able to volunteer measures to address non-compliance – these would be set down in an Enforcement Undertaking, for regulators to consider accepting. Enforcement Undertakings have the potential to make monetary penalties unnecessary in many cases
• Whether sanctions are criminal or civil, everybody will be better able to understand the seriousness of the case and the basis on which sanctions have been decided

4.18. Sanctions will be more effective because:

• More proportionate criminal and civil sanctions will do more to deter and prevent damage to the environment or the well-being of neighbouring communities
• The courts and regulators will require persons to restore harm they have done to the environment where that is possible and proportionate, including harm to the quality of life of local communities
• Prosecution can be targeted on those who have little evident concern for managing and preventing risks to the environment - it will be clearer that criminal convictions signal the worst environmental offences, and consequently carry a greater stigma, damage to reputation, and incentive to comply in future
• It will promote co-operation and greater efficiency in enforcement to the benefit of business and regulator

4.19. This document sets out how the new civil sanctions and strengthened criminal sentencing will ensure that enforcement is done in ways that are transparent, proportionate, consistent, accountable and targeted on the greater risks. Section 5 sets out the purpose and key features of the new civil sanctions enabled by the RES Act. The information set out in section 5 and Annex 1 of this document provide a broad framework to help secure broad consistency in regulators’ approach to using civil sanctions. This broad framework is further set out and explained in draft government guidance (Annex 5).
Section 9 explains how regulators will have regard to the government guidance in developing and consulting on more detailed policies and guidance.

**Policy options**

4.20. The proposals aim to ensure that enforcement continues to play an effective part in protecting the environment and ensuring a level playing field for compliant operators by means of:

- new civil sanctions for regulators to use when it is proportionate to do so;
- more effective criminal sanctions for the worst cases
- a greater emphasis on requiring harm to be restored
- opportunities for improved communication and collaboration between regulator and regulated

4.21. These proposals will not change the existing offences, available defences, or bring any new regulation to be complied with.

4.22. Options for change are compared with **Option 1**, "Do nothing". Option 1 is to maintain the existing system of environmental enforcement without introducing the measures included in options 2 or 3. The purpose of including this option is to ensure that the new proposals are compared with the current situation – i.e. as a baseline.

4.23. **Option 2** involves the introduction of RES Act civil sanctions, with no measures to strengthen the role of the criminal courts in proportionate sentencing of the worst cases.

4.24. **Option 3** involves introducing RES Act civil sanctions, and separate initial proposals to strengthen the role of the criminal courts.

4.25. Options 2 and 3 are explained in further detail later in this section. Options 2 or 3 would have impacts on business, regulators, the courts and society at large. These impacts and the findings of the draft Impact Assessment are summarised below. Taking account of these findings, the Government’s preference is for Option 3. When you have considered this section, and the information in later sections please consider the following questions.

**Question 1:** Which of Options 1, 2 and 3 do you prefer:

(a) Do you favour the status quo (**Option 1**), meaning that no action should be taken to introduce civil sanctions or strengthen criminal sentencing?

(b) Do you support the introduction of civil sanctions as proposed without complementary measures to strengthen criminal sentencing (**Option 2**)?

(c) Do you support the introduction of civil sanctions and complementary measures to strengthen criminal sentencing as proposed (**Option 3**)?
Option 2: introduce new civil sanctions only

4.26. Civil sanctions would be imposed as an alternative to criminal prosecution, or to fill the “compliance deficit” with a proportionate sanction in cases where none is currently available.

4.27. Paragraphs 4.28 onwards set out what introducing the new civil sanctions could achieve and how they would be used. Sections 5 and 7, and Annex 1 in particular set out in more detail the proposed scheme for using civil sanctions.

4.28. The newly available civil sanctions are available under the RES Act:

- **Compliance Notice**: 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;
- **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, so far as possible;
- **Fixed Monetary Penalty**: a relatively low level fine fixed by legislation that the regulator may impose for a specified minor offence;
- **Enforcement Undertaking**: a voluntary agreement by an operator to take steps that would make amends for non-compliance and its effects. It is for the regulator to decide whether to accept it.
- **Variable Monetary Penalty**: 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;
- **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;

4.29. Before imposing a Compliance or Restoration Notice, Fixed Monetary Penalty, or Variable Monetary Penalty on a person the regulator must first have issued a Notice of Intent to impose the sanction. The regulator must consider and take into account any representations made to it.

4.30. The Variable Monetary Penalty and the Enforcement Undertaking offer effective and completely new alternatives to criminal prosecution in appropriate cases. The Fixed Monetary Penalty, Restoration Notice, Compliance Notice and Stop Notice are available under the RES Act to fill important gaps in existing provisions.

4.31. The RES Act also provides\(^{25}\) for the statutory instruments introducing the civil sanctions to contain other powers that regulators will need to make the new system work effectively. The proposals set out in this consultation document include:

- a Non-compliance Penalty (NCP): a written notice issued by the regulator imposing a monetary penalty for failing to comply with a Restoration Notice or

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\(^{25}\) sections 45, 53 and 55 of the RES Act
Compliance Notice that has been imposed with or without a VMP, or a Third Party Undertaking that the regulator has accepted

- a Regulatory Cost Recovery Notice (RCRN): a written notice issued by the regulator which requires an operator 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
- a power for regulators to require a person to provide information that the regulator needs in order to determine any financial benefit from non-compliance, for the assessment a Variable Monetary Penalty

4.32. The proposed civil sanctions scheme is transparent and proportionate by design; it will be applied consistently and accountably under government guidance; it will aid regulators in targeting enforcement action on risk.

**Legislation to introduce civil sanctions**

4.33. The new civil sanctions will be introduced initially by means of two statutory instruments:

- The Environmental Civil Sanctions Order 2010 (draft in Annex 2)
- The Environmental Sanctions (Miscellaneous Amendments) (England and Wales) Regulations 2010 (draft in Annex 3)

4.34. These statutory instruments make civil sanctions available to Environment Agency, Natural England, and Countryside Council for Wales. Using powers in the RES Act, the draft Environmental Civil Sanctions Order 2010 covers offences in existing primary legislation that are enforced by these regulators. The draft Order includes key features of the scheme for use of civil sanctions.

4.35. Parts 1 and 2 of the draft Order are introductory; Part 3 sets out provisions requiring payment to central government funds of all monetary penalties received by the regulator, penalties for non-compliance, recovery of unpaid penalties and enforcement costs; Part 4 deals with certain appeal provisions, requirements on regulators to consult on and publish revised enforcement policies and guidance on the way they will use the civil sanctions, and on making information publicly available. Schedules 1 – 4 of the draft Order set out detailed provisions for the various civil sanctions:

- Schedule 1 – Fixed Monetary Penalties
- Schedule 2 – Compliance Notices, Restoration Notices, and Variable Monetary Penalties
- Schedule 3 – Stop Notices
- Schedule 4 – Enforcement Undertakings

Schedule 5 will list each offence the Order covers, and the civil sanctions to be made available for each offence. A full listing of all the Environment Agency, Natural England and Countryside Council for Wales enforced offences that are included in these proposals, and the proposed availability of civil sanctions, are set out in Annex 4.
4.36. The draft Environmental Sanctions (Miscellaneous Amendments) (England and Wales) Regulations 2010 cover offences in secondary legislation. The Regulations would be made under section 62 of the RES Act, sections 93 – 95 of the Environment Act 1995, and section 2(2) of the European Communities Act 1972. These Regulations are contained in Annex 3. The Regulations refer back to the key features of the civil sanctions scheme that are set out in the Order. A full listing of the offences covered by these proposals is in Annex 4.

4.37. The civil sanctions that Government intends to make available through subsequent amendment to the proposed Environmental Permitting Regulations 2010 are also set out in Annex 4.

4.38. The draft Order sets out key features of the process for using the civil sanctions. This includes the means for a person to appeal against a regulator’s decision to impose a civil sanction. The approach to drafting the Order has been to set out as clearly as possible a scheme in the way it will be used by regulators – the Order and Regulations cover matters specified in the RES Act and make provisions the RES Act requires to be made. The draft Order and Regulations also make the supplementary provisions mentioned in paragraph 4.31 above.

4.39. Schedule 5 of the draft Order, and the draft Regulations each set out the offences they cover - for each offence the provisions set out which of the above civil sanctions are needed for proportionate and effective enforcement.

4.40. Each statutory instrument amends the earlier legislation and enables regulators to apply civil sanctions for the offences the earlier legislation contains. By referring to the earlier legislation in its amended form it will be easy in future to see the range of civil and criminal sanctions that apply to each offence.

Making Civil Sanctions Available for Particular Offences

4.41. The draft Order and draft Regulations will both set out which civil sanctions regulators would be able to use for which offences. These proposals would make civil sanctions widely available for environmental offences, unless there are good reasons not to introduce them. This will assist regulators in better graduated and more proportionate responses to non-compliance.

4.42. Where it is not proposed to make civil sanctions available for an offence, or not the full range, it is because of the nature of the offence, the specific behaviours and circumstances in which the offence may be committed, or the unsuitability of particular civil sanctions as an enforcement tool in response to the offence.

4.43. When civil sanctions have been made available for a particular offence, regulators will have to decide whether sanctions are appropriate in a particular case, and if so whether to prosecute or to apply civil sanctions. In taking that decision regulators will have regard to the factors set out in section 3 of the draft government guidance. For example, intentional or reckless non-compliance, failure to comply with enforcement notices, obstruction, or giving false or misleading information would normally result in prosecution.

4.44. The broad approach to making civil sanctions available for use by regulators is as follows:
• Civil sanctions would not be appropriate for fault-based offences where a
regulator only deals with those cases that should be prosecuted in the
public interest, having regard to the factors set out in section 3 of the draft
government guidance. Civil sanctions will therefore not be available for offences
of illegal waste disposal (fly-tipping) that are enforced by EA; EA deals only with
“big, bad, and nasty” fly-tipping cases.
• **Fixed Monetary Penalties** will be made available for clear cut instances of
offending that do not involve creation of significant environmental harm or risk of
harm, and where Fixed Penalty Notices do not already exist. This would include
for example, failure to provide timely monitoring data despite regulator advice
and guidance on the matter.
• **Variable Monetary Penalties** will be available for a wide range of offences,
where non-compliance may be more serious. This would include making VMPs
available for breach of enforcement notices in cases when the regulator
considers there are strong mitigating factors. However, VMPs will not be
available for breach of enforcement notices issued under the Environmental
Damage Regulations. Cases that fall under the Environmental Damage
Regulations will involve especially serious environmental damage, and coupled
with the seriousness of failing to comply with an enforcement notice, this
suggests that use of civil sanctions could not be an proportionate response.
• **Variable Monetary Penalties would be made available for certain offences
that require evidence of intent or other fault** (fault-based offences), also for
offences of obstruction, and providing false or misleading information – this is
for cases when the regulator finds strong mitigating factors that point away from
prosecution. This reflects the considerable variety of circumstances in these
kinds of cases.
• **Fixed or Variable Monetary Penalties** will be available for certain offences,
such as failure to comply with a permit, which can involve a range of more and
less serious kinds of breaches. Regulators will consult on clear cut, lesser
aspects of such offences that they propose should normally be subject to a
Fixed Monetary Penalty – this will be specified for each offence in the
regulators’ draft Sanctions Guidance
• **Enforcement Undertakings** will be available for most offences, except where
there are specific reasons why they are not appropriate. For example,
Enforcement Undertakings will not be available for the serious offence of failing
to comply with an enforcement notice, as the regulator has already had to take
formal action to secure a response – this failure to co-operate rules out
accepting assurances through an Enforcement Undertaking.

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26 Giving false or misleading information could be intentional, for example to boost a company’s profits,
and is not appropriate. For example, to boost a company’s profits, obtain a permit illegally or to undermine a criminal investigation by withholding or delaying information about
the circumstances that have led to a breach. Alternatively a business might supply ‘false or misleading
information’ because of faulty equipment or human error that should have been avoided but amounts to a
lesser example of the offence. Where there is a history of failures, or the failure has had or risks significant
consequences then prosecution is likely to be more appropriate.
• **RES Act Restoration, Compliance and Stop Notices** will be used to fill important gaps in the enforcement notice powers presently available to regulators.

**Question 2:** Do you agree that the draft statutory instruments give appropriate legislative effect to the proposals presented in the Consultation Document? If not, which elements do you consider are not best framed for this purpose and why?

**Question 3:** Do you agree with the approach that has been used to select which civil sanctions should apply to offences? If not what alternative approach would you suggest?

**Question 4:** Do you agree that the offences and applicable sanctions set out in full in Annex 4 (and to be included in the necessary statutory instruments) are consistent with the approach used?

4.45. Section 5 below sets out the purpose and key features of each of the new civil sanctions enabled by the RES Act, and proposed under the above statutory instruments.

**Option 3 (the proposals): introduce new civil sanctions as in Option 2; and introduce new powers to assist the criminal courts in structured and effective sentencing in environmental cases.**

4.46. This is the Government’s proposed option, taking into account the information presented in the Impact Assessment.

4.47. If civil sanctions are to provide an accepted alternative route to sanction criminal offences in environmental cases, civil and criminal sanctions both need to be effective. The worst cases should continue to come before the criminal courts, and criminal sanctions need to be seen to be the tougher punishment. This would create an incentive for operators to declare non-compliance and to work with the regulator; or at minimum to behave so as to avoid prosecution.

4.48. Option 3 includes, in addition to the new civil sanctions under Option 2, (i) initial proposals for new powers to assist the courts in a structured approach to proportionate and effective sentencing in environmental cases; and (ii) new regulator powers to support a better graduated system of enforcement.

4.49. The new court powers would include powers to order environmental restoration or restitution to adversely affected communities if offenders have failed to respond to regulator enforcement notices; to order an offender to publicise their conviction; and for magistrates to be able to confiscate financial benefit from non-compliance. Natural England and Countryside Council for Wales would also need powers to issue enforcement notices to require compliance or restoration of harm while at the same time preparing to prosecute, which could follow months after an incident. The RES Act Compliance and Restoration Notice could not be used for this purpose as they bring immunity from prosecution if they are complied with.

4.50. These new court and regulator powers would require short primary legislation, which would be the subject of a further public consultation. The Government welcomes the
Sentencing Guidelines Council’s plans to consider possible sentencing guidelines for regulatory offences, including environmental offences.

4.51. In developing detailed proposals for primary legislation on regulator powers, Defra plans to consider with regulators the variety of existing enforcement notice powers, procedures and appeal arrangements. Defra and regulators will explore whether greater effectiveness and simplification could be achieved from fewer, consolidated powers. The Environmental Permitting Regulations (EPR) 2007 have already brought together differing enforcement regimes into a single system. For example, there is now a single set of enforcement notice powers. EPR 2007 consolidated Pollution Prevention and Control and waste permitting. The Government intends that in April 2010 a new EPR will bring a further seven permit regimes into the single system.

The impact of these proposals

4.52. The Impact Assessment in Annex 6 sets out the costs and benefits of these proposals for introducing civil and strengthening criminal sanctions. It includes four sheets that summarise the estimated costs and benefits and an evidence base to show how the estimates have been derived.

4.53. The summary sheets cover the welfare effects of the proposals: where there is either a net cost or net benefit to society. An annex is included to set out the distributional effects including the total estimated costs to offenders and the additional income to central government funds from payment of fines. Regulators would gain no revenue from imposing civil sanctions, only recovery of certain enforcement costs.

4.54. The Impact Assessment assesses all the costs and benefits of the proposals. This includes in this instance the penalties incurred as a direct result of committing offences. However, the costs of the new enforcement system will be borne mainly by non-compliant persons, and most of these costs will be borne by those who are least responsible in complying with the law.

4.55. The proposals will lead to benefits to the environment and communities both directly as the issues underlying non-compliance are dealt with more effectively and indirectly where those who do not already, take more care to avoid environmental offending. The proposals will also help to level the playing field for compliant businesses. Greater fairness in enforcement is a central aim of these proposals and cannot be expressed in pounds.

4.56. Option 1, the “do nothing’ option is to maintain the existing system of environmental enforcement without introducing the measures included in options 2 or 3. The purpose of including this option is to ensure that the new proposals are compared with the current situation – i.e. as a baseline. The costs and risks of not introducing new proposals would be that:

- the problems identified in paragraphs 3.18 – 3.30 would persist, the aims set out in paragraph 4.20 would not be realised and the net benefits that would flow from Option 3 (Impact Assessment table F) or Option 2 (table D) would not be gained.
- The opportunity would be missed for better targeting enforcement resources to better secure compliance.
• The potential benefits of the environmental legislation covered by the proposals are not fully realised and regulation is undermined
• The current level of damage incidents and risks remains unnecessarily high. This included 827 serious (and 16,000 minor) pollution incidents reported to the Environment Agency and over 140 cases of damage recorded by Natural England on sites protected for biodiversity.

4.57. Option 2, to introduce civil sanctions only, would secure some important benefits for those with a responsible approach to compliance, such as greater fairness in enforcement when non-compliance is not sufficiently aggravated to justify criminal prosecution. However, Option 2 risks unintended consequences unless the role of the criminal courts is strengthened to ensure proportionate sentencing of the most serious cases that would continue to be prosecuted. Criminal sanctions need to be a reliably tougher punishment for the worst cases. Otherwise, incentives to co-operate with regulation and to avoid the stigma of prosecution would not be guaranteed. Introducing civil sanctions alone would not provide the full benefits of the better graduated system that these proposals aim to create.

4.58. Key findings from option 2 are:
• Environment Agency would use civil sanctions for an estimated 20% of current prosecutions, over 50% of cautions and 6% of current warning letters
• Natural England would use civil sanctions for an estimated 60% of current warning letters and 50% of current cautions
• Using civil sanctions would increase administrative costs to regulators and the First-tier Tribunal; and reduce administrative costs to recipients (largely business administrative burdens) and to the courts
• There would be some direct policy costs and benefits from using the civil sanctions and some costs and benefits that result from measures regulated activities take to move towards compliance
• There would be some one-off costs to regulators, the First-tier Tribunal and the regulated community in preparing for the new measures
• Option 2 would lead to an estimated net benefit of £51m (this is a net present value over 15 years) within a range of -£28m to £95m

4.59. The Government proposes Option 3. Option 3 would involve strengthening the role of the criminal courts as well as introducing civil sanctions. This will ensure a properly graduated system of sanctions, creating incentives to comply and to co-operate in regulation. It would be clearer to all concerned that a criminal conviction for an environmental offence signals the more serious offence, bringing the toughest sanctions, and the greatest stigma. The net benefits of Option 3 (“net present value”) are greater than those for Option 2.

4.60. Key findings from Option 3 are:
• More effective and structured sentencing would be available for several thousand convictions over the period covered by the Impact Assessment.
• There would be some additional policy costs and benefits
• There would be some one-off costs to the courts in preparing for more structured sentencing
Option 3 (which includes both the civil sanctions and structured sentencing) would lead to an estimated net benefit of £164m (present value over 15 years) within a range of -£19m to £312m.

Question 5: Does the draft Impact Assessment capture all the relevant costs and benefits involved with each policy option? If not what additional or alternative evidence could be used to improve the Assessment?
5. Purpose and Key features of the new civil sanctions enabled by the RES Act

Introduction

5.1. This section introduces the new suite of civil sanctions, and supplementary powers to enable regulators to use them effectively. It sets out the proposed approach for deciding when they would be appropriate, and explains at key points how this is in accordance with good enforcement principles. Annex 1 provides further details on the way each civil sanction works. This information provides a framework within which regulators will develop their more detailed enforcement policies and guidance on using the civil sanctions – this framework is set out in the draft government guidance at Annex 5. Regulators will not retain any receipts from imposing monetary penalties - the regulator will pay all such monies into central government funds.

Variable Monetary Penalties

5.2. A Variable Monetary Penalty (VMP) is a proportionate monetary penalty which the regulator may impose for a moderately serious offence when the regulator decides that prosecution is not in the public interest.

5.3. VMPs would enable regulators to impose a proportionate and fair penalty that would reflect the seriousness of the case. A non-compliant person will be able to mitigate the offence and reduce a monetary penalty by offering to compensate individuals, communities or organisations adversely affected by the non-compliance - (a Third Party Undertaking. A person would need to offer any Third Party Undertaking when they have received the regulator’s Notice of Intent to issue a VMP.

5.4. Where non-compliance is aggravated by factors such as intent, recklessness, or failing to comply with notices issued by the regulator, prosecution would remain the normal response.

5.5. Cases of non-compliance that could be suitable for imposing a VMP would normally be too serious for the regulator to rely on advice and guidance alone as a first step. In many cases the regulator may have had the opportunity to provide advice and guidance on the issue at an earlier stage. Regulators give a high priority to providing advice and guidance, but in such moderately serious cases this will sometimes accompany steps towards a Notice of Intent to impose a VMP.

5.6. VMPs would be used:
   a) to remove any financial benefit that may exist as a result of non-compliance; and
   b) to adequately deter future non-compliance.

5.7. VMPs are for use in cases where any other costs to a person 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.

5.8. The Government’s proposed approach for determination of a VMP is set out below. It is designed to fairly and proportionately relate the penalty to the facts of the
5.9. Where appropriate, regulators will use enforcement notices (existing or RES Act notices) to require restoration.

**How should a Variable Monetary Penalty be determined?**

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

i. **The regulator’s estimate of 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 happen. These factors will be taken into account in determining the deterrent component.

iii. **Deduct any other costs incurred by the recipient of the VMP.** 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 a person 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. **Estimating the financial benefit from non-compliance**

5.11. The financial benefit is compared with a situation where the person 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 necessary actions. The estimation of financial benefit could also include potential financial return on sums that have not been expended.

**ii. Adding an appropriate deterrent component**

5.12. 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.

5.13. The starting sum could 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 5.11 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.

5.14. The regulator would choose the starting sum and may, subject to paragraph 5.13, choose the one with the highest value.

5.15. First a maximum multiplier that can be applied would be 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.

5.16. The maximum multiplier cannot exceed four. The regulators must set out in their guidance on sanctions how the maximum multiplier will be determined on the basis of the four factors.

5.17. The regulator could 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 would consider include, for example:

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27 Section 3 of the draft government guidance sets out the circumstances in which blameworthiness and other factors will normally result in prosecution rather than civil sanctions, including intentional or reckless non-compliance.
• 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

i. **Deducting any other costs incurred by the recipient of the VMP**

5.18. This is all the regulator’s estimates of the costs the offender had incurred as a result of the offence. This would include:

- The costs of coming into compliance.
- The costs of carrying out restoration.
- The costs recovered through a Regulatory Cost Recovery Notice.
- An appropriate amount to reflect any Third Party Undertaking.

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

5.19. While regulators would follow the steps outlined above there will often be uncertainty in establishing the advantage from non-compliance precisely. Ultimately regulators would 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.

5.20. There would be varying degrees of uncertainty. In some cases it will be 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. In such cases, it would be better for the regulator 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, the draft guidance advises regulators against using them.

5.21. The Government favours this approach to determining a VMP. The model outlined above would relate the penalty to the facts of the case and is proportionate by design. A VMP could range from small to modest amounts in most cases, to possibly substantial where for example harm cannot be put right. In the more serious cases that will continue to be prosecuted, the courts are not bound to make concessions to reducing removal of financial benefit or a deterrent fine simply because restoration has been or is being undertaken, though restoration may be taken as a mitigating factor. The proposed approach to working out a VMP would help to ensure that criminal sanctions would be seen to deliver the toughest sanctions for the worst offences.

5.22. The Government would welcome views on its preferred approach to working out a VMP outlined above. Some further detail is provided in Annex 1.
5.23. The regulator could reduce the VMP if it finds that the operator does not have the resources to meet the whole of the appropriate sanction (often called “ability to pay”). The onus would be on the operator to make any submission to the regulator about limited resources, as in the criminal courts.\(^{28}\) If the operator wishes to argue that their ability to pay is limited, it will be in their interests to make a full and open submission so the regulator is able to make a sufficient and reasonable appraisal of the operator’s position – this will avoid the need for the operator to provide more information to the First-tier Tribunal if it decides to appeal. In considering such a submission, the regulator will ensure that compliance is secured. Restoration of the environment and to any affected people, groups or communities would also take priority over imposing a fine if the regulator found that the person’s resources to be limited.

5.24. The person could appeal to the First-tier Tribunal if they considered the regulator’s assessment was based on an error of fact; was wrong in law; or that the amount was unreasonable.

**How large could a VMP be?**

5.25. The amount of a VMP would vary depending on the case. Most sums are likely to be relatively small. However, where substantial environmental damage could not be restored and financial benefit from non-compliance was large the VMP could be considerable. In all cases the regulator would determine the amount of the fine in accordance with the model set out above, and subject to appeal.

5.26. Where a VMP is imposed for a summary offence, the RES Act requires that it should be no greater than the maximum fine that the magistrates courts could impose for the offence. Parliament did not wish regulators to have more power than the courts. Summary only offences are also normally less serious than offences which could also be heard in the Crown Court (“either way” offences).

5.27. A VMP may also be imposed for “either way” offences. The RES Act sets no upper limit to VMPs imposed in these potentially more serious cases. If an upper limit was to be considered in environment cases, possible options would be to limit a VMP to:

- 10% of business turnover, similar to Competition law
- A cash limit – for example, related to the largest criminal fines in past cases

5.28. An upper limit may seem to provide more certainty about a person’s potential exposure to a variable monetary penalty. However, seeking to fix an upper limit to VMPs for either way offences would bring potential problems:

- Having a limit does not in itself provide for transparent or proportionate determination of a VMP
- Financial benefit is unpredictable – the Macrory report found it was often not removed so there is little experience of the amounts involved, though it may be considerable. Regulator’s have applied to the courts for substantial sums to be taken away under the Proceeds of Crime Act

\(^{28}\) R v F. Howe & Son (Engineers) Ltd
there is no limit to fines in those criminal cases that magistrates commit to the Crown court – a VMP needs to be a realistic alternative to criminal prosecution.

There is no experience of setting the deterrent element of the VMP – this may need to be large when a person has caused substantial environmental damage that cannot be restored or created serious risks but fortunately no actual harm.

5.29. The Government considers that the proposed approach to working out a VMP, based on the facts, would ensure a proportionate and fair sanction, without setting an upper limit. The review of civil sanctions three years after their introduction should reconsider whether an upper limit would be appropriate, informed by experience of regulator use of VMPs.

**Power to require information needed to determine a VMP**

5.30. Most persons will wish to ensure that the regulator has the information necessary to determine the financial benefit gained by the non-compliance. This would assist the regulator to determine a proportionate and fair VMP. The Government expects there will be cases when a person is less willing to co-operate in this way. Regulators will then need an explicit and enforceable power to require a person to provide such information. However, this power would not extend, for example to allowing a regulator to seek information to help establish ability to pay. This power would be set out in the Order.

**Question 6:** Do you support the introduction of Variable Monetary Penalties as an alternative to prosecution?

**Question 7:** Do you agree with the proposed method for calculating Variable Monetary Penalties? If not, do you have an alternative approach that is both transparent and related to the facts and scale of the offence committed?

**Question 8:** Do you agree that there should be no upper or lower limit for a Variable Monetary Penalties for “either way” offences (ie offences that may be heard in the Crown court as well as by magistrates)? If not, is there any evidence or rationale for stipulating a specific upper or lower limit?

**Question 9:** Do you agree that a regulator should have the power to require a person to provide information the regulator needs to determine any financial benefit from non-compliance as part of assessing the amount of a VMP?

**Enforcement Undertakings**

5.31. An Enforcement Undertaking (EU) is a voluntary agreement offered 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.

5.32. A non-compliant person will have the opportunity to offer an Enforcement Undertaking to the regulator. It is for the regulator to decide whether to accept it. The Government sees wide opportunities for regulators to do so, provided an Undertaking proportionately addresses the non-compliance and its issues. The draft government guidance section 3 sets out factors that would still normally point towards prosecution, and
in such cases Enforcement Undertakings are unlikely to be accepted, for example where a person had a history of offending.

5.33. The availability of Enforcement Undertakings will promote dialogue between the regulator and those who are regulated, improving trust and confidence whilst also closing the compliance deficit. Moreover, persons who actively manage risk and are generally compliant would be encouraged to volunteer information to the regulator when they find a problem because they would be more confident of a proportionate response.

5.34. An EU will be a voluntary and written agreement by a person to take action to make amends for the non-compliance and its effects. This action could include: to return to compliance; to restore harm; and to compensate those adversely affected. If the regulator accepts it, the EU would take the place of any other sanctions the regulator may have considered imposing.

5.35. The Government proposes to allow regulators to accept an EU for a wide range of offences, so as to give business maximum flexibility. This is expected fit well with the self-regulatory approach of persons who actively manage risk and compliance. Offering an EU provides a further opportunity for responsible businesses to stand apart from others and more quickly restore their reputation.

5.36. 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.

5.37. Where restoration of the actual harm is not possible, the Government expects that responsible businesses will consider making equivalent restoration in some alternative way.

5.38. Ideally a person would offer an Enforcement Undertaking unprompted when they identify non-compliance and wish to put it right. However, a regulator may consider accepting an Enforcement Undertaking that is sufficiently full and unreserved at the stage when the regulator issues a Notice of Intent to issue civil sanctions. The regulator may then consider not imposing the civil sanctions at all. The regulator is not expected to enter into negotiations over an undertaking, though it is likely that some discussion will take place around what is to be covered.

5.39. 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.

5.40. The Government intends that regulators should develop and consult on procedures for use of Enforcement Undertakings. Regulators will monitor their procedures to ensure they work well, and adapt them if necessary.

5.41. When an Undertaking has been fulfilled, the regulator will issue a Certificate of Completion.

29 The civil courts are likely to remain the forum for resolving big questions of possible compensation
5.42. Enforcement Undertakings will not be available for the serious offence of failing to comply with an enforcement notice, as the regulator has already had to take formal action to secure a response – this failure to co-operate rules out accepting assurances through an Enforcement Undertaking.

Question 10: Do you support the introduction of Enforcement Undertakings?

Question 11: Do you agree with the way in which Enforcement Undertakings would operate?

Fixed Monetary Penalty

5.43. A Fixed Monetary Penalty (FMP) is a relatively low level penalty fixed by the Order, that the regulator may impose for a specified minor offence.

5.44. Some kinds of non-compliance do not give rise to significant environmental harm, or risk of harm. Some offences do not directly give rise to harm at all but could still undermine a person’s effective management of risk or proper oversight by the regulator. The Government proposes that regulators should be able to use the FMP to signal in a proportionate way the need for compliance with specified clear cut, lesser offences of these kinds.

5.45. FMPs will be made available for the offences specified in the draft Order and Regulations (Annexes 2 and 3).

5.46. Some of these offences are specific and narrowly defined. In some cases a regulator could impose a FMP for failure to comply with lesser, clear cut aspects of more broadly defined offences, for example the offence of breaching permit conditions. Examples would include:

- An initial failure to provide monitoring data when required to do so;
- Failure to record required information;
- Failure to notify works under the Food and Environmental Protection Act.

Before using a FMP for more broadly defined offences, the regulator will have to specify and consult on the circumstances in which an FMP could be used.

5.47. Normally, a regulator would impose a FMP only when a person had not complied following advice or guidance from the regulator. Where activities are subject to permits, initial advice and guidance is built into the process of issuing the permits.

5.48. FMPs would not be appropriate for other than minor offences. Seeking to use substantial fixed penalties for more serious offences risks fixed penalties being accepted as a cost of non-compliance.

5.49. Use of FMPs will encourage greater compliance with the law. However, where an apparently minor offences is accompanied by other offences, or aggravated by the sort of factors set out in section 4 of the draft guidance, civil sanctions are unlikely to be appropriate. Prosecutions will continue to be brought in serious cases.
5.50. The Government does not consider that FMPs are appropriate for “fault-based” offences, eg where liability for an offence depends on knowing or negligent disregard for the law. This would send the wrong message about seriousness.

5.51. The Government considers that the most important aspect of FMPs will be to put on record that an offence has been committed. However, in the proposed graduated system of sanctions, regulators would not normally issue press notices when imposing an FMP. FMPs for environmental cases will be set at the relatively low level of:

- £100 for individuals, including for example sole traders
- £300 for all incorporated bodies

5.52. These levels may be reviewed for a particular offence if evidence is found that a higher level is necessary to deter the non-compliance.

5.53. Payment would be required within 28 days of a regulator’s final notice imposing the fine. The level of the FMP would 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; or
- **reduced by half** for payment within 28 days of a FMP being confirmed by the regulator, but only when the operator has made representations; or
- **increased by half** for payment more than 56 days after an FMP has been confirmed by the regulator (“late payment charge”)

5.54. If a person fails to pay within 56 days of the FMP being confirmed, the regulator would be able to recover the original and late payment penalty as if ‘on the order of’ a county court or the High Court.

5.55. Given the relatively low level of FMP proposed, the Government considers that further reductions for small limited companies or others would make the FMP scheme unnecessarily complex for business and regulator. On any definition of small firm, regulators would need to demand and firms provide additional evidence to enable a fair decision to be made. A definition based on number of employees could for example lead to complicated and burdensome discussions about part-time, temporary or contract workers.

5.56. FMPs in environment cases will provide a simple and proportionate sanction for suitable offences where no fixed penalty is already available. The Government does not propose to replace existing Fixed Penalty Notices.

**Question 12:** Do you support the introduction of Fixed Monetary Penalties?

**Question 13:** Do you agree with the proposed level of Fixed Monetary Penalty for individuals and business? If not, what level would you prefer and what evidence exists to support that level?

**Question 14:** Do you agree with the proposed discount for discharge and early payments and penalty for late payments of Fixed Monetary Penalties?
Enforcement notices

5.57. The Macrory Report concluded that statutory enforcement notices had an important part to play in regulatory enforcement and recommended that they be introduced as part of an extended, graduated enforcement toolkit. Enforcement notices would be used typically when the regulator finds significant non-compliance or harm that needs to be put right, and pressure needs to be brought to bear on the operator to take the necessary action. Such circumstances are likely to illustrate important weaknesses in a person’s approach to compliance. The enforcement notice also serves to put significant non-compliance on the record. In many other cases, regulators can rely on advice and guidance, or if necessary a warning.

5.58. When use of an enforcement notice is proportionate, it helps to establish clearly for all to see that a significant offence has been committed and what the operator needs to do to achieve or return to compliance. Enforcement notices aid transparency in enforcement.

5.59. Existing enforcement notice powers may be used in conjunction with a Variable Monetary Penalty.

5.60. EA has a variety of existing notice powers for use in several areas of regulation. Many of these notices have similar objectives to the notices introduced by the RES Act, for example they may require a business to comply with the terms of a permit; may require a business to restore damage their activity has caused; or may require a business to stop an activity. Other notices are tailored to particular requirements, such as notices that require a variety of works to be undertaken. The sanctions for non-compliance with a notice also vary - failure to comply with some notices is an offence, allowing them to be used to secure early action in advance of an expected prosecution.

5.61. NE and CCW currently have very limited enforcement notice powers. EA, NE and CCW will continue to use existing notices where they are appropriate and proportionate to secure necessary action by operators.

5.62. The Compliance, Restoration and Stop Notice powers available under the RES Act will be used to help fill important gaps in the powers available to regulators, helping to complete a fairer, more proportionate and effective enforcement system.

5.63. The draft Order and Regulations set out the offences for it is proposed that the RES Act Restoration, Compliance and Stop Notice powers should be available.

5.64. The procedures the regulator would follow in imposing a RES Act Compliance, Restoration or Stop Notice are set out in Annex 1.

5.65. Some key features of the RES Act enforcement notices are set out in brief below.

**Question 15: Do you support the introduction of enforcement notices to fill gaps in the regulators’ present enforcement powers?**

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30 Environmental Impact Assessment (Agriculture) Regulations 2006 - stop notice & remediation notice; Wildlife and Countryside Act 1981, as amended - stop notice to prevent works on an SSSI where there is no consent
Restoration Notice

5.66. A Restoration Notice (RN) is a written notice issued by the regulator which requires a person to take steps to restore harm caused by non-compliance, within a period the regulator specifies. 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.

5.67. The Defra review found environment cases where the offender’s non-compliance has caused harm but where they have not been required to make restoration, even though it would have been proportionate to do so. There are also cases where the local community has suffered substantial nuisance, but received only an apology made in mitigation.

5.68. Enforcement should put the onus on a person to restore environmental harm wherever it is proportionate and possible. This may include some forms of nuisance or loss of amenity experienced by the local community as a result of the offence.

5.69. EA considers that in many of their cases, all or at least some of the necessary restoration is generally secured. The Impact Assessment therefore makes cautious assumptions about how much more restoration will be done. Full restoration will not be possible in many cases. However, wider use of RNs is expected to help to level the playing field for persons who responsibly take swift steps to restore harm they have caused to the environment and to reduce risk of further damage.

5.70. What restoration is possible in a particular case will depend on the circumstances. Where pollution is quickly dispersed, there may be no immediate effects that could be subject to restoration. In some cases, for example when an area of protected habitat has been destroyed it may be possible and proportionate to require similar habitat to be created on another area of land or water. It will be for the regulator to assess what the original position was before the offence, and what restoration would be appropriate to return to that position.

5.71. A Restoration Notice may be issued with a VMP or other enforcement notices, but not with a FMP. The regulator may not impose a RN without first issuing a Notice of Intent to impose the sanction, so as to allow a person to make representations. The regulator must consider those representations. The procedures the regulator would follow in imposing a RES Act Restoration Notice are further set out in Annex 1.

5.72. In some cases, a business may wish to consider offering a Third Party Undertaking offering action or compensation in some form to a local community that has suffered from an environmental incident.

Compliance Notice

5.73. A Compliance Notice is a written notice issued by the regulator which requires a person to take actions to comply with the law, or to return to compliance within a specified period.

5.74. A Compliance Notice formally sets out what a person must do to achieve compliance, and by when those steps must be taken. Compliance is the minimum result required from any enforcement action.
5.75. A Compliance Notice may be issued with VMP, or a Restoration or Stop Notice, but not with a FMP. The procedures for imposing a Compliance Notice are the same as those for a Restoration Notice.

5.76. In some cases, a business may wish to consider offering a Third Party Undertaking offering compensation in some form to a local community that has suffered from an environmental incident.

**Question 16: Do you agree with the proposal to make Restoration Notices and Compliance Notices available for appropriate offences where no similar notice currently exists?**

**Stop Notice**

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

5.78. Preventing harm to the environment, including adverse impacts on the health and well-being of local communities is a key purpose of enforcement. A Stop Notice allows regulators to halt current or planned activities that are causing serious harm or present a significant risk of causing serious harm. This is a stringent test and regulators are likely to impose Stop Notices infrequently. A Stop Notice may be issued on its own or with any other civil sanction, except a FMP.

5.79. At present, EA lacks stop notice powers that can be used to order a halt to the illegal dumping of waste; or to halt any activity that brings a significant risk of serious groundwater contamination. NE and CCW need to be able to use the RES Act Stop Notice power to stop activities that are causing harm to protected sites or to the breeding places of protected species. The Government proposes to introduce the RES Act Stop Notice power for these purposes.

5.80. The impact on a business of receiving a Stop Notice could be substantial, though in most cases the Notice is likely to apply to just one activity or kind of activity. The regulator will be required to publish a scheme for compensating a person if it is found that the Stop Notice should not have been imposed. Compensation could follow if the regulator withdraws the Notice or a person successfully appeals against it to the First-tier Tribunal. The Government does not believe that compensation should be payable if a Stop Notice is overturned on a technicality. Indeed, the First-tier Tribunal may substitute a correct Stop Notice which would address any such shortcoming, so as to ensure that the environment and public health is protected.

5.81. Annex 1 sets out in broad terms the basis on which compensation would be available. The regulator will consult on its compensation scheme and publish it.

5.82. The Government proposes that a Stop Notice should not be automatically suspended on appeal because of the level of harm or potential harm that it is designed to prevent. Instead, it is proposed that the draft Order and Regulations should allow Tribunal Procedure Rules to provide for suspension of a Stop Notice (draft Order, section 10(4)). The First-tier Tribunal would then be able to consider any application for an urgent hearing, and could suspend the Notice pending an appeal hearing if the tribunal judge found special grounds to do so.
Question 17: Do you support the introduction of Stop Notices?

Question 18: Do you agree that a Stop Notice should not be automatically suspended on appeal?

Question 19: Do you agree with the principles on which compensation for a Stop Notice will be considered (set out in Annex 1, and schedule 3, paragraph 5 of the draft Order, Annex 2)?

Regulatory Cost Recovery Notice

5.83. 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.

5.84. This power is designed to allow the regulator to recover enforcement costs that it may recover under the RES Act. The regulator should set out and justify its costs to the same degree as it would for a criminal court to consider. If regulators were unable to recover justified enforcement costs, there would be a perverse incentive not to use civil sanctions.

Non-Compliance with civil sanctions

5.85. The enforcement process will differ from sanction to sanction. The draft Order specifies the procedures and powers available to regulators when a person fails to pay monetary penalties or comply with RES Act notices. Brief details are set out below – further information is given for each civil sanction in Annex 1.

VMP, FMP or other monetary penalty

5.86. Where a fixed or variable monetary penalty is imposed and a person fails to pay it, no prosecution can be brought for the original offence. Unpaid penalties will instead be enforced through the civil courts. The draft Order 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

5.87. Should a person fail to comply with the terms of an EU or only partly comply, the regulator will have the choice of whether to extend the period of the EU, 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.

5.88. 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.
RN or CN imposed without a VMP

5.89. Failing to comply with either of these notices would normally point to prosecution for the original offence unless there are strong mitigating factors.

Restoration Notice or Compliance Notice imposed with a VMP, or a Third Party Undertaking accepted by the regulator

5.90. The regulator could impose a **Non-compliance Penalty (NCP)**. This will be a written notice issued by the regulator imposing a monetary penalty for failing to comply with a Restoration Notice or Compliance Notice that has been imposed with or without a VMP, or a Third Party Undertaking that the regulator has accepted.

5.91. When either notice is issued with a VMP, no prosecution is allowed – the VMP gives immunity from prosecution to avoid any risk of a person being sanctioned twice for the same offence. The Act provides instead for the regulator to impose a Non-compliance Penalty.

5.92. A NCP would also be needed if a person has failed to fulfil a Third Party Undertaking it has made. A Third Party Undertaking will have been offered by the person to reduce the potential amount of a VMP the regulator is considering imposing. A Third Party Undertaking may also have been offered and accepted at the same time as a Restoration Notice or Compliance Notice has been imposed.

5.93. Despite non-compliance the Restoration Notice, Compliance Notice or Third Party Undertaking would remain in force. The NCP could be repeated if non-compliance continued. The regulator will not be able to retain the money from a NCP - this will be paid into the Consolidated Fund. As an incentive towards compliance, should the actions in the RN, CN or TPU be completed before the time set by the regulator for payment of the NCP, then the penalty would no longer be payable.

5.94. Views are requested on two possible options for regulators to determine a NCP:

- Option 1) the amount of the NCP could be calculated by the regulator based on the original notice. It would be a percentage of the estimated costs that the operator would incur in fulfilling the remaining elements of the RN, CN or TPU, up to a maximum of 100%. The costs would depend on the circumstances of the non-compliance; or alternatively,
- Option 2) a daily fine would be applied. The regulator would consult on the amount as part of consulting publicly on their detailed enforcement guidance.

5.95. Option 1) relates the NCP to the degree of expenditure a person is avoiding, but involves the regulator in making an estimate of the cost of compliance or restoration. The cost of returning to compliance might be minimal and not represent a proportionate sanction for the serious offence of failing to comply with a notice.

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31 For example, section 59(5) of the Environmental Protection Act allows for daily fines for non-compliance with a notice which is served to require the removal of illegally deposited waste. The daily fine is currently set at £500, one tenth of Level 5 on the standard scale.
5.96. Option 2) has the advantage of being entirely predictable, but may not be related to the avoided costs in a particular case - regulators would need to establish proportionate levels through consultation.

5.97. 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.

**Question 20:** Do you support the introduction of Non-Compliance Penalties?

**Question 21:** Which of the proposed methods for calculating a Non-Compliance Penalty do you prefer?

**Stop Notices**

5.98. Non-compliance should normally result in criminal prosecution.

**When would regulators use civil sanctions?**

5.99. Any person who has to comply with environmental regulation will wish to have a general understanding of what factors would in future tend to point regulators towards prosecution instead of the alternative civil sanctions.

5.100. Section 3 of the draft government guidance (Annex 5) illustrates the basis on which regulators are likely to take enforcement decisions in the future with the expanded toolkit that will include civil sanctions. Regulators will continue to have regard to the Code for Crown Prosecutors when deciding whether or not to prosecute. The guidance illustrates how typical enforcement scenarios may result in prosecution or civil sanctions, while maintaining ultimate prosecutor discretion.

5.101. The government guidance has been developed in discussion with the regulators. The guidance will provide a framework to ensure broad consistency of approach between regulators when deciding whether prosecution or civil sanctions should follow an non-compliance. Regulators will have regard to this government guidance when setting out and consulting on their more detailed enforcement policies and guidance following introduction of the new civil sanctions powers.

5.102. The result of the guidance will be that prosecution will be reserved for the worst cases. Civil sanctions will provide an effective means of addressing lesser but still significant non-compliance. This may include cases where substantial environmental damage may have occurred, but factors aggravating the offence are outweighed in the regulator’s view by factors mitigating the offence.

**Question 22:** Do you agree with the proposed approach (set out in section 3 of the draft guidance) to identifying the kinds of case that should normally result in prosecution instead of a civil sanction?
6. Strengthening the Role of Criminal Courts

Introduction

6.1. Introducing civil sanctions would be a radical change in the enforcement system. In the proposed more proportionate, fair and effective enforcement system, criminal sanctions will be reserved for the worst offending. Introducing civil sanctions therefore brings with it the need to strengthen the role of the criminal courts in proportionate sentencing of the worst cases. Criminal sanctions would need to be reliably tougher than civil, bringing greater public exposure of offenders, and greater risk of reputational damage. This has the potential to reinforce incentives to comply with regulation.

6.2. The Macory report drew attention to the need for the courts to have access to a wider range of sentencing powers. To ensure a proportionate criminal sanction and to gain public confidence in the new enforcement system, the criminal courts would need to routinely and explicitly address the same key issues as civil sanctions: restoration where not already secured by the regulator, and removal of any financial benefit from non-compliance. This would be in addition to any punishment that the court finds to be appropriate. To support this approach, the powers of the courts in environmental cases will need to be increased.

6.3. Strengthening the role of the criminal courts in environmental cases would need an opportunity for short primary legislation. The initial proposals set out below will be subject to further public consultation on possible legislation to cover environment cases.

Court powers

6.4. The courts would need to have the following powers generally for environment cases to support proportionate and structured sentencing:

1. **To order restoration of the environment, if this has not already been adequately secured by the regulator.** At present this power is available under section 31(1) of the Wildlife and Countryside Act 1981, as amended, but not generally. Magistrates have welcomed and used the power in the 1981 Act when restoration has been needed following a conviction. Offenders should know that if convicted there is no escaping their responsibilities, and that early action to restore would reduce criminal sanctions later.

2. **To require alternative forms of restoration, where the particular harm cannot be restored (“flexible restoration”).** This will be important where, for example, the local community has suffered serious nuisance, which having ended cannot itself be put right. This power would also enable the courts to impose on a criminal offender the kind of measures that a responsible business may volunteer under an Enforcement Undertaking. An example of a power to require flexible restoration exists in Forestry legislation\(^\text{32}\). In support of this power, the Government proposes to increase the maximum compensation

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\(^{32}\text{section 17A(1) Forestry Act 1967 (as inserted by article 4 of the Regulatory Reform (Forestry) Order 2006 S.I. No. 780).}\)
magistrates can order for all environmental offences that could involve harm (see 6.4.6 below)

3. **To enable Magistrates to take away the offender's benefit from non-compliance.** This may be achieved by introducing an alternative to the existing confiscation process in the Crown Court under the Proceeds of Crime Act 2002; this option is under consideration in the Home Office and would require legislation. In addition, section 97 of the Serious Organised Crime and Police Act 2005 is an option which provides that an Order can be made so magistrates’ courts can make confiscation orders in low value cases.

4. **To order the offender to publicise their offence, and the sanctions imposed (a “publicity order”).** This would mirror provision in the Corporate Manslaughter and Corporate Homicide Act 2007. A power of this kind was recommended by the Macrory report.

5. **To order the offender to pay the regulator’s costs or estimated costs of restoration** when it falls to the regulator by default. This power exists in some areas, for example in relation to waste that has been disposed of illegally (section 33 of the Environment Protection Act (EPA) 1990). It is a power that would be valuable in relation to certain offences under the Wildlife and Countryside Act 1981.³³

6. **For magistrates to be able to order an offender to pay compensation up to the higher level of £50,000.** At present, this maximum exists in relation to illegal waste disposal (under the Environment Protection Act 1990 section 33 as amended by the Clean Neighbourhoods and Environment (CNE) Act 2005). Magistrates should have this power in relation to other environmental offences that can lead to harm to third parties.

6.5. The Government proposes that if the court finds an offender’s resources are limited, priority in sentencing should be normally given to restoration ahead of any fine, so as to maximise environmental and societal outcomes. “Restoration” would include a response to harm to the environment (and society’s long term interests); and to adverse impacts on the quality of life of local communities. This is consistent with the present position whereby compensation takes priority where an offender’s means are limited. The courts would decide how to apportion resources available for restoration – this will depend on information provided by the regulator.

6.6. There should be no limit to the amount of restoration magistrates can require – this should be dependent on the facts. Magistrates could commit a case to the Crown Court if they considered there was a risk of the restoration order being breached, and the Crown Court’s greater sanctions might be called for.

³³ For example, under section 28P(1) (2) or (3) of the Wildlife and Countryside Act 1981 where a person has destroyed or damaged any feature by virtue of which a Site of Special Scientific Interest is of scientific interest; or where a person has been convicted of the offence of intentional or reckless damage, under section 28P(6) or (6A).
6.7. In regulatory cases such as these it would aid transparency if regulators record whether ability to pay has had an impact on the sentence in a particular case. This could be put on the public record in the interests of transparency. It is normal practice for the courts to tell an offender in open court that the financial penalty takes into account their ability to pay, and to have this recorded.

6.8. Individual magistrates typically see few environmental cases. The new powers, and the structured approach to sentencing they would support, would help make connections between the very varied environmental cases. Systematic use of the new powers would also provide regulators with a basis for gathering information that would better demonstrate to what extent polluters really pay.

6.9. The courts would continue to assess seriousness on the basis of culpability and harm, as required by the Criminal Justice Act 2003 and the relevant overarching guidelines from the Sentencing Guidelines Council. The availability of the above powers would bring the following benefits to sentencing in environmental cases:

- giving a more prominent place to environmental restoration where that is proportionate, which would increase the direct impact the courts could have on reducing environmental degradation and adverse effects on local communities;
- allowing the courts to explicitly and separately address issues of restoration and removal of financial benefit in the immediate case - these aspects of sentencing can then be related to potentially measurable effects of the non-compliance. This would improve transparency, proportionality and consistency in addressing these issues, which can be undermined by reliance on fines in past cases as a guide;
- enabling existing guidelines on punishment of other aspects of the offender’s non-compliance to be more easily applied;
- encouraging consideration of a range of non-monetary sanctions as part of a sanctions package, to better match sanctions to achieving key purposes of enforcement, and to reduce the possibility that limited ability to pay a fine could undermine proportionate and effective sentencing;
- providing a demonstrably tougher criminal sentencing regime in environmental cases that will support the proposed better graduated system of enforcement

6.10. The Government welcomes Sentencing Guidelines Council plans to consider guidelines for environmental and regulatory sentencing which the Macrory report concluded were necessary, and which may complement the proposals set out above.

**Regulator powers**

6.11. The Government proposes to introduce additional enforcement notices that can be used in advance of a criminal prosecution by Natural England and by Countryside Council for Wales, who currently lack such powers. Prompt action to secure proportionate restoration of habitat damage or restore the breeding prospects of protected species should not only be a requirement that can be placed on those who receive civil enforcement notices. Giving regulators these powers will enable them to move quickly to require restoration, and will ensure that the court’s time is not wasted later. Introducing these new notice powers will require primary legislation.
Question 23: Do you agree with the initial proposals for strengthening the role of the criminal courts in sentencing environmental cases?

Question 24: As prosecution would be reserved for the worst offenders do you consider that publicity orders would be justified in these serious cases, at the court’s discretion?
7. Ensuring Fair Process in use of civil sanctions

What safeguards will be available to ensure proportionate and fair use of civil sanctions?

7.1. The following safeguards will be in place to ensure the new sanctions will be used fairly and in accordance with good enforcement principles:

- Regulators must be satisfied beyond reasonable doubt that an offence has been or is being committed in order to impose one or a combination of the following civil sanctions: a Variable Monetary Penalty, Fixed Monetary Penalty, Restoration or Compliance Notice;
- Regulators will normally investigate to the standard expected of any criminal investigation. This includes protections for the rights of individuals provided by the Codes made under the Police and Criminal Evidence Act 1984;
- There will be a right to make representations against the imposition of VMP, RN, CN and FMP when they receive the regulator’s Notice of Intent to impose one of these sanctions. Representations may be made within 28 days of receiving the Notice of Intent;
- The regulator will take account of a person’s resources in finally determining a VMP or requirements for restoration;
- Regulators will be accountable for their decisions - a person may appeal against all civil sanctions to the independent and impartial First-tier Tribunal, except for Enforcement Undertakings, which are volunteered;
- The government will publish high level government guidance (Annex 5) to regulators on the way civil sanctions would be applied, building in proportionality, and transparency, and ensuring broad consistency of approach across environment regulators. Each Regulator will have regard to this in developing and consulting on their Enforcement Policy;
- Each regulator must also consult on and publish guidance on the use of the new sanctions, including more detail on the methodology for arriving at VMPs and Non-compliance penalties, further increasing transparency;
- All monetary penalties will be paid into the Consolidated Fund, so there will be no financial incentive for a regulator to impose monetary penalties – regulator decisions will be based on published criteria.

How would an operator go about making an appeal to the First-tier Tribunal?

7.2. A person on whom a regulator imposes a civil sanction will be able to appeal if they wish to do so. Appeals will be made to the General Regulatory Chamber of the First-tier Tribunal. In draft procedure rules for that Chamber it is specified that appeals should be made by sending or delivering a notice of appeal to the Tribunal so that it is received within 28 days of the date on which notice of the sanction was received

7.3. The composition of a tribunal is a matter for the Senior President of Tribunals to decide. A tribunal may include in addition to Tribunal Judiciary non legal members with suitable expertise or experience in the issues in an appeal. It is intended 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 establishment of the Chamber in September 2009. The tribunal rules and the tribunal judges’ discretion will ensure that cases are dealt with in the interests of justice and minimising the parties’ costs. What follows is to illustrate how tribunals typically approach cases.

7.4. The Tribunal Procedure Committee recently consulted on draft Rules for the General Regulatory Chamber. Amendments to the draft Rules are being considered by the Committee.

7.5. The appellant would submit their case in writing - 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 at least 14 days notice of a hearing to consider disposal of proceedings. The effects of some environmental incidents may such that members of the local community will wish listen to proceedings. It will be for the Tribunal judiciary to decide whether or not public listing of cases is appropriate.

7.6. 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.

7.7. 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 or Compliance Notice. The Tribunal will take this into account.

7.8. Provisionally, section 10(2) of the draft Order states that the standard to which the regulator must prove the commission of an offence is “beyond reasonable doubt”, and the Tribunal must decide the standard of proof in any other matter. Consultees may wish to comment on whether or not it is necessary for the Order to state this in the interests of transparency.

7.9. Any party to a case has a right to appeal a decision of the First-tier Tribunal only on points of law arising from the Tribunals decision. The right may only be exercised with permission of the First-tier Tribunal or Upper Tribunal. Where permission is given, the further appeal would be heard by the Upper Tribunal.

7.10. A forecast of the possible number of appeals and the cost implications are set out in the Impact Assessment. This is based on Environment Agency in particular phasing in the proposed use of civil sanctions in selected regulatory areas so as to allow experience to be assessed and lessons learned. Environment Agency would set out their plans for phasing in use of civil sanctions when they consult on their revised enforcement policies.

7.11. 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

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7.12. The Lord Chancellor has the capacity to charge fees for appeals to the First-tier Tribunal, for example an application fee. Where he is proposing to introduce fees he is required to consult the Senior President of Tribunals and the Administrative Justice and Tribunals Council. The Lord Chancellor would also carry out public consultation prior to the introduction of any new fees. Following this, any such proposal would be subject to secondary legislation that would need to be debated and agreed by both Houses of Parliament before it would take effect.

What is the scope for an appeal?

7.13. Under the draft Order and draft Regulations a person will be able to appeal against the imposition of a civil sanction to the First-tier Tribunal. The Tribunal will provide oversight of regulators’ decision making.

7.14. The RES Act 2008 provides that, as a minimum, an appeal may be on the grounds that the regulator based their decisions on an error of fact; an error of law; the decision was unreasonable, or the amount of a financial penalty was unreasonable. These grounds are provided for in the draft Order and draft Regulations (draft Order, Schedules 1 – 4, sections on appeals). The Government intends that there should be broad grounds for appeal and considers that the grounds provided for in the Order are wide-ranging, and would allow the Tribunal to review the discretion that regulators will exercise in imposing civil sanctions. At the same time the grounds provide helpful pointers as to the basis for a valid appeal.

7.15. However, the RES Act does allow additional grounds of appeal to be added when introducing civil sanctions in a particular regulatory area. The Government wishes to consider whether the grounds of appeal should be widened so as not to exclude some other category of case. The Government also wishes to avoid disputes between parties over whether an appeal falls within the stated grounds. The Government would welcome views from anyone who believes there are cases or aspects of cases that the minimum grounds for appeal would not cover.

7.16. 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 to consider any matter (Rule 5); direct the parties as to which particular issues are to be resolved (Rule 6), and for complex or technical evidence on issues to be submitted by an expert (Rule 15); reach a decision based on the written submissions alone (Rule 32) if both parties agree; or conduct a wider ranging hearing if that is necessary.

Can civil sanctions be cited in a future prosecution?

7.17. If a person is later convicted of an environmental offence, the regulator will be able to refer to relevant civil sanctions at the sentencing stage. The court may wish to consider previous civil sanctions in taking account of the person’s compliance record.
How would imposition of civil sanctions affect private legal action?

7.18. People affected by non-compliance will still have the option to bring civil litigation to claim damages. In assessing any damages, the court would normally take into account any compensation paid or restitution already made under civil sanctions or through an Undertaking.

7.19. Where a civil sanction has been imposed, a criminal court may regard a private prosecution as an abuse of process, and halt the proceedings. This would be a matter for the court. In addition, the Director of Public Prosecutions has the power to take over and discontinue a private prosecution where he is of the view that it would not be in the public interest for it to go ahead.

Question 25: Do you agree with the proposed 28 day period within which a person may make representations and objections to the intended imposition of civil sanctions?

Question 26: Do you support the proposed grounds of appeal against the imposition of a civil sanction? If not, what further grounds would you like to see and why?

Question 27: Do you agree that if a civil sanction is appealed the regulator should carry the burden of proving its case?

Question 28: Do you agree that all proposed notices and penalties (except stop notices) should be suspended until the appeal is heard?

Question 29: (on behalf of the Tribunals Service) Do you consider that a Tribunal may sometimes need to hear an appeal against a Stop Notice on a fast track? If so, in what circumstances?

Question 30: (on behalf of the Tribunal Procedure Committee) Do you consider that the draft General Regulatory Chamber Rules will suit the handling of appeals against civil sanctions imposed for environmental offences?

Question 31: Do you consider that a substantial proportion of appeals in environment cases would have the potential to be decided on the parties’ written submissions alone?
8. Making information publicly available about sanctions

8.1. Public confidence in the use of civil sanctions calls for transparency. The Macrory report emphasised the importance of transparency as a characteristic of good enforcement. Transparency will be important not only in the way regulators will determine sanctions, and in appeals to the First-tier Tribunal, but also in ready public access to information about sanctions that have been imposed.

8.2. Without public information about sanctions imposed, the full gains from a better graduated system will not be realised. Proportionate exposure of sanctions helps to ensure that those who do not comply with the law experience pressure from those who have influence over their performance, such as customers. Where unscrupulous persons do not value a reputation, public exposure helps to warn those who may be deceived by them.

8.3. The RES Act requires regulators to report on the use of civil sanctions. As a matter of good practice, national regulators should establish web based registers of both criminal and civil sanctions, and use of enforcement notices more generally. This will include information about Enforcement Undertakings. Web based registers will take some time to develop, so regulators will find other ways to report initially. HSE’s web-based registers of convictions and enforcement notices show what can be done as part of a regulator scheme under the Freedom of Information Act.

8.4. Regulators should establish registers with separate sections for criminal convictions, VMPs, FMPs, enforcement notices and EUs. This would help to draw distinctions between the seriousness of cases in which the various sanctions are used.

8.5. Sanctions will not be recorded on a public register until any appeal has been heard or the time limit for appealing has expired. Sanctions that have been quashed on appeal will not be put on the register. In putting information on sanctions on a public register, regulators will take account of the Data Protection Act and Rehabilitation of Offenders Act.

8.6. In addition, regulators may choose as they do now, when it is proportionate, to explain publicly the facts on which they have based their decision by, for example, issuing a press release or other form of publicity or a report.

8.7. Publicity that regulators give to sanctions should be carefully targeted: FMPs should be recorded but not normally given active publicity; regulators may need to publicise EUs depending on the severity of any environmental damage, or a business may deserve credit for the way it has responded to an unforeseeable incident; VMPs may well warrant active publicity because they are likely to be for the more serious non-compliance that is still to be treated as civil; criminal convictions normally would be publicised by a press notice as now.

8.8. It is proposed in section 6 that the criminal courts should be able to impose a publicity order, forcing the offender to publicise their own conviction and the sanctions imposed. This would help the courts in marking out the especially serious cases that will continue to come before them.

8.9. In accordance with the Environmental Information Regulations, interested parties will continue to be able to ask a regulator to provide information about a case.
9. Guidance

9.1. The RES Act requires each regulator to consult on a revised enforcement policy and sanctions guidance before they may use civil sanctions. This requirement is duplicated in the draft Order. Regulator policy and guidance will set out the range of enforcement options available to the regulator, civil and criminal, the circumstances in which they will be used and how they will be applied.

9.2. Defra has worked with regulators to develop a high level scheme for use of civil sanctions that will explain how civil sanctions will work in broad terms. This scheme is set out in full in the draft government guidance to regulators at Annex 5. This government guidance sets out government policy on how civil sanctions would be used in environment cases. Regulators will have regard to this guidance in developing their own enforcement policies and sanctions guidance.

Consistency

9.3. Regulators will need to be flexible in selecting the sanctions most appropriate to the circumstances of each case, and these circumstances vary a great deal. They need to be able to exercise discretion within the terms of their published enforcement policy. Consistency in the steps that regulators take to reaching enforcement decisions is therefore especially important. Regulators will set out these steps when they consult on their enforcement policies and guidance.

9.4. In the interests of consistency, regulators will develop arrangements to ensure that appropriate oversight of decisions to impose civil sanctions is in place. They may, for example, establish panels to review decisions, monitor the use of sanctions and assess their outcomes and impacts. For example, EA is setting up a national panel of senior experts to review these decisions.

9.5. The RES Act provides an important means to encourage consistency in enforcement decision-making when using civil sanctions. This is by requiring regulators to issue a Notice of Intent to impose a VMP, FMP, Compliance or Restoration Notice. This will provide an opportunity for the recipient to raise any questions they may have as to how the proposed sanction fits with the government and regulator policy and guidance.

Question 32: Do you agree the draft government guidance provides regulators with an appropriate clear, high level, cross-environment framework within which to develop their own guidance as required by the draft Order? If not which elements conflict with this and what would you propose as an alternative?
10. Transitional arrangements

10.1. It may be some time before civil sanctions become available in all suitable areas of regulation.

10.2. Sometimes two regulators enforce the same piece of regulation in different kinds of case. For example, the Environment Agency and the Health and Safety Executive share responsibility for regulations on the Control of Major Accident Hazards and on the Registration, Evaluation, Authorisation, and Restriction of Chemicals. Civil sanctions will not be made available for these regimes at this time to allow further consideration as to whether and how civil sanctions might be appropriate.

10.3. EA and local authorities have overlapping responsibilities in relation to some areas of regulation. Under the Environmental Permitting Regulations (EPR), a business may in some cases reach agreement with EA and the relevant local authority as to which will enforce at the site. The government proposes that EA should be able to use civil sanctions where they take the lead in cases under EPR. This would ensure consistency in the way EA carries out its core functions in relation to permitting. In other areas of regulation where both EA and local authorities have responsibilities, the Government does not propose to introduce civil sanctions for the time being.

Question 33: Do you agree that EA should not generally take on civil sanctions powers for the time being in relation to enforcement under regulations where they share enforcement responsibility with another regulator, eg regulations on the Control of Major Accident Hazards and on the Registration, Evaluation, Authorisation, and Restriction of Chemicals?

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35 Control of Major Accident Hazards Regulations 1999 (SI 1999/743) and Control of Major Accident Hazards (Amendment) Regulations 2005 (SI 2005/1643)
36 Enforced under the REACH Enforcement Regulations 2008
11. Monitoring and review

11.1. The use of civil sanctions will be reviewed as soon as possible after three years from their introduction, as required in the RES Act. Defra will work with regulators to ensure that suitable information is gathered from the first operational use of civil sanctions onwards, so that the use and impact of the new sanctions can be assessed.

11.2. Gathering information on use of civil sanctions is expected to require the use of independent assessors to establish a baseline of information where possible, to gather information, and to feedback lessons to regulators and Defra as the operational use of civil sanctions goes ahead. This information will be made publicly available at suitable stages in the first two years. Regulators will establish reference groups of key stakeholders in order to discuss progress and receive feedback. Information from monitoring will assist the three year review.

11.3. More proportionate and effective sanctions are expected to contribute to environmental protection directly by securing increased restoration of environmental harm. More emphasis on removing financial benefit from non-compliance will also help to level the playing field for responsible businesses. Indirectly, more proportionate criminal and civil sanctions are expected to create stronger incentives to compliance and contribute to reduction in the number of environmental incidents. A structured approach to sanctions, civil and criminal, will allow the extent to which polluters are required to undertake restoration and to give up financial benefit to be assessed. This will help to demonstrate the part that enforcement plays in achieving good environmental outcomes from regulation.

11.4. Defra is working with regulators to agree suitable indicators of performance.

11.5. Regulators will also develop their information systems to provide management and monitoring data, as part of their longer term IT systems development.
### Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<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</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-compliance and its effects. It is for the regulator to decide whether to accept it.</td>
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<tr>
<td>Final notice</td>
<td>Notice served after the period for representations.</td>
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has ended.

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<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<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</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 Or FMP</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>Fixed Penalty Notice Or FPN</td>
<td>Low level fine fixed by legislation which if not paid will result in prosecution for the original offence.</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</td>
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action, the right to make representations and objections etc.

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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<tbody>
<tr>
<td>Offence</td>
<td>Breach of legislation</td>
</tr>
<tr>
<td>Offender</td>
<td>Person who has committed or suspected of committing an offence.</td>
</tr>
<tr>
<td>Person</td>
<td>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.</td>
</tr>
<tr>
<td>Regulated community</td>
<td>Those who are subject to environmental regulation.</td>
</tr>
<tr>
<td>Regulators Compliance Code</td>
<td>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.</td>
</tr>
<tr>
<td>Regulatory cost recovery notice</td>
<td>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.</td>
</tr>
<tr>
<td>Restoration</td>
<td>Restore to the position that would have persisted if no offence had been committed.</td>
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<tr>
<td>Restoration notice</td>
<td>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</td>
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<tr>
<td>Acronym</td>
<td>Definition</td>
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<td>-----------------------------------------------------------------------------</td>
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<tr>
<td>RN</td>
<td>restored, so far as possible, to what it would have been if no offence had been committed.</td>
</tr>
<tr>
<td>Standard of proof</td>
<td>Level of evidence needed to prove that an offence has been committed.</td>
</tr>
<tr>
<td>Stop notice</td>
<td>A written notice which requires an operator to cease an activity that is causing harm or presents a significant risk of causing serious harm.</td>
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<tr>
<td>Or</td>
<td>SN</td>
</tr>
<tr>
<td>Third Party Undertaking</td>
<td>An action offered by a business to benefit a third party affected by the offence, including the payment of compensation.</td>
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<tr>
<td>Or</td>
<td>TPU</td>
</tr>
<tr>
<td>Triable summarily only</td>
<td>Cases that may only be heard in the magistrate’s court.</td>
</tr>
<tr>
<td>Variable Monetary Penalty</td>
<td>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.</td>
</tr>
<tr>
<td>Or</td>
<td>VMP</td>
</tr>
<tr>
<td>Written representations</td>
<td>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.</td>
</tr>
</tbody>
</table>
Annex 1 – Civil sanctions: details of how the sanctions will work

[Attached separately]
Annex 2 - Draft Environmental Civil Sanctions Order 2010

Including the offences to be covered, and the civil sanctions that are proposed for each offence. A full listing of all the offences and sanctions covered by these proposals is at Annex 4.

[Attached separately]
Annex 3 – Draft Environmental Sanctions (Miscellaneous Amendments) (England and Wales) Regulations 2010

Including the offences to be covered, and the civil sanctions that are proposed for each offence. A full listing of the offences and sanctions covered by these proposals is at Annex 4.

[Attached separately]
Annex 4 – Full listing of offences covered by these proposals, and for each offence the civil sanctions that are to be made available

[Attached separately]

(a) Environment Agency

[ table attached separately ]

Note: Includes offences under the draft Environmental Permitting Regulations 2010 – civil sanctions would be applied to these by means of a further Statutory Instrument.

(b) Natural England and Countryside Council for Wales

[ table attached separately]
Annex 5 - Draft government guidance

(a) Full guide - draft

[Attached separately]

(b) Short guide – draft

[Attached separately]
Annex 6 - Impact assessment for consultation

[Attached separately]
Annex 7 - Summary of consultation questions

[Attached separately]
Annex 8 – List of consultees

[Attached separately]