Civil Sanctions for Environmental Offences

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

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[This short guide will be illustrated with photographs before publication]
Introduction

The government has introduced civil sanctions for environmental offences using the enabling powers in the Regulatory Enforcement and Sanctions Act 2008. There are two statutory instruments: The Environmental Civil Sanctions Order 2010 & The Environmental Sanctions (Miscellaneous Amendments)(England and Wales) Regulations 2010.

The civil sanctions include the following:

- Compliance notice
- Restoration notice
- Fixed monetary penalty
- Enforcement undertaking
- Variable monetary penalty
- Stop notice

They are available for:

- The Countryside Council for Wales
- The Environment Agency
- Natural England

This short guide is for anyone who wants a brief overview of the civil sanctions and how they should be applied. It outlines:

- The background and objectives of the civil sanctions
- What the civil sanctions are
- Approach to using civil sanctions
- General rules and procedures for using civil sanctions
- How civil sanctions will be enforced
- Rules on costs
- Arrangements for fair process
- Contacts

More detailed information can be found in the government guidance to regulators and the regulators’ own sanctions guidance and enforcement policies [regulators have to consult on and publish these before they may use the new sanctions]. These and other relevant documents are referenced on page 11.
Background and objectives of the civil sanctions

The Macrory Review of regulatory enforcement and a Defra review of environmental enforcement both concluded that the current sanctioning framework for dealing with environmental offences needed to be improved. The Government is therefore proposing to introduce civil sanctions in order to:

- create a better graduated enforcement system
- provide an alternative to criminal sanctions for those with a responsible approach to compliance
- create a more level playing field for compliant companies
- benefit the environment and local communities

The regulators will be able to use them when appropriate and proportionate.

However, regulators will still have the discretion to use existing mechanisms, and any other sanctioning powers they may have where it is appropriate and proportionate to do so. Advice and guidance will remain the normal response to many cases of non-compliance.
What are the civil sanctions?

Compliance notice:

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

Compliance notices may for example require investment in plant or equipment or updating management systems or processes.

Restoration notice:

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

Restoration notices may be appropriate where there is damage to the environment or adverse effects on the local community. A wide range of measures might be considered, for example removing contaminants or other pressures on the environment or restoring damage to protected sites. What is possible will depend on the circumstances of the case. Restoration notice will not be appropriate where a notice to undertake remediation is served under the Environmental Damage Regulations 2009.

Variable monetary penalty (VMP):

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

VMPs should be used to remove any financial benefit that may exist from non-compliance; and to deter future non-compliance. The amount of a VMP will depend on the circumstances.

A third party undertaking can be offered by anyone who receives a notice of intent to impose a compliance notice, restoration notice or variable monetary penalty. It involves taking action to benefit a third party affected by the offence, including the payment of compensation. It will be up to the regulator to decide whether to accept it and how to take it into account in making sanctioning decisions.
Enforcement undertaking:

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

Enforcement undertakings provide an opportunity for a person to volunteer measures that proportionately address the non-compliance and the issues it raises.

Fixed monetary penalty (FMP):

A relatively low level fixed penalty which the regulator may impose for a specified minor offence.

An FMP may be appropriate, for example, where there is an initial failure to provide required monitoring data, failure to provide required information and failure to notify works under FEPA. The level of penalties is generally £100 for individuals and £300 for all others (including businesses).

Stop notice:

A written notice which requires a person to cease an activity which is causing serious harm or presents a significant risk of causing serious harm until the steps specified in the notice to remove the risk of serious harm or fully return to compliance with the law have been taken.

The notice can require a person to stop carrying out certain processes and will relate to the activities or part of activities that are responsible for the risk or harm.

A regulator must compensate for losses suffered as a result of a stop notice where the notice is withdrawn or amended because it was unreasonable, where the regulator was acting against the law or where the person successfully appeals against the notice.
Approach to using civil sanctions

The decision on which enforcement option is appropriate in a particular case is an operational matter for regulators in line with their sanctions guidance and enforcement policies. These have been informed by the Government’s guidance to regulators on civil sanctions.

In addition to the general principles contained in the Regulators’ Compliance Code (see p11), there are some further principles set out in the guidance to regulator that should guide the use of sanctions. These are that the approach should:

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

Regulators should endeavour to apply civil sanctions in a way that is consistent across different geographical regions, across offences and across those they regulate.

Factors pointing to prosecution

Regulators already take a range of factors into consideration in deciding whether prosecution is justified in the public interest and they must have regard to the Code for Crown Prosecutors (see p11).

The same kinds of factors will continue to be relevant. However, the introduction of the new civil sanctions will mean that in some cases objectives such as bringing an offender into compliance, securing restoration of damage, removing financial benefit and securing long term protection of the environment may be delivered through civil sanctions and so prosecution is reserved for the worst cases. The guidance to regulators sets out the types of factors that would point to prosecution as the appropriate response with the availability of civil sanctions. For example, intentional or reckless non-compliance will normally point to prosecution.
Some general rules for using civil sanctions

- Regulators must apply a criminal standard of proof, i.e. they must be satisfied ‘beyond reasonable doubt’ that an offence has been committed before using them, except for enforcement undertakings and stop notices;

- The law specifies which civil sanctions can be used for which offences;

- They can be used for any person who causes the offence including, for example, businesses, landowners, individuals, public organisations, an non-governmental organisations;

- Sometimes it will be appropriate to use more than one civil sanction in combination and the law and guidance set out which can be used together;

- In general criminal proceedings cannot be taken where a civil sanction has been served;

- Revenue from penalties are paid into the Government’s main bank account and does not go to the regulators themselves;

- Regulators will place information about the civil sanctions they have imposed on the public record, except where overturned at appeal.

- Civil sanctions will be used fairly. More detail on processes is on p10.
Procedures for using civil sanctions

Compliance notices, restoration notices and variable monetary penalties

- The regulator issues a notice of intent;
- The person can make representations;
- Subject to any representation, the regulator confirms or varies the civil sanction;
- The person can appeal;
- Subject to any appeal, the person must comply with the civil sanction.

Enforcement undertakings

- The person offers an undertaking and the regulator agrees it;
- The person implements the undertaking.

Fixed monetary penalties

- The regulator issues a notice of intent
- The person can make a (reduced) discharge payment and also has the opportunity to make representations
- Subject to any representation, the regulator confirms the penalty
- The person can appeal
- Subject to any appeal, the person must pay the penalty
- There is a late payment penalty

Stop Notices

- The regulator imposes a stop notice
- The person can appeal
- Subject to any appeal, the person must comply with the notice
Enforcing civil sanctions

**Fixed monetary penalties (FMPs) and variable monetary penalties (VMPs)**

Unpaid penalties will be enforced through the civil courts.

**Enforcement undertaking**

The regulator can choose between whether to extend the period of the undertaking, use a different civil sanction or pursue a criminal prosecution for the original offence.

**compliance notice or restoration notice without a VMP**

Failing to comply with a restoration notice would normally point to prosecution but where there are strong mitigating factors a non-compliance penalty can be served.

**Restoration notice or compliance notice with a VMP**

Where a VMP is served, no prosecution is allowed, so the regulator can impose a non-compliance penalty for failures to comply. A non-compliance penalty can also be used for failure to comply with a third party undertaking.

**Stop notice**

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

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

The regulator must serve a notice which, amongst other things, should include the grounds for imposing the notice, the amount to be paid and by when and the revised time period within which the original notice must be complied with. The amount to be paid as a non-compliance penalty will be up to 100% depending on the circumstances.
Costs

The regulator can recover certain costs when imposing civil sanctions. This includes investigation and administrative costs and any related costs for obtaining legal or other expert advice. This power is limited to costs for:

- compliance notices
- restoration notices
- variable monetary penalties
- stop notices

The regulator cannot recover costs for fixed monetary penalties or enforcement undertakings.

The regulator will recover costs using a regulatory cost recovery notice which should be served, if practicable, at the time the civil sanction is imposed.
The procedures for using civil sanctions on page 7 show when in general representations and appeals are available. Appeals can be made to the independent and impartial First-tier Tribunal against:

- Compliance notices
- Restoration notices
- Variable monetary penalties
- Fixed monetary penalties
- Stop notices
- Regulators’ decisions not to issue certificates of completion for stop notices and enforcement undertakings
- Non-compliance penalties
- Regulatory cost recovery notices

Appeals can be made on the grounds that:

- the regulator based their decisions on an error of fact or an error of law
- the decision was unreasonable
- the amount of a financial penalty was unreasonable
Contacts and further information

Contacts:

Countryside Council for Wales:

Environment Agency:

Natural England:

Department for Environment Food and Rural Affairs:

Further information:

Defra website, including the Government’ guidance to regulators on the civil sanctions: http://www.defra.gov.uk/environment/enforcement/index.htm

Regulator guidance on sanctions and enforcement policy:

The Environmental Civil Sanctions Order 2010:

The Environmental Sanctions (Miscellaneous Amendments) (England and Wales) Regulations 2010:


