Cyfoeth Naturiol Cymru
Natural Resources Wales

Enforcement and Prosecution Policy

Guidance on Enforcement and Sanctions

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Natural Resources Wales

Guidance on Enforcement and Sanctions

- This document provides guidance on Enforcement and Sanctions and the use of civil and criminal sanctions.
- It should be read with the Enforcement and Prosecution Policy Statement
- It applies to all Enforcement powers transferred to Natural Resources Wales from the Environment Agency in Wales, the Forestry Commission in Wales and the Countryside Council for Wales.
- Examples of the types of offences and possible available enforcement response options can be found in appendix 4 to this document.

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Introduction

General

This document considers how Natural Resources Wales makes enforcement decisions, the types of tools available and associated processes.

We will use the full range of enforcement and sanctioning tools that are available to us, in combination if necessary, to achieve the best outcomes for the environment and for people. This may range, for example, from providing advice and guidance through to prosecution. Within this overall approach, where an offence has been committed we will consider issuing some form of sanction as well as any other preventative or remedial action taken to protect the environment and people. In this document anything beyond the provision of advice and guidance or a warning is considered to be a sanction, either civil or criminal.

For the purpose of this guidance a sanction is defined as an enforcement requirement (such as a notice), a binding legal agreement or a penalty applied by us or a court.

To commence a prosecution we must be satisfied that the case before us meets the test in the Code for Crown prosecutors, namely that there is a realistic prospect of conviction.

Burden of proof

For most sanctions issued under the Regulatory Enforcement and Sanctions Act 2008 (RES Act) there is a higher burden of proof, namely that we must be satisfied beyond reasonable doubt that an offence has been committed before we can issue a sanction. In respect of Enforcement Undertakings received under that Act we must have reasonable grounds to believe that an offence has been committed before we can accept the offer. In such cases we will still want to be in a position to establish that an offence has been committed in case further enforcement action is necessary where an offender fails to comply with the undertaking.

Action against the Crown

Action against the Crown

No contravention by the Crown of any provision will make the Crown criminally liable, nor can the Crown be made the subject of a RES Act civil penalty.

However, Natural Resources Wales may apply to the High Court for a declaration that any act or omission of the Crown is unlawful. This is an unusual course to take and whether we do so will depend upon:

- the gravity of the incident or breach;
- whether liability is admitted; and
- the response of the body concerned.

Costs

Costs

Where the law allows we will always seek to recover the costs of investigation and enforcement proceedings. Where we have carried out remedial works, we will seek to recover the full costs incurred from those responsible in accordance with the 'polluter pays' principle. Detailed provisions concerning costs arising from RES Act civil sanctions are set out below.

Penalty Principles

Penalty Principles

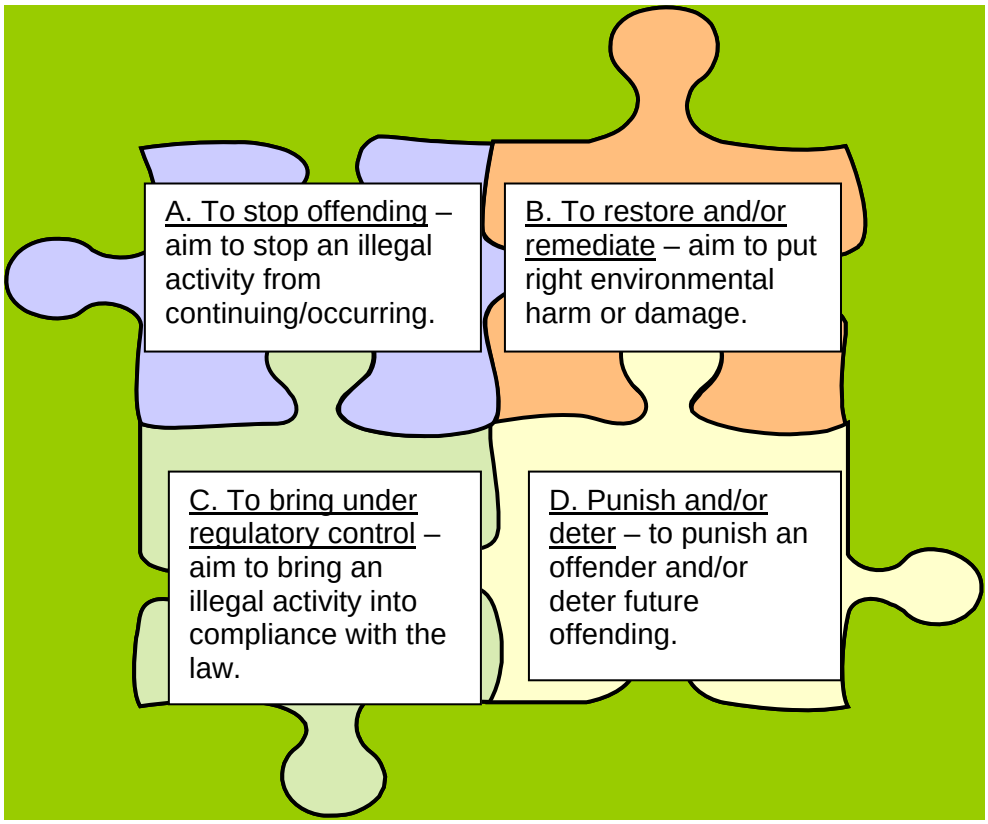
When considering the appropriate course of action to address offending and to ensure compliance, we aim to follow the penalty principles set out in the Macrory Review and included in the Regulators' Compliance Code.

- 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 regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
- be proportionate to the nature of the offence and the harm caused;
- aim to restore the harm caused by regulatory non-compliance, where appropriate; and
- aim to deter future non-compliance.

Outcome-focused enforcement

Outcome-focused enforcement

We can use the sanctions that are available to us to achieve environmental outcomes. The outcomes that we seek can be divided into four general types:



Outcomes

The enforcement and sanctioning tools available to us to achieve the desired outcomes (in addition to the provision of advice and guidance and warnings detailed below) include the following. Note that some can be used in combination to contribute to achieving more than one outcome.

The terms used above are defined and further explained below.

Tools to stop offending – Box A

Injunctions

An injunction is an order of a court directing an individual (or company) to either:

- stop a particular activity (a prohibitory injunction); or
- carry out a particular activity (a mandatory injunction).

Failure to comply with an injunction is treated as a contempt of court and is punishable by an unlimited fine and/or up to two years' imprisonment.

Court Order under the Environmental Permitting (England and Wales) Regulations 2010 (EP Regulations)

- This is similar to an injunction.

Notices

- Stop notice;
- Suspension notice;
- Groundwater prohibition notice;
- Anti-pollution works notice.

Tools to restore or remediate – Box B

Notices

- Restoration notice;
- Enforcement notice;
- Notice to remove waste;
- Notice requiring forestry restocking
- Anti-pollution works notice,

Powers

- Under the EP Regulations 2010, power to seek a regulation 44 remediation order;
- Acceptance of an Enforcement Undertaking or acceptance of a Third Party Undertaking. This can include restitution to adversely affected third parties and communities.

Tools to bring under regulatory control – Box C

Notices

- Compliance notice;
- Enforcement notice;
- Suspension notice;
- Anti-pollution works notice;
- Revocation of an environmental permit; and
- Variation of permit conditions.

Powers

- Acceptance of an Enforcement Undertaking.

Tools to deter and/or punish – Box D

- Criminal Sanctions
- Variable Monetary Penalties, Fixed Monetary Penalties.
- Additional civil penalties for the EU Emissions Trading Scheme and the Carbon Reduction Commitment Energy Efficiency Scheme.

General enforcement responses

Advice and guidance – compliance assistance

We aim to provide advice and guidance to assist an operator or individual to come back into compliance at any point. In the context of enforcement we will normally provide advice and guidance after an offence is committed or where we consider that an offence is likely to be committed. Where we provide compliance assistance of this type it is without prejudice to any other enforcement response that may be required. This compliance assistance may be either verbal or written, but will be recorded. In the event of continued or further non-compliance(s) this may influence the subsequent choice of response.

We will also seek, where possible, to achieve a lasting solution to the problem that caused offences to be committed.

Warnings

A warning is a written notification that we believe an offence has been committed. The notification can be either:

- a warning letter; or
- a site warning that is normally issued on-site or otherwise as a result of a compliance visit to a permitted site or activity.

It will be recorded and may, in the event of further non-compliance, influence subsequent choice of sanction.

Warnings can be used to achieve any of the four types of environmental outcome that we might seek (see above).

Non- RES notices, powers and orders

Many of the regimes that we enforce already contain powers to serve specific notices which require the recipient to stop offending, to restore or remediate an affected environment or to come into compliance with regulatory requirements. These existing provisions may be used wherever appropriate.

Examples of these notices, powers and orders include:

- Environmental Permitting Regulations 2010 (EP Regulations):
  - Notices: Variation notice (regulation 20), Enforcement notice (regulation 36), Suspension notice (regulation 37), Revocation notice (regulation 22), Groundwater prohibition notice (Schedule 22, paragraph 9);
  - Court order: Enforcement by the High Court (regulation 42);
  - Remediation powers: Power to prevent or remedy pollution and recover costs (regulation 57), Power to dispose of radioactive waste (Schedule 23, part 3, paragraph 4), Orphan sources (Schedule 23, part 4, paragraph 8).
- Environmental Protection Act 1990:
  - Notice to remove waste (Section 59 and 59Z).
- Wildlife and Countryside Act 1981:
  - Court order : Restoration of damaged SSSI resulting from un-consented works
- Forestry Act 1967 as amended:
  - Notices: Restocking notice (section 17A) and Enforcement notice (section 24

The RES Act 2008 has created new notice powers to complement the existing notices, particularly to provide powers to require an offender to stop the unlawful activity, to bring the activity into regulatory compliance and to restore damage that has been done. These new notices, namely Stop, Compliance and Restoration Notices, have been made available in order to address situations not capable of being dealt with by the notices described in the paragraph above (see below).

Criminal sanctions

Fixed Penalty Notice (FPNs)

A Fixed Penalty Notice is a financial penalty for an offence, imposed by the regulator, which if unpaid can be dealt with by way of prosecution in the criminal courts. FPNs are available to us for a limited number of offences. Where a Fixed Penalty Notice is served, payment of the penalty discharges the liability. Where this happens a record of the payment of the FPN will be kept and treated in the same way as a record arising from a warning.

Where a Fixed Penalty Notice is imposed by us but not paid, the recipient will normally be prosecuted for the original offence.

Formal caution

A formal caution is the written acceptance by an offender that he has committed an offence and may only be used where a prosecution could properly have been brought. To this extent it differs from a formal warning as described above, which is simply a record and warning about an offence that has been or may be committed. The formal caution is a formal recorded criminal sanction which will be produced in court if there is further offending. It differs from the imposition of a civil sanction as the circumstances which led to the offence have been considered to be appropriate for a prosecution and, indeed, a repetition of similar offending would be likely to lead to such a response.

Formal cautions are intended to be a specific deterrent to an offender and are suitable for cases where, although a prosecution could be initiated, other factors mitigate against this. We must however consider the test under the Code for Crown Prosecutors, namely whether there is sufficient evidence and also the public interest factors involved.

Where a formal caution is not accepted we will normally prosecute for the original offence.

Prosecution

The sanction of prosecution is available for all criminal offences by law. The legislation which establishes the penalty provisions gives the courts considerable scope to punish offenders and to deter others. In some cases imprisonment and unlimited fines may be imposed.

Where we decide that a criminal sanction is appropriate we will assess the case in accordance with the requirements of the Code for Crown Prosecutors before commencing a prosecution.

We recognise that prosecution is a serious matter which should only be embarked upon after full consideration of the implications and consequences.

Where it is decided that a prosecution is the most appropriate choice of sanction, we must meet the test set out in the Code for Crown Prosecutors, to determine whether there is sufficient evidence and be satisfied that the prosecution is in the public interest.

We must then make a decision as to whether prosecution is an appropriate response or whether an alternative to prosecution may be more appropriate. The factors that will influence this assessment are set out in further detail in section 3 of the Defra/WG Civil Sanctions for environmental offences guidance document.

Orders imposed by the Court ancillary to prosecution

The Code for Crown Prosecutors requires us to apply for compensation and ancillary orders, such as anti-social behaviour orders and confiscation orders, in all appropriate cases. Listed below are the ancillary orders that a court may make following a conviction:

- disqualification of directors;
- confiscation of assets - Proceeds of Crime Act 2002;
- anti-social behaviour orders;
- forfeiture of equipment used to commit the offence;
- disqualification from driving;
- compensation;
- vehicle seizure;
- remediation – under the Environmental Permitting Regulations.

We may also consider a person's competence to be the holder of some Environmental Permitting Regulation permits or the desirability of a person continuing to be a registered waste carrier or broker.

RES Act Civil Sanctions

General

In some cases the outcome may be best delivered by a civil sanction made available under the RES Act. Note that civil sanctions are not available for all offences – see the Offence Response Options document. The following illustrates the sorts of circumstances where civil sanctions might be used or accepted. As such the examples are not exhaustive.

Fixed Monetary Penalties (FMPs)

These are fixed penalties which will be most suitable for offences with minor or no direct environmental impact, such as paperwork and administration offences. They will be most appropriate where advice and guidance has failed to secure the necessary improvements. Fixed Monetary Penalties are set at £300 for business and £100 for individuals, with discounts for early payment. They may be used for offences where a low-level monetary penalty is more likely to change the offender's behaviour and encourage future compliance for example because advice and guidance has failed. They can be issued for minor offences that need some kind of enforcement action but which, depending on the public interest factors, may not be serious enough to warrant a prosecution.

Variable Monetary Penalties (VMPs)

These are monetary penalties which we can impose directly for more serious offences. We will follow the published methodology (see Annex 1) to set the level of the VMP. Variable Monetary Penalties may be used instead of criminal sanctions for offences where imposing a financial penalty may change offender behaviour and deter others and/or lead to faster resolution. A Variable Monetary Penalty does not carry the stigma of a criminal conviction. It may also provide a saving for the recipient in avoiding the need to pay for representation, and enable the recipient to offer a Third Party Undertaking to make restitution to adversely affected third parties, including local communities.

This may include, for example, cases where there has been more significant environmental damage but other factors indicate that imposing a Variable Monetary Penalty may be appropriate. Variable Monetary Penalties will also be used, where appropriate, to remove an identifiable financial gain or saving resulting from the non-compliance. We may choose to use VMPs where there is evidence of negligence and mismanagement.

Compliance Notices

These require the offender to come back into compliance. They may be used in a case where the offender has previously been in compliance with a requirement, such as regularly submitting returns, but is currently not fulfilling their obligations. The notice should ensure that the offender takes action to stop the non-compliance, addresses the underlying causes and comes back into compliance. They may be used where previous advice or guidance to encourage compliance has not been followed and a formal notice has become necessary to ensure compliance. They can be combined with a Variable Monetary Penalty and a Restoration Notice.

Restoration Notices

These require the offender to take steps to put right any damage caused as a result of the non-compliance and address any harm. These notices can be used where damage has been caused to the environment and the action and work needed to address the damage can be identified and carried out by the offender. They may be used where restoration has not been undertaken voluntarily or we consider that a formal notice is necessary to ensure it is undertaken. They may be used where there is no other suitable enforcement notice available and where previous advice or guidance to encourage restoration has not been followed. They can be combined with a Variable Monetary Penalty and a Compliance Notice.

Stop Notices

A Stop Notice can be used in two sets of circumstances:

- to immediately stop an activity that is causing, or presents a significant risk of causing, serious harm to human health or the environment and where a specified offence is being, or is likely to be, committed;
- to immediately stop an activity that is likely to be carried on that will cause, or will present a significant risk of causing, serious harm to human health or the environment, and the activity likely to be carried on involves or will be likely to involve a specified offence being committed.

Enforcement Undertakings (EUs)

These are legally binding voluntary agreements offered by those who may have committed an offence and accepted by us. An Enforcement Undertaking can be accepted from a person where we have reasonable grounds to suspect that a specified offence has been committed. They will only be accepted where we have sufficient confidence that the terms of the EU will be delivered. We are more likely to accept them when they are offered early. We will be unlikely to accept an Enforcement Undertaking where we have already decided that a prosecution is required in a particular case. Equally we will be unlikely to accept an EU when we are already in discussion as to the level of a Variable Monetary Penalty in a particular case. The terms of the Enforcement Undertaking will normally contain an element of restoration as well as steps to ensure future compliance such as long-term investment in environmental management systems. Enforcement Undertakings should encourage legitimate business operators to make amends, come into compliance and prevent recurrence. See Annex 2 for more information about Enforcement Undertakings and the Offence Response Options document for the offences they are available.

Other Civil Sanctions

Other Civil Sanctions

Certain schemes impose specific civil penalties for specific offences. In the EU Emissions Trading Scheme, both in relation to stationary installations and aviation, the legislation sets out civil penalties in the form of financial penalties.

In the Carbon Reduction Commitment (CRC) Energy Efficiency Scheme, the legislation sets out various civil penalties, in the form of financial penalties, publication of breach, determination of an annual emissions figure, the requirement that extra allowances be surrendered, placement at the bottom of the performance league tables and blocking of a registry account.

In both of the above schemes, the level of the financial penalties is generally set out in the legislation. For certain penalties, the imposition of the penalty is mandatory. For others, a power is given to waive or modify the penalty but only in accordance with the limited discretion set out in the legislation.

In relation to the Landfill Allowance scheme, the legislation requires suspected non-compliance to be reported to the Welsh Minister.

How do we choose the appropriate response?

General

When we are considering our response to an offence there will normally be a range of possible sanctioning responses available for us to use.

RES Act civil sanctions are not available for all offences and, where they are available, not all of the civil sanctions can be applied. Similarly non-RES Act notices, powers and orders are not available for all offences. A list of all available sanctions for each offence is contained within our Offence Response Options (ORO) document.

When considering the choice of sanction, we will also consider whether a regulatory position statement has been published for that offence.

Government has provided advice to us on the imposition of civil penalties and the use of our discretion under the Carbon Reduction Commitment (CRC) Energy Efficiency Scheme titled Civil penalties under the CRC Energy Efficiency Scheme Order 2010, which we will follow.

Non–RES Act civil sanctions

In some cases, the appropriate response to non-compliance will be dictated to us by the relevant legislation. This is the case for some of the non-RES Act civil sanctions, and we therefore have no discretion in such cases and must apply the sanction as set out in the legislation. In other cases, the legislation will require us to impose a particular sanction except where we are satisfied that the sanction may be waived or modified in accordance with the limited discretion given to us under that particular legislation. Again, we must exercise our discretion in accordance with the legislation in such cases and we will consider the public interest factors set out below only where appropriate and within the confines of the legislation.

Choosing the right response: procedure

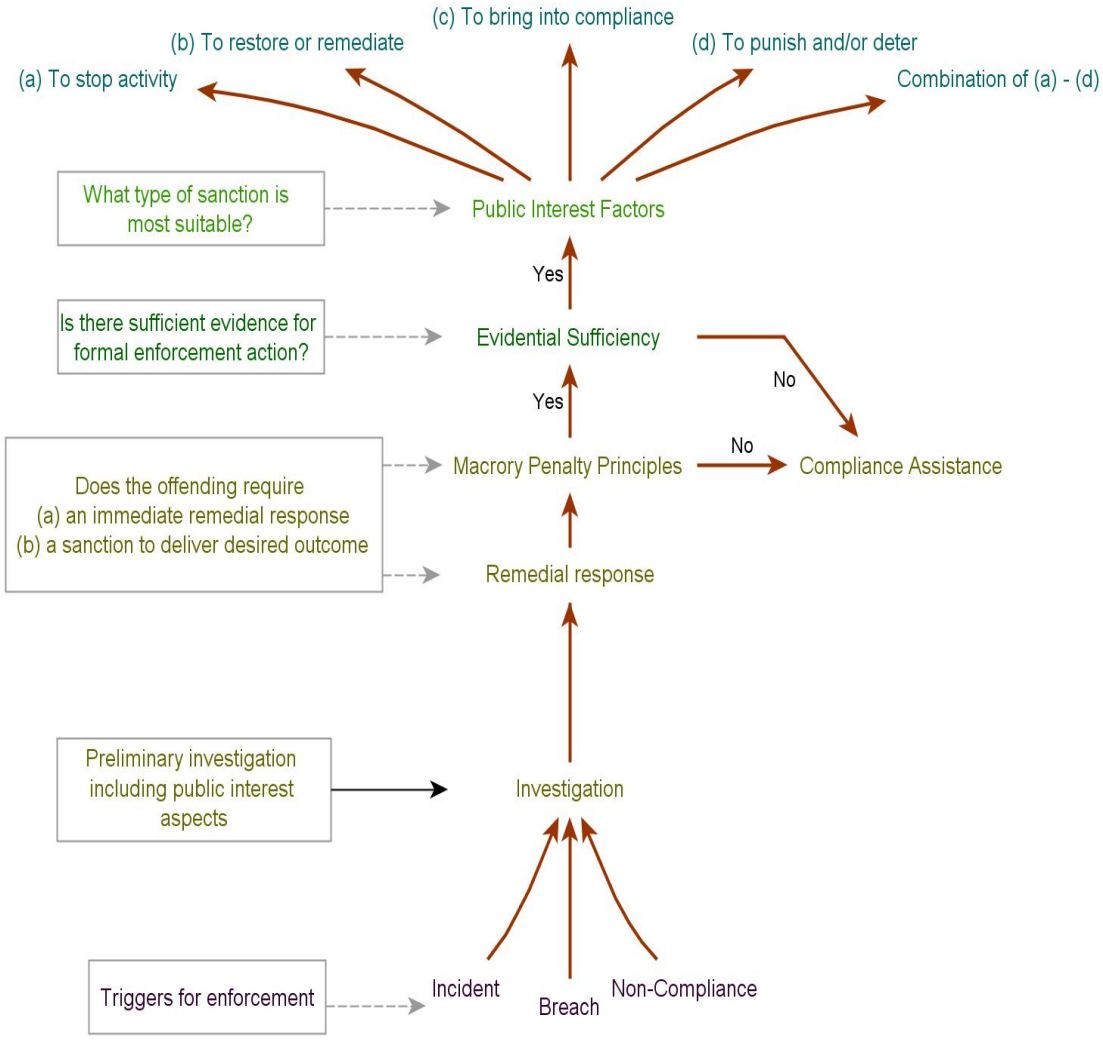
First we will consider the outcome that we are seeking to achieve in accordance with our commitment to outcome-focused regulation. We will consider what immediate action is needed as a response to protect the environment, such as the need to immediately serve a notice, and whether further action is then required to secure the desired outcomes. See Figure 1 below.

Where we consider that advice and guidance has not or will not achieve the necessary outcome, and that some form of sanction (either criminal or civil) is required to secure that outcome, then we will consider the facts against public interest factors (set out below) in order to decide what type of sanction to impose.

Where the circumstances leading to the offence could reasonably have been foreseen, and adequate avoiding and/or preventative measures were not taken, the response will normally give rise to a sanction beyond advice and guidance or issuing a warning.

See below:

Sanctions decision tree



The public interest factors

General

The importance of each public interest factor may vary on a case by case basis. Deciding on the public interest is not simply a matter of adding up the number of factors in favour of and against applying a sanction. We will decide how important each factor is in the circumstances of each case and make an overall judgement.

Consideration of these factors will normally indicate the appropriate sanction(s) likely to produce the desired outcome. These outcomes may include lasting compliance with the law, redress for environmental harm and obtaining a good and lasting benefit for the environment, affected local communities and ensuring a level playing field for businesses and others.

Intent

Offences that are committed deliberately, recklessly or with gross negligence are more likely to result in prosecution. Where an offence was committed as a result of an accident or a genuine mistake this is more likely to result in the use of advice and guidance, warning or an available civil sanction.

Foreseeability

Where the circumstances leading to the offence could reasonably have been foreseen, and no avoiding and/or preventative measures were taken, the response will normally be to impose a sanction beyond advice and guidance or the issuing of a warning.

Environmental effect

The response will address the potential and actual harm to people and the environment. Normally where an offence is classified under the Common Incident Classification Scheme (CICS) or Compliance Classification Scheme (CCS) (or the equivalent under the Reservoirs Dam Risk Categorisation Scheme) as category 1 or 2 we would consider a prosecution, formal caution or a Variable Monetary Penalty.

Certain offences are of a type designed to prevent environmental harm, for example particular abstraction offences. Where such an offence could give rise to either a category 1 or 2 CCS or CICS incident we would normally consider a prosecution, formal caution or a Variable Monetary Penalty.

Nature of the offence

Where the offending impacts on our ability to be an efficient and effective regulator, for instance where our staff are obstructed in the conduct of their duties, where we are targeting a particular type of offending or where we are provided with false or misleading information, we will normally prosecute.

Financial implications

Where legitimate business is undercut, or where profits are made or costs are avoided, such as costs saved by not obtaining a permit, this will normally lead to the imposition of a Variable Monetary Penalty or a prosecution. This will include offences motivated by financial gain.

Deterrent effect

When choosing a sanction we will consider the deterrent effect, both on the offender and others. Prosecutions, because of their greater stigma if a conviction is secured, may be appropriate even for minor non-compliances where they might contribute to a greater level of overall deterrence.

Where the use of a sanction is likely to reduce future self-reporting of offences or non-compliance, a different sanction may be appropriate.

Previous history

The degree of offending and/or non-compliance (including site-specific offending or generic failures by the offender) will be taken into account. We will normally escalate our enforcement response where previous sanctions have failed to achieve the desired outcome. For example, where a formal caution has previously been used to deal with offending but has failed to encourage behaviour change and prevent a repeat of the offending, it is likely that the offender will be prosecuted or, where available, a Variable Monetary Penalty will be served.

Attitude of the offender

Where the offender has a poor attitude towards the offence and/or is uncooperative with the investigation or remediation, this will normally mean that we consider a prosecution or a Variable Monetary Penalty. Conversely, where the offender provides us with the details of an offence voluntarily or through a self-reporting mechanism, we will take this into account when deciding on a sanction or whether advice and guidance will suffice.

Personal circumstances

We will consider the personal circumstances of the offender (for example if the offender is suffering from a serious illness). A first offence by a juvenile will not normally result in prosecution.

When we are considering a sanction that incorporates a financial penalty or a requirement to perform costly remediation we will carefully consider the offender's ability to pay. Where that consideration indicates the penalty is beyond the offender's ability to pay it will be modified to place it within the reach of the offender.

We will not normally apply a Fixed Monetary Penalty or a Variable Monetary Penalty (unless there is significant financial gain) to an offence where a person is receiving Common Agricultural Policy (CAP) payments that are expected to be reduced by reason of failure to comply with the relevant cross compliance requirements, but we may still apply other civil or criminal sanctions.

Other public interest considerations

Serious offences

When we are dealing with overt criminality, gross negligence or reckless behaviour or where the seriousness of an offence requires that it be heard in a public forum, we will normally choose to prosecute.

We will normally consider prosecution, subject to a consideration of the public interest factors, where either:

- the offending has been intentional, reckless or grossly negligent or involves outright criminal activity;
- the offending has created serious harm (or has the potential to cause such harm) to the environment or to people;
- there has been large-scale and protracted non-compliance with regulatory provisions;
- our staff have been subject to harassment, alarm, distress or fear of violence;
- intentionally, recklessly or wilfully making a false or misleading statement or record;
- we have been obstructed in our duties and this obstruction has prevented the investigation of potentially criminal activity or an offender has impersonated a Natural Resources Wales officer; or
- where an offender has failed to comply with a Stop Notice.

Minor breaches

When we are dealing with minor breaches of a permit condition where there is no environmental impact, we will normally choose to provide advice and guidance to help the business back into compliance.

Repeat offending

Where offending has continued or been repeated despite us taking enforcement action we will normally increase the level of our enforcement response and impose a more serious or severe sanction.

Failure to comply with a notice

Where a recipient fails to comply with a notice we will seek a sanction that is likely to punish and/or deter.

Operating without a permit, licence or other authority

Where a person has failed to obtain the necessary authorisation, then we are more likely to impose a sanction that is likely to punish and/or deter.

Multiple site operations

We will always have regard to the compliance history of an offender. We will not normally take account of offences committed on another of an operator's sites unless they are of a similar type or demonstrate an overall management failure on the part of the operator.

Offences by bodies corporate

We will take enforcement action against those persons responsible for the offence. Where a company is involved, it will be usual practice to enforce against the company where the offence resulted from the company's activities. However, where an offence has been committed by a body corporate and is attributable to the consent, connivance or neglect of any director, manager, secretary or other officer, that person can be guilty of an offence and is liable to be the subject of enforcement action for that offence.

In such circumstances we will take action against the most appropriate body (corporate and/or individual) or in combination, using the full range of the enforcement tools at our disposal. In appropriate cases, we will consider seeking disqualification of directors under the Companies Act.

Combining sanctions

Other than where specifically allowed by the legislation it is not normally possible to combine criminal and civil sanctions for the same offending.

Combinations of sanctions will in some circumstances be possible but careful regard must be had to the relevant legislative provisions. For instance, the RES Act 2008 allows us to impose Variable Monetary Penalties, Restoration and Compliance Notices for the same offence.

Where it appears desirable to use a combination of sanctions we will carefully consider the extent to which this is lawful and appropriate. For regimes which involve annual registration and compliance such as those established by Producer Responsibility obligations, where we choose a civil sanction response, we will endeavour to reflect all compliance failures by choosing one civil sanction option, which most fairly characterises the offences arising, rather than issuing a number of sanctions for each compliance period.

Other notices, powers and orders

Other notices, powers and orders

Many of the regimes that we enforce already contain powers to serve specific enforcement notices which require the recipient to stop offending, to restore or remediate an affected environment or to come into compliance with regulatory requirements. These existing provisions may be used wherever appropriate.

Procedures for RES Act civil sanctions

General

The RES Act sets out highly prescriptive requirements and procedures for regulators wishing to use civil sanctions. These are expanded by the:

- Environmental Civil Sanctions (Wales) Order 2010 (ECS(W)O);

and

- Environmental Civil Sanctions (Miscellaneous Amendments) (Wales) Regulations 2010. (ECS (W) R).

The legislation does not however set out all of the considerations which arise in relation to proceedings which are alternatives to criminal sanctions. We believe that we must be demonstrably fair and judicious in the way that we administer our civil sanctions regime. Accordingly, we will adopt high levels of propriety throughout our procedures in respect of the use of these civil sanctions. We will ensure that an offender who receives a Notice of Intent for a civil sanction has similar safeguards to an offender who has been prosecuted. We will ensure that the safeguards inform our considerations in the use of administrative penalties as set out below.

Investigations

In carrying out our investigation as to whether or not an offence has been committed, or is likely to be committed, we will apply the safeguards laid down by the Police and Criminal Evidence Act 1984.

Assessing the strength of our evidence

When assessing our evidence as to whether an offence has been committed we will carefully assess the weight and cogency of all of the evidence to satisfy ourselves that an offence has been made out in accordance with the relevant test. We will take into account any weaknesses and ambiguities in our evidence and strive to search for the truth so far as possible in relation to any such ambiguities. In the event of a direct conflict of evidence we will construe any uncertainty in favour of the accused.

Disclosure

We will ensure that the recipient of a Notice of Intent has a clear statement of the facts behind the proposed sanction or details of the evidence upon which we rely so that he will understand the case against him. We will detail the offence alleged, date and time of commission and the circumstances of the offence to the extent that they are known to us.

Unused material

If at any time we are in possession of material which undermines our case or assists the offender we will disclose that material in accordance with the interests of justice. If we find that there is material which is so sensitive that a judge should rule on the issue of its disclosure or admissibility then we will consider whether it is more appropriate to proceed by way of prosecution rather than administrative sanction.

Representation

We will carefully consider and weigh any representations we receive and review our evidence in light of these. Decisions to proceed with a civil sanction in the face of representations to the contrary will only be made by a separate reviewing lawyer and manager.

Interests of victims

We will have regard to the interests of victims and third parties whose interests have been adversely impacted by an environmental incident. We will attempt to ensure that, in accordance with the 'polluter pays' principle, third parties are compensated appropriately when a civil sanction is imposed or an Enforcement Undertaking accepted. We will encourage offenders to engage with the local community and to assess and remediate fully the impacts of an environmental incident.

Where we receive information from an offender that a third party is to be compensated we will require evidence, usually by confirmation in writing, that the third party is satisfied with the compensation arrangements. Only where we believe it to be appropriate in all the circumstances will we proceed with a civil sanction, including an Enforcement Undertaking, without some attempt having clearly been made to agree reasonable compensation with a directly affected third party.

In accepting an Enforcement Undertaking we will make it clear that this does not forestall or prejudice the rights of third parties to bring their own civil claims in relation to the incident to which the undertaking relates.

Enforcement Cost Recovery Notices (ECRN)

We may serve Enforcement Cost Recovery Notices requiring payment of our costs up to the time of imposition of most civil sanctions. We will always seek to recover our costs in accordance with the 'polluter pays' principle and will attempt to assess our actual and necessary costs associated with the imposition of the sanction and recover these from the relevant offender.

An Enforcement Cost Recovery Notice may not be served where a Fixed Monetary Penalty is imposed as the legislation does not allow this. Where an Enforcement Undertaking is offered we are not entitled to require payment of our costs but we will look more favourably upon Enforcement Undertakings which offer a contribution towards the costs associated with an alleged offence and the acceptance of the undertaking through to its discharge under a completion certificate.

While we may reduce the amount of a civil sanction by reason of an offender's inability to pay the amount due we are unlikely to reduce the amount of an Enforcement Cost Recovery Notice. This is because the Enforcement Cost Recovery Notice should reflect the actual costs associated with the offending and the sanction imposed and because of our duty to protect the public purse.

There is a right of appeal against the imposition of an Enforcement Cost Recovery Notice as provided for by the relevant Statutory Instruments in both England and Wales.

Non-Compliance Penalties (NCP)

We are entitled to impose a Non-Compliance Penalty where an offender fails to comply with a Compliance Notice, Restoration Notice or Third Party Undertaking. This is the case even where a Variable Monetary Penalty is also imposed for the relevant offence. We will attempt to assess the real cost of complying with the original sanction or Third Party Undertaking and will base our Non-Compliance Penalty on this assessed cost. We will then take into account the reasons for the non-compliance in assessing what proportion or percentage of that cost should be imposed by way of a Non-Compliance Penalty. If the failure to comply is deliberate then the percentage is likely to be greater. If the failure arises because of facts and circumstances beyond the offender's control then the percentage will be smaller. Because any such failure is likely to be fact specific we will apply the public interest criteria to decide what percentage payment is appropriate by way of a Non-Compliance Penalty.

For Compliance Notices and Restoration Notices we can prosecute for non-compliance with a notice or serve a Non-Compliance Penalty. In normal circumstances we would choose to either impose a Non-Compliance Penalty or prosecute depending on the particular circumstances of the non-compliance. Where a Non-Compliance Penalty is served but this does not bring about compliance with the original notice we may still prosecute for the original offence.

If the requirements of the original sanction or Third Party Undertaking are complied with before the time set for payment of the Non-Compliance Penalty, the penalty falls. We would have regard to the desirability of reducing the amount of a Non-Compliance Penalty if its imposition led to prompt and comprehensive proposals for compliance with the terms of the original notice.

The relevant Civil Sanctions Statutory Instruments in both England and Wales provide a right of appeal against the imposition of a Non-Compliance Penalty.

Appeals

General

Enforcement action (specifically the imposition of a sanction) can normally be appealed either through the criminal court process or as a result of specific appeal provisions.

Our notices set out the rights of appeal which apply in the specific circumstances of each sanction or provision.

When considering any type of appeal against enforcement and sanctioning action it will usually be appropriate for the recipient to obtain independent legal advice.

Appeals against RES Act sanctions

RES Act sanctions cannot be imposed in the following circumstances:

- where that offence is not specified as having a RES Act sanction available;
- where that offence does not have that particular RES Act sanction available;
- where no offence has been committed;
- where it is not possible for the offence to be proved beyond reasonable doubt; or
- where representations indicate that a defence is available.

References to specified offences mean those that are specified under the Environmental Civil Sanctions (Wales) Order 2010 (ECS (W) O), and the Environmental Civil Sanctions (Miscellaneous Amendments) (Wales) Regulations 2010 (ECS (W) R).

Where a RES Act sanction can be imposed our notices will set out rights of appeal. These are very far ranging. The First Tier Tribunal has issued forms and guidance in respect of such appeals and these are available from their website (http://www.tribunals.gov.uk/Tribunals/Firsttier/generalregulatory.htm).

Generally, the grounds of appeal against the imposition of a RES Act sanction are as follows:

- that the decision was based on an error of fact;
- that the decision was wrong in law;
- that the decision was unreasonable;
- the amount is unreasonable;
- any other reason or, in Wales, any other similar reason.

These are set out in more detail at Annex 3 below.

Compensation provisions – Stop Notices

Compensation provisions – Stop Notices

Where a Stop Notice has been served we must compensate a person if, as a result of the service of the notice or the refusal of a completion certificate, that person has suffered loss, and:

- we withdraw or amend the Stop Notice because the decision to serve it was unreasonable or any step specified in the notice was unreasonable;
- we are in breach of our statutory obligations;
- the person successfully appeals against the Stop Notice and the Tribunal finds that our service of the notice was unreasonable; or
- the person successfully appeals against the refusal of a Completion Certificate and the Tribunal finds that our refusal was unreasonable.

In these circumstances compensation should cover loss including exceptional costs resulting from the service of the Stop Notice (for example, legal or expert advice).

A person who wishes to claim compensation must do so in writing to the address which appears on the Stop Notice with which they have been served.

Any dispute over whether compensation should be paid, or over the amount of any such compensation, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties to the dispute or, in default of agreement, a person will have the right of appeal to the First Tier Tribunal against our decision not to provide compensation or against the amount of compensation.

The compensation scheme is without prejudice to a person's rights to seek redress through the Ombudsman, judicial review or civil litigation.

Related documents

Links

Enforcement and Prosecution Policy

Offence Response Options Document

Annex 1: Variable Monetary Penalty methodology

1. General principles

When we may use a Variable Monetary Penalty (VMP)

Under our Enforcement and Sanctions Statement and Enforcement and Sanctions Guidance, Variable Monetary Penalties may be used for specific offences especially where the imposition of a financial penalty may change offender behaviour and deter others. This may include, for example, cases where although there has been significant environmental damage requiring restoration imposing a VMP is also appropriate. Variable Monetary Penalties will also be used to remove an identifiable financial benefit or saving resulting from non-compliance, where appropriate. We may also want to use them where there is evidence of negligence and mismanagement, but this is not sufficient to warrant prosecution.

1.2 Government guidance

The Government has issued guidance to regulators on how they must calculate Variable Monetary Penalties (Defra/WG guidance and RES Act guidance).

This methodology follows that guidance. It is important to note that:

- Variable Monetary Penalties have to be calculated individually for each offence and the starting point for the deterrent component (see below) for each offence has to be individually determined.
- Where more than one offence is committed, a separate VMP may be imposed at the same time for each offence.
- The total payment under any single VMP may not exceed £250,000.

1.3 Overview of components of a Variable Monetary Penalty

Variable Monetary Penalties have three components:

i. Financial benefit component – to remove financial benefit from the offence including:

- avoided costs such as permit fees;
- operating savings arising from being non-compliant e.g. equipment, staff, consultants; and
- financial gain arising from operating at lower costs.

ii. Deterrent component – based on one of three starting points determined by the characteristics of the offence, which is then adjusted according to aggravating and mitigating factors. The three starting points are:

a. the financial benefit from (i)

b. the costs required to comply with a restoration notice

c. the maximum criminal fine a magistrate's court could impose for the specific offence where there is neither significant restoration nor significant financial benefit.

The deterrent component is added to the financial benefit to:

- change the behaviour of the offender;
- act as a general deterrent to others to help to improve compliance overall; and
- reassure those that do comply that the non-compliant have not secured any advantage from offending.

iii. Deduction component – to reduce the penalty by some of the costs incurred by the offender.

The basic calculation is:

(Financial benefit + Deterrent) – Deductions = VMP

Where:

Deterrent = £ (Starting point x Total aggravating factor) – £ (Total mitigation)

1.4 We calculate the Variable Monetary Penalty in the following stages:

- We assess and estimate each starting point relevant to the offence:

  a. the financial benefit gained by the offender in committing the offence;

  b. the costs required to comply with a restoration notice; and

  c. the maximum criminal fine a magistrate's court could impose for the specific offence where there is neither significant restoration nor significant financial benefit.

- We choose the starting point for the deterrent component depending upon the nature of the offence. We will usually choose the one with the highest value, unless there are reasonable grounds for choosing a lower value.

- We assess the aggravating factors and the mitigating factors and use them to modify the chosen starting point to give us the Variable Monetary Penalty total. Some aggravating factors may be such as to indicate the use of a prosecution rather than a civil sanction such as a Variable Monetary Penalties.

- We consider deductions, the costs incurred by the offender that can be taken into account to reduce the penalty.

- We calculate the Variable Monetary Penalty for the Notice of Intent we shall serve on the offender. We include the final amount payable, after any written representations have been made, in the Final Notice.

We provide more detail on each of the components in section 2.

2. Calculating and estimating the components

2.1 Estimating financial benefit:

Variable Monetary Penalties aim to remove any direct financial benefit from an offence including:

- avoided costs;
- operating savings; and (where applicable)
- any gain made as a direct result of the offence.

Financial benefit will not always be an identifiable feature of a case. For example, in some water pollution cases there may be strict liability for the case but very little obvious gain. However even in these cases there may be some avoidance, for example alarms not installed and maintained, inadequate bunding or security measures not installed. These failures will be investigated and any costs avoided will be considered as financial benefit.

The boxes below outline how we may identify financial benefit.

Avoided costs:

- While what may constitute financial benefit cannot be specified for all cases, it would include all avoided costs where these can be identified and estimated.

- These costs, which may include fees, registrations, taxes (for example landfill, unless they are being recovered by the relevant authority), will be assessed and estimated and if disputed or otherwise necessary, we will seek evidence of them from the offender.

Operating savings:

- We will assess and estimate operating costs such as administration, staff, consultants and set-up costs and if disputed or otherwise necessary, we will seek evidence of them from the offender.

- We will base any relevant set-up costs on either current set-up costs or costs at the time of the offending, whichever is the highest.

- This prevents any advantage from deferring operational costs until such time as technologies and operational practices are cheaper, or obtaining an advantage from interest on non-expended sums or tax differentials.

Other financial gains:

- We can assess other aspects of the financial benefit where these are obvious or they can be readily calculated or estimated, and where their removal addresses any competitive advantage that offenders have gained as a direct result of the offending.

- This may include the return on money not invested in plant, equipment or training, or profit accrued as a result of the non-compliance.

- This may be the case where, for example, the operation is intrinsically and wholly linked to the offence, such as operating a waste management facility without obtaining a permit, and where the business could not have been set up and continued other than by offending.

- Wherever possible we will base the calculation of financial gain on evidence.

- Offenders can be required by powers under Schedule 2 1(6) Environmental Civil Sanctions Order 2010 and Schedule 2 1(5) Environmental Civil Sanctions (Wales) Order 2010 to provide the information necessary to determine a proportionate VMP, including financial information.

- If they fail to comply with this requirement, we will estimate the financial benefit based on the evidence we have, or based on similar cases or industry practices.

- Offenders also have a chance to make representations at the Notice of Intent stage.

2.2 Choosing the starting point for the Deterrent component

The choice will depend on the characteristics of the offence. Reference should be made in each case to the Enforcement and Sanctions Guidance.

To reflect the seriousness of the offence, the starting point for determining the deterrent component will be that which is the most significant in terms of characterising the offence. This is likely to be the starting point with the highest value.

Each case is decided on its individual merits, allowing for discretion to be applied in cases such as those where, despite severe environmental damage, only limited restoration can practicably be undertaken (hence low cost), or where a large number of relatively minor or technical offences could give rise to a disproportionate penalty should the statutory maximum be used.

We acknowledge that no two cases are the same and that they will often contain several elements. We cannot therefore prescribe the exact circumstances where each starting point will be used or for which offence a starting point will be used. However the characterisation of the offending, and hence choice of starting point, can be broadly determined as follows.

2.3 Cases that are characterised by financial benefit

This will include cases where offending behaviour generates significant financial benefit in comparison to the restoration costs if present (where this is required by notice) or the available statutory maxima. Whilst it is ultimately our estimate it should, where possible, be determined with evidence directly from the offender or from industry associations and professional bodies to give a degree of certainty.

Example: A failure to register under the Producer Responsibility (Packaging) Regulations will typically involve three offences for each year where the registration is not made. One of these offences will be the failure to purchase Packaging Recovery Notes to, for example, the value of £10,000. The statutory maximum for the offence is £5,000. In this example the offence is characterised as one of financial benefit, and the financial benefit is also the starting point of highest value. Financial benefit will therefore form the basis for the calculation of the deterrent component for this specific offence.

Note: Restoration costs will typically not apply to cases of this nature.

2.4 Cases characterised by restoration costs

This will be the starting point for calculating the deterrent component where there is environmental damage resulting in costs from the issue of a Restoration Notice[1] that are significant when compared to any financial benefit from the offence or the available statutory maxima.

[1] A restoration notice here includes a RES Act Restoration Notice, Anti Pollution Works Notices under s161A Water Resources Act 1991 or an s59 EPA 1990 Waste removal notice.

Restoration costs

- Use of restoration costs as a starting point only extends to those associated with restoring the position to that which it would have been if the offence had not been committed. It does not include restoring or repairing infrastructure. Costs incurred by us in restoring the environment[2] are excluded from the penalty calculation.

- We do not include costs incurred by the offender voluntarily as this would act as a disincentive for voluntary restoration and restitution to adversely affected third parties. They may however be taken into account in the deductions component.

- The restoration costs associated with the notice must be determined with some certainty, either because they have already been carried out (where specified in a Notice), or where they are the result of the specification in a Notice and costed (and these costs are accepted) by the offender.

- We do not take historic contamination into account. We will only take account of costs that we can demonstrate arose from the commission of the offence.

- In the first place we will rely on the costs assessed for the restoration notice.

- If no costs have been assessed for the restoration notice, we will base the level of assessment we carry out on whether the outcome of the assessment is likely to have a significant impact on the level of the penalty.

- Calculating restoration costs will not always be straightforward as it can require the use of economic valuation methodologies. Undertaking individual valuation studies for every case will not be practical. The general approach we will follow is to use a progressive assessment methodology that moves from qualitative to quantitative to monetary assessment as necessary.

- Where a particular type of impact may be significant enough to affect the level of the penalty, it should first be described in quantitative terms and then, if possible, in monetary terms. Government guidance on valuation will be used for the quantification.

Example: A long-running chronic oil pollution affecting several kilometres of a local stream is finally traced to a company where an unbunded industrial oil storage facility is found to be the cause. The financial benefit is estimated to be the cost of building a bund around and is a few hundred pounds, but in preparing the service of a restoration notice we estimate the restoration costs

[2] Costs incurred by Natural Resources Wales for restoration can only be recovered via specific statutory costs recovery notice (e.g. s161 Water Resources Act 1991) where a relevant power exists, and do not form part of the penalty calculation.

to be £75,000. This case is therefore clearly characterised by the cost of restoration rather than the financial benefit. The maximum criminal fine assessed is less than the assessed restoration costs and so we do not use it in this case. Hence we use the restoration costs as the starting point for calculating the deterrent. We then apply aggravating and mitigating factors and deduct the offender's relevant assessed costs.

2.5 Cases where the maximum criminal fine a magistrates court could impose for the specific offence is used

This will be the starting point for calculating the deterrent component where the financial benefit and/or restoration costs are either not present, cannot be ascertained with any certainty or are not a significant feature of the case (i.e. where they are less than the statutory maximum available).

This will be the maximum penalty that can be applied in a magistrates' court for the offence committed. We must be satisfied that we have the evidence to prove each individual offence beyond reasonable doubt, and care will be taken to distinguish between a single continuing offence (such as failure to have a permit) and periodic repeated failures (such as failure to provide annual returns).

Example: Due to a failure to register, a series of summary offences (penalty £5,000 each) are committed over six years. The offences, however, have very little financial benefit to the offender and no direct environmental impact, hence no restoration costs. The offending behaviour is best characterised by the length and number of offences, therefore the starting point for the deterrent component of each VMP (as each offence would have an individual VMP, should more than one be applied) will be the maximum criminal fine. We will then apply aggravating and mitigating factors and deduct the offender's relevant assessed costs.

3. Aggravating and mitigating factors

After the starting point is chosen, it will then be adjusted to reflect the individual circumstances of the case as broken down into aggravating and mitigating features.

Aggravating features will be assessed and scored, and their scores added to make a multiplying factor. This will be multiplied by the starting point to make the aggravated penalty. This multiplier cannot exceed a maximum of four times the starting point.

Similarly, mitigating features will reduce the deterrent component. Mitigating features will be assessed and scored as percentages, which will then be added to give a total percentage reduction in the aggravated penalty. Application of mitigating features will normally allow up to an 80% reduction of

the deterrent element, but the regime can allow for 100% reduction in exceptional circumstances.

The aggravating and mitigating factors are calculated as follows: **Total aggravating factor** = Sum of assessed individual aggravating factors (with a maximum total of 4) **Total mitigating factor** = Sum of assessed individual mitigating factors (Percentage of starting point) **Total mitigation** = £ (Starting point x Total aggravating factor) x Total mitigating factor

3.1 Aggravating factors

The following factors will be scored using scales described under each factor. These scores will be added. There will be a maximum score of 4. A '0' denotes that the factor is entirely absent. Normally more than one factor must be present before the maximum overall multiplier can be applied.

3.2 Blameworthiness

Blameworthiness or culpability will be assessed on a sliding scale to ensure that there is fairness to the offender and differentiation between offences. The score for this factor is selected from the following whole numbers scale to best fit the case.

Multiplier to be applied	Explanation
x 3	Deliberate offence. However it is anticipated that prosecution will be the normal outcome for deliberate acts.
x 2	Reckless offence. For acts that are committed intentionally without regard for the consequences and or the environmental harm that results.
x 1	Negligent offence. For offences committed where the offender was in a position to stop or prevent the offence but failed to recognise the danger or have the correct procedures in place.
x 0.1	Low/no culpability. For offences that occur as a result of a genuine accident rather than the absence of prudent preventative measures, or where adequate preventative measures and procedures were in place but were overcome by exceptional events.

3.3 History

Previous offences will be relevant to the current offence. These may relate to the specific site (for example a permit breach where there have been previous similar breaches at that site) or they may relate to the offender in which case they may indicate management or corporate failures.

The score for this factor is selected from the following whole numbers scale to best fit the case.

Multiplier to be applied	Explanation
x 3	Previous conviction, Stop notice or Suspension notice for offences occurring within the last three years. However it is anticipated that prosecution will be the normal outcome where this is the case.
x 2	Previous formal caution, Variable Monetary Penalty or issue of any other notice (other than Stop or Suspension notices) for offences occurring within the last two years. This encompasses earlier admissions to previous offences, long-running offending behaviour and non-RES Act notices.
x 1	Previous written warnings or Fixed Monetary Penalties, warning letter or five or more site warnings for offences occurring within the last two years.
x 0	No previous offences. Factor absent.

3.4 Attitude

This factor accounts for the offender's attitude to and actions following the offence. It includes lack of prompt action to eliminate or reduce the risk of damage resulting from regulatory non-compliance and lack of cooperation with us in investigating the offence, assessing the damage or assessing a proportionate Variable Monetary Penalty.

The score for this factor is selected from the following whole numbers scale to best fit the case.

Multiplier to be applied	Explanation

x 3	Despite knowledge, no action was taken to stop the offending or stop significant/serious environmental damage, refusal to cooperate with the investigation, assessment or remediation. These types of factors would normally warrant prosecution but we will allow an element of flexibility, for example for dealing with companies where it is difficult to assess corporate knowledge.
x 1.5	Partial, insufficient or incomplete action was taken to stop the offence and prevent harm from occurring or continuing and/or there was some co-operation but this was not full and voluntary. For example where prompt action would have prevented the offending continuing or damage from occurring or persisting. Where information had to be required or compelled rather than offered, assistance or cooperation with remediation was delayed or only partial.
x 0	Prompt action which immediately stops the offending, full and frank cooperation with the investigation and remediation. Factor absent, for example when immediate remedial measures, training, process or policy changes are undertaken, or there is complete cooperation with the investigation and/or remedial activity.

3.5 Foreseeability and risk of environmental harm

This factor considers whether the offending or any resulting environmental harm could have been foreseen by the offender and how effectively the environmental risks and their consequences were being managed. Where the risk of harm or the actual impact can be accurately assessed, we will base our assessments on our systems including the Common Incident Classification Scheme (CICS)/Compliance Classification Scheme (CCS). Note that CCS scores must be final ones reflecting the potential/actual impact, not initial assessments.

This factor therefore takes into account any actual impacts arising from the offence. The score is selected from the following whole numbers scale to best fit the case.

Multiplier to be applied	Explanation
x 4	Where the offence was obvious and bound to occur without action or where there was a confirmed Category 1 CCS/CICS breach or incident. Incidents and breaches of this nature would normally warrant prosecution, but we will allow an element of flexibility for exceptional cases.

x 3	Where the offence, while not obvious, was bound to occur without the required or reasonable measures put in place or where there was a confirmed Category 2 CCS/CICS breach or incident confirmed score.
x 2	Where the offence occurs and results in a Category 3 CCS/CICS confirmed score.
x 1	Category 4 CCS/CICS confirmed score. This will include those cases where there is no environmental impact but where the offence was a foreseeable consequence of inaction.
x 0	Where the offending was unforeseeable. Factor absent. This will include cases which have arisen as a result of third party intervention that could not have been reasonably foreseen, for example isolated vandalism or the actions of a disgruntled employee.

3.6 Ignoring previous advice and guidance

This factor will be applied where advice and/or guidance have previously been given to an offender, or where specific codes of practice apply to the sector (for example Code of Good Agricultural Practice, Best Available Technology). The score is selected from the following whole numbers scale to best fit the case.

Multiplier to be applied	Explanation
x 2	Where advice for avoiding or mitigating the offence has been given to the offender and not followed. This will include breaches of a permit condition where a Notice has been served requiring provisions that would have directly impacted or prevented the offence or its consequences, and failure to follow direct advice, for example pollution prevention following a site assessment.
x 1	Where codes of practice or standard technologies exist relating to the activity from which the offence arose but were not (or only partly) followed or implemented. This will include failure to install industry-standard equipment which would prevent the offence occurring or the impact of the offence, or use of inferior equipment or outdated equipment.
x 0	Where codes of practice documents or standard technologies exist which were followed. This will include cases where this was implemented or where advice and guidance were followed but failed to prevent the offence from occurring.

3.7 Calculating the multiplier

Where a single factor of the highest value (4) is present, this will represent the maximum aggravating factor and no others need to be considered.

Where several factors are present we will add them up, but they are capped at a maximum of four times the starting sum.

The deterrent component is multiplied by the aggravating multiplier before mitigating factors and deductions are considered.

4. Mitigating factors

The deterrent component is then reduced to take into account any mitigating factors.

Where present, each applicable mitigating factor is scored and awarded a percentage reduction. These are fixed percentage numbers for most of the mitigating factors, except factors 4.6 'Personal circumstances' and 4.7 'Case-specific features', which are whole number percentages within a maximum range.

Where a factor is not present or there is insufficient evidence, the score will be 0%.

These percentage scores are then added together and applied to the deterrent component (after the application of the aggravating factors). The normal maximum deduction that can be applied will be 80%. In cases where there are exceptional or unique case factors the deduction can be increased to 100% of the deterrent component.

4.1 Preventative measures: 10%

Deduction	Explanation
10%	Voluntary effective preventative measures that were put in place prior to the offence occurring. This will take into account, for example, infrastructure, management systems and training that was not required as part of a permit or industry standard.

4.2 Cooperation with Natural Resources Wales: maximum 10%

The following percentages can be added together to produce a maximum of 10% where both are present.

Deduction	Explanation
5%	Voluntary and full cooperation in investigation and assessment of a proportionate VMP: deduction. This will apply to actions taken following the discovery of an offence, such as investigating the circumstances that led to it, attending interviews and providing records.
5%	Voluntary and prompt cooperation in remediation: deduction. This will apply where environmental impact has arisen from the offence.

4.3 Self reporting: 20%

Deduction	Explanation
20%	Immediate and voluntary reporting of regulatory non-compliance. This will apply where the offence is unknown to us and is reported promptly by the offender.

4.4 Immediate and voluntary remediation and restoration: maximum 20%

The following accounts for voluntary works only. Works required by the relevant notice are deductible from the final overall figure (see deductions below).

Deduction	Explanation
20%	Complete remediation and restoration undertaken without requirement. This will apply where works are undertaken voluntarily without formal requirement and they restore the environment as far as possible to that which existed prior to the offence.
10%	Partial remediation and restoration undertaken without requirement. This will apply where works are undertaken which partially restore the position, but where additional works could be done but have not been done, for example because the offender considers the cost of doing so will only achieve minimal benefit.

4.5 Attitude to the offence: maximum of 10%

Deduction	Explanation
10%	Prompt action taken to stop the offence and prevent a recurrence. The maximum will apply where both factors are present, for example prompt remedial action, management instructions, procedures, infrastructure and/or training which will effectively prevent the recurrence.
5%	Prompt action to stop the offence. Where prompt action is taken to stop the offence but where further action to prevent a recurrence is either not taken or not a factor of the offence.

4.6 Personal circumstances: 10%

Deduction	Explanation
0%-10% (Whole percentages only)	Where the personal circumstances of the offender mitigate the cause of the offence or its effects. This will apply where the age, physical or mental capability of the offender affects their ability to physically react or deal with the offence promptly or to mitigate its effects, or where it may have had some bearing on the circumstances of the offence being committed. While it will be presumed not to apply in a case, where evidence is forthcoming a discretionary deduction can be made depending on the personal circumstances and how closely related their impact was to the offence.

4.7 Case-specific factors: 20%

Deduction	Explanation
0%-20% (Whole percentages only)	Other case-specific mitigating features: this will only apply in rare cases where there are unusual or unique case factors and can be applied on a discretionary basis from 1-20%. It allows us to account for factors which are unanticipated but which would tend to mitigate the cause of the offence or its effects.

5. Overall penalty figure

The overall penalty is the sum of the financial benefit plus the deterrent component after the application of the aggravating and mitigating features. It may then be subject to further adjustment by way of relevant deductions.

6. Deductions

Finally, the overall penalty can be reduced by such costs incurred by the offender as are solely related to the offence. These costs will be based on evidence supplied by the offender where necessary. Where evidence is not voluntarily forthcoming, this attitude to the offence will be reflected as an aggravating feature and in the loss of any relevant mitigating allowance.

These costs include:

- the costs of complying with a Compliance notice;
- the costs to the offender of any restoration undertaken as a result of the serving of a Restoration notice;
- any costs recovered by us from the offender using an Enforcement Cost Recovery notice;
- a discretionary deduction to account for (and encourage) voluntary restoration and repayment;
- payments to compensate those affected as part of a Third Party Undertaking (TPU).

6.1 The costs of complying with a Compliance notice

Where a Compliance notice is served in relation to a specific offence, the costs of actions taken to comply with it will be deducted, where evidence is provided by the offender. The costs could include the costs of capital investment, contracted services and additional staff time required above and beyond that which would have been applied under normal circumstances.

6.2 The costs of complying with a Restoration notice

Where a RES Act Restoration notice or other legislative specific Restoration notice (for example Anti Pollution Works notice) has been served in relation to a specific offence, the cost of actions to comply with a Restoration notice, either evidenced by the offender or estimated by us, will be deducted. The costs could include the costs of actual restoration works, administrative costs and the costs of monitoring. Where this includes future works to be undertaken, the costs will be assessed and agreed by us before they are deducted; where this is uncertain we will make a fixed estimate.

6.3 The costs recovered through an Enforcement Cost Recovery Notice

Where a RES Act Enforcement Cost Recovery notice (ECRN) is served, the total, where paid, will be deducted from the overall Variable Monetary Penalty prior to issue of the VMP. The ECRN may include our legal, expert, or administrative costs incurred up to the point at which the Variable Monetary Penalty is imposed.

6.4 An amount to reflect a voluntary Third Party Undertaking

We will deduct an amount to reflect the amount expended by the offender in recompensing third parties affected by the offence. This will be accounted for at a rate of £1 deduction for every £1 spent. Only that aspect of the Third Party Undertaking that is directly related to restitution for the specific offence will be taken into account, and the undertaking must be to an unconnected third party (that is, not subsidiaries or relations).

6.5 An amount to reflect any other costs resulting from the offence that the regulator considers are justified

This allows, for example, for a deduction for voluntary works undertaken. It is at our discretion and must be based on evidence from the offender that the costs were incurred, related directly to the offence and were necessary or of environmental (including preventative work at the offending premises) or public benefit.

Annex 2: Enforcement Undertakings

1. Criteria for accepting and rejecting Enforcement Undertaking offers

1.1 General Considerations

Generally we will only consider accepting an Enforcement Undertaking (EU) offer when:

- we believe that a breach of relevant legislation has occurred; and
- we consider the Enforcement Undertaking to be an appropriate regulatory outcome having regard to the significance of the issues concerned to the environment and the community.

Where the relevant offence to which your offer relates, involves pollution of the environment or harm to human health, we would expect and look more favourably upon your offer, if you can demonstrate that any necessary remediation or restoration work commenced at the earliest opportunity.

1.2 We will not normally accept an offer:

- for a Category 1 offence, or where we have commenced legal proceedings;
- in cases involving intent or of the most severe environmental impact, (but we do not rule it out, as discretion will always apply);
- where we have already determined that a prosecution is appropriate in the public interest;
- which is made after representations (negotiations) over the amount of a Variable Monetary Penalty following a Notice of Intent (this is to prevent attempts to negotiate an assessed Variable Monetary Penalty down and then to have it replaced at the last minute by an Enforcement Undertaking).

1.3 Factors we will consider when deciding whether an Enforcement Undertaking is an appropriate regulatory outcome include:

- whether we feel the person is likely to comply with it in the light of their compliance history;
- the nature of the offence and the regulatory impact of the undertaking compared to that of other forms of enforcement remedy;
- the prospects of securing a timely and satisfactory environmental outcome where this is in the public interest.

1.4 We will seek to ensure that Enforcement Undertakings and their development, implementation and monitoring are cost neutral to Natural Resources Wales.

We would welcome and look more favourably upon an Enforcement Undertaking offer containing actions that the person will contribute towards the costs we have necessarily incurred up to the time we may accept this offer and for any subsequent compliance monitoring and discharge activities.

Please note that in all cases where the offence legislation allows, we will pursue cost recovery in accordance with the 'Polluter Pays' Principle.

1.5 We will not accept an Enforcement Undertaking offer if it contains:

- a clause denying liability;
- any clause that sets up defences for possible non-compliance with an Enforcement Undertaking.

1.6 Additional considerations

We will only accept an Enforcement Undertaking offer when the person makes a positive commitment to:

- stop the particular conduct or alleged breach that concerns Natural Resources Wales; and
- not recommence that conduct.

An Enforcement Undertaking offer must also set out how the person will:

- address the conduct Natural Resources Wales is concerned about;
- prevent that conduct occurring again; and
- rectify the consequences of the conduct, including interacting with any third party affected by the offence.

2.0 Examples of what could be included in an Enforcement Undertaking offer

2.1 Your Enforcement Undertaking offer should contain actions to:

- secure that the offence does not continue or recur;
- restore the position to what it would have been if the offence had not been committed;
- benefit any person affected by the offence (including the payment of a sum of money); or
- secure equivalent benefit or improvement to the environment, where restoration of the harm arising from the offence is not possible.

Your offer must include at least one of the above or it will be rejected.

2.2 Examples of actions which may form part of your offer includes:
training of staff;

- undertaking works to prevent a recurrence (including undertaking pollution studies and pollution reduction programs); and
- implementing a program to improve your overall compliance with the legislation.

We would wish to see the following elements included in an internal compliance program:

- details of the monitoring and reporting mechanisms the person will adopt;
- demonstrable Board and senior management commitment to, and involvement with, the entire program;
- the assignment of responsibility for the compliance program to a named senior manager of the person;
- the development and dissemination throughout the organisation of a clear compliance policy;
- the identification of compliance issues and operating procedures for compliance;
- the development and delivery of a compliance training program to key personnel groups within the organisation;
- the establishment of permanent procedural checking and monitoring mechanisms, such as nominating a compliance officer and procedures to prevent future breaches and to ensure that any potential breaches are not only averted but also reported to senior management;
- the commitment to an independent audit of the compliance program at regular intervals (usually annually), for a specified period (usually 3 years);
- a requirement to report to us at a specified time on the steps taken to implement the compliance program.

2.3 The Enforcement Undertaking may also include:

- the name of a senior manager who is responsible for monitoring and complying with the undertaking; and
- the name of a Natural Resources Wales officer to whom the contact officer must report.

Generally, the person giving the undertaking will be responsible for:

- monitoring how the undertaking is implemented; and
- reporting this to Natural Resources Wales in the specified manner.

The way the person giving the undertaking proposes to do this must be set out in the Enforcement Undertaking offer and we must be satisfied that this is adequate. In resolving any matter we want to find ways to redress the offence.

3.0 Acceptance of your offer

Once your offer has been accepted, it becomes a legally binding written agreement between you and Natural Resources Wales. As such, we can enforce against the actions you have offered.

4.0 Varying or extending an Enforcement Undertaking

An Enforcement Undertaking may be varied, or the period within which the action(s) must be completed may be extended, if both parties agree in writing. Applications should be made in writing to either of the addresses shown in Part 5 of the 'Enforcement Undertaking Offer form'.

We will only consider an application by you to vary or extend your EU, if we receive it before the original completion date(s) and you can demonstrate you have taken reasonable steps to comply.

Applications received after the relevant completion date(s) will normally be refused.

5.0 Discharging an Enforcement Undertaking

5.1 Once you believe you have fully complied with the Enforcement Undertaking, you can apply for a Completion Certificate at any time. Applications should be made in writing to either of the addresses shown in Part 5 of the 'Enforcement Undertaking Offer form'.

You must include sufficient information with your application to help us determine whether or not the undertaking has been fully complied with and whether or not we can issue a completion certificate. This may include documentary evidence, such as receipts or technical reports on works completed.

We will also require evidence demonstrating that all affected third parties have received any monies owing to them as part of your offer.

If you fail to provide such information, we can require it from you under written notice and may decide not to issue a certificate.

We will allow those with accepted Enforcement Undertakings to present to us on agreed terms, where necessary. We are also considering the approach of other regulators in presenting improvements.

5.2 In some cases, we may also consider it appropriate to issue a completion certificate without the need for us to visit the site, where we have received an application in writing containing sufficient information for us to assess compliance along with a signed declaration from a senior person (e.g. Owner, Director, Board Member etc) in the organisation confirming that all actions contained in the Enforcement Undertaking have been fully complied with. For example, where we have received an electronic copy of an Environmental Monitoring Plan.

5.3 Once we have assessed your application, we will make a decision whether or not to issue a Completion Certificate and give you written notice within 14 calendar days of our receipt of your application, by either:

- issuing you with a Completion Certificate; or
- serving a Refusal Notice on you, outlining the reasons for our decision not to issue a certificate.

5.4 We may also revoke a completion certificate, if we believe it was granted on the basis of inaccurate, incomplete or misleading information. You will then be regarded as not having complied with the Enforcement Undertaking.

6.0 Enforcement and sanctioning response

Failing to comply (either fully or in part) with an Enforcement Undertaking is likely to result in one of the following responses:

- serving a Variable Monetary Penalty, Compliance notice or Restoration notice on you; or
- prosecuting you for the original offence.

7.0 Enforcement Undertakings and Third Party Undertakings

As seen above, the Enforcement Undertaking can be used in a range of situations. The Third Party Undertaking (TPU), however, is more limited in its application and has a much narrower scope. The TPU can only be offered in a situation where an offender has already received a Notice of Intent to serve one of the following; a Variable Monetary Penalty, a Compliance notice or a Restoration notice. They can only be used to make an offer to compensate someone who has been affected by the offence.

Annex 3: Grounds of Appeal for RES Act sanctions

Introduction	The grounds of appeal for the individual RES Act sanctions are listed below.
Fixed Monetary Penalties (FMPs)	▪ That the decision was based on an error of fact; ▪ That the decision was wrong in law; ▪ That the decision was unreasonable; ▪ Any other reason.
Variable Monetary Penalties	▪ That the decision was based on an error of fact; ▪ That the decision was wrong in law; ▪ That the amount of the penalty is unreasonable; ▪ In the case of a non-monetary requirement, that the nature of the requirement is unreasonable; ▪ That the decision was unreasonable for any other reason; ▪ Any other reason.
Compliance and restoration notices	▪ That the decision was based on an error of fact; ▪ That the decision was wrong in law; ▪ In the case of a non-monetary requirement, that the nature of the requirement is unreasonable; ▪ That the decision was unreasonable for any other reason; ▪ Any other reason.
Non-compliance penalties	▪ That the decision to serve the notice was based on an error of fact; ▪ That the decision was wrong in law; ▪ That the decision was unfair or unreasonable for any reason; ▪ That the amount of the penalty was unreasonable; ▪ Any other reason.
Enforcement Cost recovery notices	▪ Against our decision to impose the requirement to pay costs; ▪ Against our decision as to the amount of those costs; ▪ Any other reason.
Enforcement Undertaking completion certificate	▪ That the decision to not to issue a certificate was based on an error of fact; ▪ That the decision was wrong in law; ▪ That the decision was unfair or unreasonable; ▪ That the decision was wrong for any other reason.

Stop notices	▪ That the decision was based on an error of fact; ▪ That the decision was wrong in law; ▪ That the decision was unreasonable; ▪ That any step specified in the notice is unreasonable; ▪ That the person has not committed the offence and would not have committed it had the stop notice not been served; ▪ That the person would not, by reason of any defence, have been liable to have been convicted of the offence had the Stop Notice not been served; ▪ Any other reason.
Stop notice completion certificate	▪ That the decision to not to issue a completion certificate was based on an error of fact; ▪ That the decision was wrong in law; ▪ That the decision was unfair or unreasonable; ▪ That the decision was wrong for any other reason.
Compensation	A person may appeal against a decision not to award compensation or the amount of compensation: ▪ On the grounds that our decision was unreasonable; ▪ On the grounds that the amount offered was based on incorrect facts; ▪ For any other reason.