NRW Ag White Paper development – Future uses of Civil Sanctions

Sustainable Farming Scheme information request		DATE:	21/07/20
SFS Action No.	SFS-Act-084		
Requests from Welsh Government	Civil sanctions (CS) are a series of enforcement measures provided by the Environmental Civil Sanctions (Wales) Order 2010 (www.legislation.gov.uk/wsi/2010/1821/article/6/made). The Order outlines a range of civil sanctions: fixed monetary penalties (fines); variable monetary penalties; compliance notices; remediation notices; stop notices and enforcement undertakings. Together, these sanctions are intended to be more outcome-focussed: providing more options for a proportionate response to an offence and also being more efficient to administer. The 2010 Order lays out the primary legislation against which specific civil sanctions may be used (Schedule 5), in Wales this is a more limited range of legislation than the equivalent order in England. Since 2010, legacy bodies and NRW have employed civil sanctions in a range of situations as part of our enforcement approach. **WG are interested in our views on how civil sanctions could be used in the future to support a clear regulatory baseline,** in a manner that is consistent with a proportionate approach to enforcement. Specifically, WG would like to know: 1. Examples, evidence or narrative on how access to a full menu of civil sanctions could be used (either now, or in the future), to help deliver SMNR in line with NRW's regulatory principles (from an outcome perspective, from a regulatory cost perspective, from a practical perspective, from a stakeholder perspective). 2. Strengths and weaknesses (from an outcome perspective, from a regulatory cost perspective, from a practical perspective, from a stakeholder perspective) of using civil sanctions against existing/expanded range of Cross-Compliance regulations. 3. Consideration of how the burden of proof relates to the existing use of civil sanctions and how this might be better aligned in the future		

NRW response	**Overview: Regulatory Futures Team**: In Wales the Environmental Civil Sanctions (Wales) Order 2010 and The Environmental Civil Sanctions (Miscellaneous Amendments) (Wales) Regulations 2010 came into force on 15 July 2010. The Order permits Natural Resources Wales as a regulator to impose civil sanctions in relation to offences specified in Schedule 5 of the Order. It sets out the procedure relating to the sanctions such as the provisions for non-compliance, administration costs, appeals and a requirement to provide guidance. The Regulations amend a number of other Statutory Instruments which permits the regulator to impose specified civil sanctions in relation to breaches of those regulations. Civil sanctions are not meant as a substitute for the criminal law but are intended to provide a more proportionate, more effective approach for operators who are generally compliant, with criminal prosecution remaining available for the most serious offences. Although civil sanctions in the Order have transferred to Natural Resources Wales, civil sanctions are not currently available for legislation formally administered by the Countryside Council for Wales or Forestry Commission Wales. Civil Sanctions are only available for certain sections of the following legislation; • Salmon and Freshwater Fisheries Act 1975 • Salmon Act 1986 • Environmental Protection Act 1990 • Water Resources Act 1991 • Water Industry Act 1991 • Land Drainage Act 1991 • Environment Act 1995 • Water Act 2003 • Sludge (Use in Agriculture) Regulations 1989 • Environmental Protection (Disposal of Polychlorinated Biphenyls and other Dangerous Substances) (England and Wales) Regulations 2000 • Hazardous Waste (Wales) Regulations 2005 • Producer Responsibility Obligations (Packaging Waste) Regulations 2007 However, in England Civil Sanctions are available for all offences under the Environmental Permitting Regulations (EPR) 2010 and 2016 and are far more widely used. This puts NRW at a disadvantage in determining our enforcement responses, and also means that operators who deal with both the EA and NRW are not being dealt with in a legally equivalent or fair manner. In 2019 the EA accepted 31 Enforcement undertakings, NRW were only able to accept three, in part due to the reduced number of offences available to NRW. In that same year 2019 NRW prosecuted 30 charges under the EPR regulations, and it is possible that a number of these prosecutions could have been dealt with by the way of a civil sanction, namely an enforcement undertaking. If we make an assumption that 10 of those charges may have been suitable for an enforcement undertaking, the cost saving to NRW would be in excess of

	£100k, as well as the benefits lost to the environment in the remediation or restorative work that would have been funded by the offender as part of the enforcement undertaking agreement. There would also be a cost saving to the judicial system in magistrates and crown court time. One of the enforcement sanctions that NRW have available to them is the ability to offer a formal caution to an offender. 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. In 2019 NRW issued 53 formal cautions, at a cost of between £300k and £500k of officer time. Once a formal caution has been signed by the offender, the conviction is immediately spent. NRW does not have the ability to recharge its officers or legal services costs when we have served a formal caution. If NRW's access to civil sanctions was extended to include all EPR offences (the same as the EA), then we would have the potential to minimise our use of formal cautions and instead have the ability to use enforcement undertakings or any of the other civil penalties available to instead. This would provide NRW with potential officer cost savings by a reduction of prosecution charges and formal cautions of between £300k and £600k a year, at a time when our GIA is under pressure, as well as the cost savings to the courts. Similarly, if EUs were available there would have been considerable concurrent benefits to the environment in the remediation or restorative work. Joined up availability and use of Civil sanctions go part of the way to support NRW to be a more efficient (costs) and effective (outcomes) regulator and would allow NRW to regulate business in a less burdensome manner whilst supporting the green recovery. **Specific policy area: Geoscience, Groundwater perspective:** Currently very few prosecutions for illegal groundwater activities. Enforcing groundwater incidents can be difficult due to the lack of regulatory flexibility in enforcement options at the moment. Current options for enforcing groundwater incidents are limited to warning, formal caution or prosecution. Implementing a wider range of enforcement options such as use of civil sanctions for EPR 2016 offences would be beneficial, more proportionate and flexible for the more common and generally smaller scale pollution incidents we see frequently (e.g. leaking oil tanks, inappropriate land spreading) which might not directly cause pollution. Prosecution via the courts could be considered excessive and resource intensive for these offences. Being able to fine or seek enforcement undertakings for such offences would likely see more action taken for these types of incident. It would also be of benefit to other activities in EPR such as water discharges, waste offences etc. In addition, the burden of proof is not high for groundwater activities (definition in Schedule 22 of EPR 2016 is very broad and can be demonstrated / evidenced by theory), it would be fairly straight forward to 'pin' enforcement upon groundwater to gain wide environmental benefits. This is applicable to NRW's existing enforcement options. This would allow NRW to deal with pollution in a wider variety of

	Wales which is proportional to the scale of the incident and the damage it causes to the environment. **1. Examples, evidence or narrative on how access to a full menu of civil sanctions could be used (either now, or in the future), to help deliver SMNR in line with NRW's regulatory principles (from an outcome perspective, from a regulatory cost perspective, from a practical perspective, from a stakeholder perspective).** **Legal perspective:** From a practical point of view the advantage of civil sanctions and in particular Enforcement Undertakings (EU) is in relation to where the monies obtained via any donation as part of the EU can be used. If an offender is taken before the Courts, the penalty is normally a financial one in relation to our types of offences. These monies, unless NRW has the evidence to request compensation such as for a Local Authority in clearing up fly tipped waste, once received from the offender will be sent to the Treasury. Therefore although the offence and the impact of that offence may have been felt in a community in West Wales for example the fine will be put into a pot in Westminster which is used to administer the Courts and Justice system in England and Wales. The advantage of EUs are that the offender is encouraged to identify a charitable project near to the area where the offence was committed or a charitable organisation that will benefit the catchment affected. For example if a slurry pollution occurred on a watercourse in South East Wales and the South East Rivers Trust were undertaking a project of replanting along the watercourse and/ or going into communities to promote using the environment around them then this both improves the affected catchment also educates the future generation and supports our SMNR principles. **Regulatory Approaches Team**: A full suite of Civil sanctions would be beneficial to form part of the regulatory toolkit, potentially providing a more time efficient and flexible approach. This suite should consider Environmental Permitting Regulations (as is the case in England) and other legislation that would be relevant to land management, such as under the Forestry Act (and other Forestry powers) and the aspects of the Wildlife and Countryside Act that are relevant to NRW. Civil sanctions could be used as an "immediate " enforcement response to "lesser or minor "regulatory breaches where environmental impact is minimal, to bring about environmental improvement/compliance e.g. slurry spreading in wet and waterlogged conditions. Reduced resources(cost) to regulator (no case file, court costs etc), offender and stakeholders, with potential for the proceeds to be used to fund direct improvements. Civil sanctions such as enforcement undertakings can help make good damage that was caused to the environment. By seeking either to mitigate through restoration and/or remediation to the area that was damaged back to a state before the harm was caused. This helps both the environment and maintains

	resilient ecosystems. In the case of a river, when restoration or remediation is complete users such as abstractors and anglers can once again use the river as well as it being an attractive outdoor feature once again that can be enjoyed by the community helping with both mental and physical wellbeing. Court costs are not incurred by either party and funds go directly to where they can make a difference for people affected and the environment. The offender does not get a criminal record and should allow the business to continue to operate. Fixed and variable monetary penalties will be very useful and as would an ability for on the spot fines. Notices can be particularly useful and, in the future, identifying ways to improve their speed and ease of the use. This would also need to involve improving the internal processes that could allow us fast track use of these sanctions where appropriate **2. Strengths and weaknesses (from an outcome perspective, from a regulatory cost perspective, from a practical perspective, from a stakeholder perspective) of using civil sanctions against existing/expanded range of Cross-Compliance regulations.** **Regulatory Approaches Team**: Overall the strengths of the civil sanction system would be that they can be easier to administer, less onerous for regulator and offender. By having a fuller suite of civil sanctions this may make it easier for both our staff and those being regulated to understand the available sanctions and reduce complexity. Civil Sanctions may also lead to higher Enforcement Undertaking offers than may be been fined by the courts, and there is the potential for these monies to go by the directly back into the environment affected, so more environmental improvement/mitigation (more SMNR). Civil Sanctions may however be perceived by certain stakeholders to be a failure to enforce regulations adequately. Existing cross compliance regulations are very prescriptive and difficult to enforce. The burden of proof is the same as criminal law for the regulator but with no stigma of conviction, the penalties are relatively minor and take a long time to be imposed. Under cross compliance there is no requirement to put right any environmental harm done, which impacts affected stakeholders and the environment. With an enforcement undertaking harm to both the people affected and environment is considered. However, not all civil sanctions are severe enough to effect a behavioural change or even repair harm done e.g. Fixed Penalty Notices. These can be costly to administrate. The right sanction or other regulatory action needs to be available for the right breach. **3. Consideration of how the burden of proof relates to the existing use of civil sanctions and how this might be better aligned in the future** **Legal perspective:** The difficulty that is faced currently with the civil sanctions that NRW are able to utilise is in relation to the burden of proof. In relation to Fixed Monetary Penalties (FMP), Variable Monetary Penalties (VMP), Restoration Notices (RN) and Compliance Notices (CN) are “satisfied beyond reasonable doubt”. This is a very high standard of proof for NRW to achieve. In relation to VMPs where the potential penalty is £250,000 per offence the burden of proof seems appropriate.

	However in relation to FMPs where the penalty for an individual can be as low as £50 (if the penalty is paid within a certain period of time), insignificant when compared against the cost of the resource in investigating the offence and gathering the evidence in accordance with PACE so that the Prosecutor is "satisfied beyond reasonable doubt". Interestingly, in comparison when deciding to bring a prosecution for an offence the prosecuting body must be satisfied that "there is a reasonable prospect of conviction". It is for the Prosecution to prove the Offender's guilt "beyond reasonable doubt". Of further interest is that in the majority of civil sanctions (FMP/VMP/CN & RN) a Notice of Intent is served before a penalty or notice is served. This allows the recipient to provide representations. However before this step can be taken the Prosecutor is required to "be satisfied beyond reasonable doubt" rather than "a reasonable prospect of conviction" as is required in a criminal sanction. As there is this opportunity to make representations it could be argued that a lesser burden could be required at this stage. In relation to a Stop Notice (SN) the Prosecutor needs to "reasonably believe" that there is a "significant risk of harm". The need to prove "significant risk of harm" has proved difficult as there is no definition of "significant" within the legislation. **Regulatory Approaches:** Presently, for our own investigations, we ensure that evidence is secured for our civil sanctions that is beyond all reasonable doubt. This helps to ensure fairness in that we know an offence has been committed, along with by whom by following all lines of enquiry. This is in the interest of fairness for all and should help reduce the likelihood of an appeal against the sanction. This also allows the regulator the option of the criminal route if needed. **Regulatory Innovation**: The burden of proof is an important aspect of perception of fairness. However, the nature of the offence will determine how challenging it is to meet the burden of proof criterion. Present use of civil sanctions is limited to offences mostly defined around environmental harm, where the burden of proof means proving beyond all reasonable doubt that environmental harm has occurred as a result of the defendant's actions. There are many instances where proving harm and its causality is not possible without great investment of time: for example – proving that slurry application in wet weather on steep ground (although perhaps outside the minimum spreading distance to a water course) has caused actual harm to the aquatic environment. By the time our officers are onsite, the river channel may have flushed through and little evidence of harm may be visible on site. There is however a considerable body of evidence that suggest that practices such as slurry spreading in wet weather on slopes are very likely to result in environmental harm – and in such cases such practices would be strong candidates for a general binding rule approach to an uprated cross-compliance system. With the regulatory baseline redefined to clearly prohibit actions that are very likely to cause harm, civil sanctions could work more effectively, as the burden of proof would then be based on proving beyond all reasonable doubt that slurry was spread in heavy rain on a steep slope – a more tractable proposition for our officers. The reduced investment required to prove the offence would make deployment of the lesser civil sanctions (particularly FMPs) a more practical cost/benefit proposition and would enable their wider deployment. Their wider

	use for these activity based offences on or close to the regulatory baseline would provide a powerful signal to land managers that certain prohibited activities can and will be enforced against – and this in itself could help deter further, more serious, offences being committed. This approach would require careful codesign of the future regulatory baseline and framework legislation to enable the appropriate sanctions to be brought against the revised baseline. Tackling either in isolation is unlikely to deliver the best results in terms of cost/benefit.
NRW teams who contributed to this response	[redacted]

How the responses complies with NRW's duty to meeting its well being objectives and goals and SMNR principles

Identify which of NRW's Well-being objectives are being met by this proposal:	Level of contribution to the Well-being Objective		
	Significant	Moderate	Minor
Champion the Welsh environment and the sustainable management of Wales' natural resources	☐	☒	☐
Ensure land and water in Wales is managed sustainably and in an integrated way	☒	☐	☐
Improve the resilience and quality of our ecosystems	☐	☒	☐
Reduce the risk to people and communities from environmental hazards like flooding and pollution	☒	☐	☐
Help people live healthier and more fulfilled lives	☐	☒	☐
Promote successful and responsible business, using natural resources without damaging them	☒	☐	☐
Develop NRW into an excellent organisation, delivering first class customer service	☐	☒	☐

Identify which of the principles of SMNR are being met:	Level of contribution to SMNR principles		
	Significant	Moderate	Minor
Adaptive management - manage adaptively, by planning, monitoring and reviewing action	☐	☒	☐
Scale - consider the appropriate spatial scale for action	☐	☒	☐
Collaboration and engagement - promote and engage in collaboration and co-operation	☐	☐	☒
Public participation - make appropriate arrangements for public participation in decision-making	☐	☐	☒
Evidence - take account of all relevant evidence and gather evidence in respect of uncertainties	☒	☐	☐
Multiple benefits - take account of the benefits and intrinsic value of natural resources and ecosystems	☐	☒	☐

Preventative action - take action to prevent significant damage to ecosystems	☐	☒	☐
Long-term - take account of the short, medium and long term consequences of actions	☐	☒	☐
Building resilience - take account of the resilience of ecosystems, in particular the following aspects: • diversity between and within ecosystems; • the connections between and within ecosystems; • the scale of ecosystems; • the condition of ecosystems (including their structure and functioning); • the adaptability of ecosystems.	☐	☒	☐