

EXPLANATORY MEMORANDUM TO
THE DRAFT ENVIRONMENTAL CIVIL SANCTIONS (WALES) ORDER
2010

AND

THE DRAFT ENVIRONMENTAL CIVIL SANCTIONS (MISCELLANEOUS
AMENDMENTS) (WALES) REGULATIONS 2010

This Explanatory Memorandum has been prepared by the Directorate for Environment and Sustainability and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Environmental Civil Sanctions (Wales) Order 2010 and the Environmental Civil Sanctions (Miscellaneous Amendments) (Wales) Regulations 2010. I am satisfied that the benefits outweigh any costs.

Jane Davidson
Minister for Environment, Sustainability and Housing
15.06.2010

Description

1. The attached draft Environmental Civil Sanctions (Wales) Order 2010 and The draft Environmental Civil Sanctions (Miscellaneous Amendments) (Wales) Regulations 2010 give the Environment Agency in Wales (the regulator) the power to impose civil sanctions for a range of environmental offences.
2. Civil sanctions are sanctions provided in Part 3 of the Regulatory Enforcement and Sanctions Act 2008. Civil sanctions will provide a proportionate alternative to prosecution for business and other persons who significantly fail to comply with environmental regulation despite having a good general approach to compliance.

Matters of special interest to the Constitutional Affairs Committee

3. The draft Order and Regulations are the first to make use of the powers to introduce civil sanctions in Wales enabled by the Regulatory Enforcement and Sanctions Act 2008 (hereafter RES Act).
4. The Order and Regulations should be read together. The Order (Parts 1 – 4, and Schedules 1 – 4) sets out the basis on which civil sanctions may be used. It also sets out in Schedule 5 the offences in primary legislation for which civil sanctions may be imposed, and specifies which civil sanctions are available for each offence. The Regulations set out the same information as Schedule 5 in relation to certain offences in secondary legislation. The civil sanctions introduced in the Regulations must be used on the basis set out in the Order.

Legislative background

5. The Power to make an Order conferring civil sanctioning powers on a regulator in relation to offences contained in primary legislation is conferred by section 36 of the Regulatory Enforcement and Sanctions Act 2008. Section 36(2) provides that this Order making power may be exercised by the Welsh Ministers in relation to a Welsh Ministerial matter.
6. The Regulations conferring civil sanctioning powers in relation to offences contained in subordinate legislation will be made, in relation to Wales, under powers contained in section 2(2) of the European Communities Act 1972, section 93 to 95 of the Environment Act 1995 and section 62 of the RES Act.
7. The power to make Regulations under section 62 of the RES Act conferring powers to impose civil sanctions in relation to offences contained in subordinate legislation is exercisable by a Minister of the Crown or the Welsh Ministers where they have the power to make

provision creating the criminal offence in question, and that power has been or is being exercised so as to create the offence.

8. Section 66 of the Act provides that no provision can be made to confer power on a regulator to impose a civil sanction in relation to an offence, whether by Order or by Regulations, unless the relevant authority (Welsh Ministers) making that provision are satisfied that the regulator will act in accordance with the regulatory principles (transparent, accountable, proportionate and consistent) referred to in section 5(2) in exercising that power.
9. Part 3 of the RES Act enables a range of civil sanctions to be introduced, these include:
 - **Compliance Notice** - requiring specified steps within a stated period to secure that an offence does not continue or happen again;
 - **Restoration Notice** - requiring specified steps within a stated period to restore (so far as possible) any damage caused by an unlawful activity;
 - **Enforcement Undertakings** – which will enable a person (who a regulator reasonably suspects of having committed an offence), to give an undertaking to the regulator to take one or more corrective actions set out in the undertaking;
 - **Fixed Monetary Penalty Notices** - under which a regulator will be able to impose a monetary penalty of a fixed amount;
 - **Variable Monetary Penalty Notices** - of an amount determined by the regulator. A person may give a third party undertaking to compensate persons affected by an offence. The regulator if it accepts the undertaking must take it into account the undertaking in determining the variable monetary penalty; and
 - **Stop Notices** – which will prevent a person from carrying on an activity described in the notice until it has taken steps to come back into compliance. Stop notices are designed to prevent an activity or planned activity causing serious harm or a significant risk of serious harm to the environment or human health.
10. The RES Act also provides for enforcement of these civil sanctions in various ways if they are not complied with:
 - **Compliance or Restoration Notice** – prosecution for the original offence. However, when imposed with a variable monetary penalty, no prosecution may be brought for the original offence, to avoid creating double jeopardy, and instead a monetary non-compliance penalty may be imposed;
 - **Enforcement Undertaking or Third Party Undertaking** - prosecution for the original offence;
 - **Fixed or Variable Monetary Penalties, or a Non-compliance Penalty** – recovery of the amount as a civil debt; and
 - **Stop Notice** - prosecution for the original offence and for non-compliance with the stop notice.

11. The RES Act also requires:

- Appeals against a civil sanction to be made to a Tribunal (Article 10 of the Order), in the case of the Order and Regulations, to the First-tier Tribunal. The First-tier Tribunal will handle appeals according to the General Regulatory Chamber Rules.
- Regulators to draw up and consult on revised enforcement policies which set out when the civil and other sanctions are likely to be used, and guidance on how they will be determined (Articles 11 to 13).
- Welsh Ministers to satisfy themselves that the civil sanctions will be used in accordance with the principles of Better Regulation: transparency, proportionality, consistency, accountability and being targeted on where action is needed (RES Act section 66).

12. The Environment Agency is the Regulator for the purpose of the Order and Regulations. The work of the Environment Agency has been assessed for the Better Regulation Executive by independent reviewers

<http://www.berr.gov.uk/Policies/better-regulation/improving-regulatory-delivery/implementing-principles-of-better-regulation/reviewing-regulators/hampton-implementation-review-reports> .

On the basis of the Hampton Implementation Review reports and the delivery and oversight plans set out in Government guidance to regulators. Welsh Ministers have concluded that the Environment Agency will exercise the new powers in accordance with principles of Better Regulation, i.e. transparently, accountably, proportionately, consistently, and appropriately targeted.

13. During the Parliamentary stages of the RES Act, the issue was raised as to whether there should be an upper limit to a variable monetary penalty that is imposed for an “either way” offence, i.e. one that may be tried in the Crown court as well as in a Magistrates court. The Act sets no limit. This has been reconsidered in drawing up the Order and Regulations. The Welsh Assembly Government has decided to recommend in guidance that the regulators have a cap of £250,000 on variable monetary penalties. This is similar to the decision taken by the Department of Environment, Food and Rural Affairs (Defra) and will allow the regulators to use variable monetary penalties in the circumstances in which they would be suitable while providing further assurance that the most serious offences would be considered by a court. This position will be reviewed after two years.

14. Since the RES Act there has been further discussion with expert interests as to whether the minimum grounds for appeal against civil sanctions decisions set out in the RES Act would be sufficient in environment cases to allow all meritorious appeals to be heard. The RES Act specified particular grounds in the interests of transparency, and to support efficiency in the conduct of appeals. This was to be reviewed in developing proposals for particular regulatory areas. The Welsh Assembly Government has decided that in environment cases, it would also be appropriate for the Order also to allow an appeal to be made for “any other similar reason”.

15. The draft Order and Regulations are subject to the Assembly's affirmative procedure under section 61(2) of RES Act (Order), and sections 62 RES Act and section 93(10) of the Environment Act 1995 (Regulations).

Purpose & intended effect of the legislation

16. Sir Phillip Hampton's 2005 review, "Reducing Administrative Burdens: Effective Inspection and Enforcement", set out principles for Better Regulation, now incorporated in a Compliance Code, to which Regulators must have regard. The Hampton review concluded that sanctions were not yet a deterrent to serious non-compliance and needed to be toughened – there needed to be a review of regulatory sanctions and this was subsequently carried out by Professor Richard Macrory.

17. The Macrory Report, "Regulatory Justice: Making Sanctions Effective", (final report published in November 2006) found an overreliance on prosecution in regulatory enforcement. In addition, where prosecution was not proportionate, there were some cases where no effective sanction was available to put right non-compliance and its effects or to deter future non-compliance. The Macrory Report recommended the introduction of a range of civil sanctions to correct this position. The RES Act enables the introduction of civil sanctions by secondary legislation such as these instruments.

18. The Macrory Report of regulatory sanctions and a Government review of environmental enforcement concluded that the current sanctioning framework for dealing with environmental offences was inadequate. A review of environmental enforcement identified problems in relation to:

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

19. The Fairer and Better Environmental Enforcement proposals aimed to address the key shortcomings. They consist of two central components:

- Providing the Environment Agency with a range of new civil sanctions that they can use in response to environmental offences which are more appropriate than relying either on the extremes of warning letters and cautions alone, or prosecution. This will use the more general enabling power conferred by Part 3 of the RES Act 2008 to introduce civil sanctions.
- Setting out proposals for more structured sentencing to guide courts in responding proportionately and effectively to environmental offences.

20. The main objectives of using the new civil sanctions and sentencing framework are to:

- Make enforcement more proportionate and appropriate to the circumstances
- In suitable cases, avoid prosecuting businesses (and other individuals or organisations who cause environmental offences) with the associated administrative costs and reputational damage when a civil sanction can achieve enforcement objectives equally as effectively.
- Reserve prosecution for the worst offences.
- Ensure restoration of environmental damage and certain adverse effects on local communities.
- Ensure 'polluters' pay the cost to society of their non-compliance.
- Remove financial benefit from non-compliance.
- Create a more level playing field in removing competitive advantages for non-compliant companies.
- Provide a stronger incentive for compliance in the future.

21. Prosecution will be reserved for the worst offenders. Intermediate civil sanctions will allow significant non-compliance and its effects to be addressed in cases where prosecution is not in the public interest, typically where businesses and others have a good general approach to compliance. Variable monetary penalties may be used for the more serious non-compliance that is still suitable for civil sanctions. Fixed monetary penalties, for lesser non-compliance, will be mainly appropriate when advice and guidance from the regulator has failed to secure the necessary improvement. Advice and guidance from regulators will remain the cornerstone of the new and better graduated enforcement approach.

22. The Order sets the level of fixed monetary penalties at £100 for an individual and £300 for corporate bodies. The relatively low level reflects the significant reputational impact expected from the publicly recorded use of a fixed monetary penalty in this context.

23. The draft Order and Regulations make no changes to existing offences, or existing enforcement mechanisms. They introduce no new regulatory requirements. The two instruments are designed to fill important gaps in the enforcement measures presently available to the regulators. Particular civil sanctions are being made available where they will provide a proportionate and effective response, sometimes in combination with existing sanctions. These additional enforcement powers will enable a

more flexible and better graduated response to cases of non-compliance. Enforcement will be more proportionate and more effective.

24. The Environment Agency will determine civil sanctions so that they will be proportionate to the facts of each case in accordance with published Welsh Assembly Government/DEFRA and Environment Agency guidance. Civil monetary penalties will vary from low level fixed penalties for lesser but still significant non-compliance to sometimes substantial variable monetary penalties for the more serious offences where it is still not in the public interest to prosecute. The approach to determining a variable monetary penalty is designed to approximate the penalty to the minimum level necessary to deter future non-compliance.
25. The Welsh Assembly Government recognises the need to give commensurate rights to make representations and objections before a civil sanction is imposed and for appeal to an independent and impartial tribunal if a sanction was imposed. The regulator must therefore serve a Notice of Intent to impose a compliance or restoration notice, or fixed or variable monetary penalty. The recipient has the right to make representations and objections which the regulator must consider before deciding whether finally to impose the sanction. A Notice of Intent is not served ahead of imposing a stop notice, which may need to be served urgently in preventing serious or potentially serious harm.
26. If a civil sanction is imposed, the person may appeal to the independent and impartial First-tier Tribunal. A judge will consider the appeal, and may decide to take assistance from experts in the matters at issue.
27. An enforcement or third party undertaking may be freely offered by a person, in which case the Notice of Intent stage does not apply. However, a person may appeal to the First-tier Tribunal against a regulator decision not to issue a certificate confirming completion of the steps set out in the undertaking.
28. The draft Order and Regulations introduce civil sanctions for a range of environmental offences by amending several pieces of primary and secondary legislation. This is essential to create an enforcement system which is widely and consistently applied, and easily explained.

Implementation

29. On 6 April 2010 parallel Environmental Civil Sanctions (England) Order and Environmental Civil Sanctions (Miscellaneous Amendments) (England) Regulations were implemented in England.
30. Should the making of legislation in Wales be delayed or not made at all then the Environment Agency, which have regulatory duties in Wales and England, would be undertaking their regulatory responsibilities and prosecuting offenders under two separate enforcement systems. Welsh businesses would be disadvantaged as they would not be subject to a civil

sanctions process that reduces the need for criminal prosecution in the less serious cases of environmental offences.

Consultation

31. From 22 July 2009 to 14 October 2009, the Welsh Assembly Government conducted a joint consultation exercise with DEFRA. The consultation proposed the introduction of a more proportionate, fairer and more effective approach to enforcing environmental criminal offences in Wales and England. The consultation included a draft Order and set of amendment Regulations. The consultation considered conferring civil sanctioning powers on the Countryside Commission for Wales and Natural England as well as the Environment Agency. Welsh Assembly Government has decided not to confer the powers on the Countryside Council for Wales at this time. A summary of the replies and the Assembly Government's response is publicly available.

<http://new.wales.gov.uk/consultations/environmentandcountryside/environmentalenforcement/?lang=en&status=closed>

32. The Regulatory Impact Assessment below sets out the costs and benefits of the Order and Regulations and a summary of the consultation responses.

REGULATORY IMPACT ASSESSMENT

Options

1. The impact assessment is structured around three options:

Option 1: do nothing

Option 2: introduce the new civil sanctions for specified regulators

Option 3: introduce the new civil sanctions and improvements to the approach for criminal sanctioning

2. Options 2 and 3 consider the costs and benefits compared to option 1 (not introducing any proposals). More structured sentencing is not considered as a standalone option on the basis that it is preferable for the less serious cases to be addressed using civil sanctions before applying tougher criminal sanctions.

Option 1

3. The 'do nothing' option is to maintain the existing system of environmental enforcement without introducing the measures included in options 2 and 3. The purpose of including this option is to ensure that the new proposals are compared with the current situation – i.e. as a baseline.

Options 2 & 3

4. The assessments for options 2 and 3 adopt a broadly similar approach to each other. Option 3 adds the additional costs and benefits that arise from using the proposed new sentencing framework.

Summary of Evidence and Analysis

5. Tables C and D below summarise the costs and benefits arising annually and the one off costs associated with implementing Civil Sanctions for options 2 and 3.
6. The Welsh Assembly Government has agreed with the position taken by the UK Government and has chosen to implement option 3 as only this will fully address the problem under consideration, ensuring effective civil and criminal sanctions and strengthening incentives to comply.
7. The costs and benefits of implementing option 3 are:
 - Total annual costs to regulators, the courts and offenders are £21.8m
 - Total annual benefits, which estimate environmental costs and risks reduced directly through civil sanctions and strengthened sentencing, are £36.5m
8. This gives a net benefit of introducing option 3 of £14.7m per annum.
9. Further detail is contained below which explains how the costs and benefits have been assessed, where estimates have been used and where there is uncertainty in evaluating the costs.

Assessing the impact of the civil sanctions

10. Using any of these sanctions is likely to have some direct effects. The additional impact of using the sanctions will depend in any individual case on what would otherwise have been used (prosecution). The costs, for example, may be higher or lower than for the mechanism that would otherwise have been used. The overall impact of introducing these sanctions also clearly depends on how often and how appropriately they are used.
11. The starting point was therefore to collect information from the proposed regulator, the Environment Agency, on the number of times existing enforcement mechanisms are used and the extent to which the new sanctions might be used instead of them.
12. The **direct effects** identified are:
 - *Costs and cost savings to the regulators who use them.*

The regulators provided information on the costs incurred in using existing enforcement mechanisms and the estimated costs of using civil sanctions. These provide the basis for the estimated change in costs in using civil sanctions.
 - *Costs and cost savings to the offenders on whom they are served.*

This is in terms of both the administrative costs of co-operating with sanctions and of taking any measures required by the sanctions. Consideration of the cost implications was given to what action the offender might take compared to what action he would have taken under the mechanism that would otherwise have been used. The estimates of administrative time taken by offenders are guided by the time estimates provided by the regulators for each sanction and by discussions with businesses. The assessment estimates costs (and benefits) for restoration notices and for enforcement undertakings. These estimates are based on cost and benefit information for restoring damage to the environment in other situations. Some initial assumptions have been made to estimate the potential costs of stop notices and compliance notices.
 - *Costs to the First-tier Tribunal/Courts.*

The First-tier Tribunal (FTT) will be responsible for administering any appeals and will face increased costs; the costs to courts will be reduced to the extent that they will hear fewer prosecutions. The estimate of costs to the FTT are based on regulators' views on the proportion of cases in which appeals would be made and guided by information from the FTT on the costs of administering them. The estimate of cost saving to the Courts is guided by the views of regulators on the reduction of prosecution numbers and information in the RES Act Impact Assessment on the costs to Courts of prosecution.

- A transfer of funds from offenders to government for monetary penalties issued.

This is based on regulators views on the potential level of sanctions applied and a view of the potential level of penalties.

- Benefits to the environment.

These might, in the case of a restoration notice, be the restoration of damage that has been caused or, in the case of a stop notice, it might be that some damaging activity ceases. The assumptions made are set out in the assessment of options below.

13. There are likely to be some **indirect effects** of using these sanctions.

These are expected to include:

- An improved environment from change in behaviour towards greater compliance with existing regulations and greater care in avoiding offences and environmental damage.

How great the benefits of greater compliance with existing regulations are compared with the costs is largely dependent on the body of regulation to which these additional enforcement mechanisms relate. Paragraph 41 - 43 provides an indication of the costs and benefits of this change in behaviour.

- A more level playing field as a result.

Improved enforcement is likely to benefit those businesses who typically comply with regulations. This is because companies with a less desirable approach to compliance are more likely to have had reduced operating costs as a result of not complying with environmental regulations (e.g. reduced monitoring costs, not investing in appropriate equipment or not paying waste disposal charges). This may give them a market advantage from being able to charge lower prices. To the extent that costs are increased as a result of these proposals either directly or from moving to greater compliance, the relevant businesses will either have reduced profits or pass costs on and may lose business as a result. However this and the fact that, in some cases, offenders may move out of illegal activities (e.g. illegal waste disposal) will make more market share available for companies that generally comply with regulations. Without more detailed financial information on those affected by the proposals it is difficult to predict how those operating unlawfully will respond to increased costs.

- Competitive advantage from effective environmental regulation.

There is growing evidence to support the theory that countries can achieve a competitive advantage from implementing environmental regulations. This is because companies become good at complying with regulations and can then compete more effectively (as other countries implement similar regulations) and because the environmental sector develops expertise that it can then sell to other markets. These effects are likely to be undermined to the extent that there is non-compliance with regulations; more effective enforcement may therefore enhance these advantages.

14. There are also likely to be one-off costs of implementing the new measures. These will include:

- *Costs to regulators of setting up appropriate systems and training.*

These are estimated on the basis of information provided by the regulators and previous experience of comparable regimes.

- *Costs to the FTT of setting up the appropriate systems and training.*

These are estimated on the basis of information provided by the FTT.

- *Costs to the regulated community in finding out about the new rules.* The Welsh Assembly Government and DEFRA have provided a short guide to the changes and information is available on Welsh Assembly Government, DEFRA and regulators' web pages. Discussions with businesses about these and other similar proposals suggest that businesses are most likely to find out about the changes via the information channels provided by trade associations. Estimates are made on that basis making assumptions about the proportion of businesses in each sector and the amount of time they spend finding out about the changes. The estimates are guided by a similar analysis undertaken in the Impact Assessment for the Environmental Damage Regulations 2009 (hereafter EDR IA) which was crosschecked with businesses.

Assessing the impact of the sentencing framework

15. Option 3 includes civil sanctions and the introduction of guidance to the courts (where criminal sanctions are still used) on a more structured approach to sentencing. Compared with the costs and benefits identified for option 2, option 3 is expected to involve the following:

- Additional direct costs to offenders and benefits to the environment from additional or increased restoration of damage. This is assessed in the same way as for the costs and benefits of restoration required by civil sanctions.
- Transfer from offenders to Government to the extent that fines are increased to remove financial gain from non-compliance. It is not possible to predict with a reasonable level of accuracy when and by how much fines will be increased.
- Increased compliance with associated costs, reduced damage to the environment and a more level playing field for business.

General issues on the assessment of options 2 & 3

16. To keep the narrative of this evidence base clear and concise, the analysis starts by considering estimates of the annual costs and benefits. These estimates are based on the views of relevant experts and assumptions for each of the input parameters. The annual estimates are also 'steady state' estimates: that is they reflect the settled pattern of enforcement activity once the new proposals have bedded in and do not attempt to reflect any

adjustments to the settled pattern which is harder to predict¹. The one-off costs associated with implementing the new measures are also considered.

17. Total costs and benefits are then considered both annually and, in present value terms, over a fifteen year period from 2010 to 2024. A discount rate of 3.5% is used to derive the present value, consistent with HM Treasury's Green Book. Fifteen years is chosen for consistency with the RES Bill Impact Assessment and because it is difficult to predict whether the same offences and enforcement mechanisms will remain in place over longer timescales. Estimates are provided in 2009 £s.

18. For these estimated totals, 'low' and 'high' scenarios are considered in addition to the central estimates. The low scenario assumes that limited additional restoration is undertaken as a result of the measures, that costs are higher than expected by the regulators and that the benefits of additional environmental measures taken are relatively low. The high scenario, conversely, assumes significant additional restoration, relatively low costs and relatively high benefits from environmental measures.

19. There is significant uncertainty in the precise costs and benefits of introducing these sanctions. There are a number of reasons for this:

- Datasets on the current use of enforcement mechanisms are not comprehensive.
- Regulators were only able to make broad predictions about the scale of the switch to using the new sanctions on the basis of statistics of past offences, their experience and their views of factors likely to influence use of prosecution and civil sanctions in the future. They do not know precisely how patterns of future offending will change from current patterns.
- It is not possible to predict precisely what action will be taken when each of the new sanctions is applied with what result and what action and result it displaces.
- Even if this were known there is uncertainty in evaluating the costs of taking the action and of valuing any benefits that arise.

Costs & Benefits

Option 1: do nothing

20. Table A summarises the current pattern of use of enforcement mechanisms by the Environment Agency (data provided is on an England and Wales basis²). This concludes that the Environment Agency spends

¹ Two particular effects are worth noting: 1) that regulators may start using civil sanctions slowly in the first period and then increase their use as they become more familiar and confident 2) that as businesses change their behaviour towards greater compliance as a result of the proposals, some reduction in non-compliance would be expected. This should not change the overall level of enforcement action however, which is determined by the level of resource dedicated to enforcement, but it would increase the proportion of cases of non-compliance for which enforcement action is taken.

² The Environment Agency regulate in both Wales and England, under the titles of Environment Agency (for England) and Environment Agency Wales (for Wales), however the organisation itself is one Regulatory body, therefore all statistics provided by the Environment Agency have been calculated on a Wales and England basis and can not be separated to reflect information specific to Wales only.

around £13m p.a. using existing enforcement mechanisms. This provides an overview of the baseline scenario.

21. Costs and risks of not introducing new proposals:

- Issues identified in paragraph 18 of the Explanatory Memorandum persist, objectives identified in paragraph 20 are not realised.
- Opportunity missed for better targeting of enforcement resources to better secure compliance.
- The potential benefits to the environmental legislation covered by fairer better environmental enforcement through the use of civil sanctions are not fully realised and regulation is undermined.
- Current level of damage incidents and risks remains unnecessarily high. For example 827 serious (and 16,000 minor) pollution incidents reported to the Environment Agency in one year.

Table A: Current use of enforcement mechanisms

	Number	Regulator costs per unit³ £'000s	Total Regulator costs £'000s
Environment Agency⁴			
Site warnings	24800	0.1	2480.0
Warning letters	6000	0.6	3600.0
Notices – permitted sites	280	1.0	280.0
Notices	279	2.2	613.8
Formal cautions	397	3.3	1310.1
Fixed Penalty Notices	0		0.0
Prosecutions	804	5.6	4602.4
Total costs			12786.3

Option 2: introduce the new range of civil sanctions

Estimates of use of civil sanctions

22. The assessment of direct costs and benefits is based on estimates of the use of civil sanctions by the Environment Agency. These predictions are set out in the second (proportion of usage of current mechanism which switches to civil sanction) and third (number of uses of civil sanction) columns of Table B. The Environment Agency put together an expert panel to predict the likely level of use of the proposed sanctions relative to the current situation. They used information from 2006-07 to inform estimates of the likely level of switches to civil sanctions.

³ Including a component for the costs of internal review and appeals

⁴ Use numbers based on an average from 2004-07. Costs based on estimates from an expert panel from EA.

Table B: Predicted use, costs and benefits of new sanctions relative to the current situation⁵

	% of old	Number/use of civil sanctions*	Number of appeals*	Regulator ⁶ costs*	Offender admin costs*	Courts costs*	First Tier Tribunal costs*	Offender policy costs*	Total benefit*
				£'000s	£'000s	£'000s	£'000s	£'000s	£'000s
Environment Agency (switches to civil sanctions)									
Site warnings (SW) to SW and Fixed Monetary Penalty (FMP)	2%	496	25	392	16	-	20	-	-
Warning letters (WL) to Ws and FMPs	2%	120	6	64	4	-	5	-	-
Cautions to FMPs	5%	20	1	-49	-18	-	1	-	-
Cautions to Variable Monetary Penalty (VMPs)	20%	79	6	-217	165	-	5	-	-
Prosecutions to VMPs	10%	80	6	-414	-514	-19	5	-	-

⁵ Represented using * within the table, these estimated use, costs and benefits have been forecast based on current EA data.

⁶ This represents the total change in costs. A positive number is increased costs and a negative number is reduced costs.

Warning letters to WLs and VMPs	1%	60	5	16	181	-	4	-	-
Warning letters to WLs and compliance notices	2%	120	6	50	156	-	5	80	80
Cautions to compliance notices	2%	8	0	-23	3	-	0	5	5
Informal compliance request to compliance notice		50	3	23	68	-	2	33	33
Warning letters to WLs and restoration notices	0%	9	1	4	17	-	1	101	232
Cautions to restoration notices	1%	4	0	-10	4	-	0	45	103
Informal to restoration notice		10	1	7	19	-	1	112	258
Site warnings (SWs) to SWs and stop notices	0%	12	6	23	72	-	5	877	0
Informal to stop		5	3	10	29	-	2	353	0

notices									
Warning letters to undertakings	1%	60	0	137	50	-	0	673	1548
Cautions to undertakings	25%	99	0	-42	-16	-	0	1114	2561
Prosecution to undertaking	10%	80	0	-228	-694	-19	0	984	2263
<i>Total costs and benefits*</i>		1312		-257	-458	-38	56	4377	7083

23. In addition to the expected level of use for each sanction, Table B also sets out the estimated administrative costs to the Environment Agency, offenders, the First-tier Tribunal and the Courts (cost savings) and the policy costs and benefits of using the civil sanctions. The following paragraphs explain the method underlying the estimates.

Costs to regulators

24. Costs to regulators are based on the estimated costs of administering each type of civil sanction minus the costs of using the current enforcement mechanism. It also takes account of the fact that some costs will be recovered from offenders assuming that 90% of costs of administering the new civil sanctions (except for FMPs where cost recovery is not allowable) will be recovered (Table B column 5). Some of the switches in enforcement sanction lead to a net cost (e.g. where a VMP is used instead of a warning letter to close the compliance gap) and others lead to a cost saving (e.g. where a VMP is used instead of a prosecution). Increased expenditure on using civil sanctions is expected to lead to a reduction in environmental damage and an increase in restoration of damage to the environment.

Administrative costs to offenders of new measures

25. The difference in administration time that offenders will take in responding to civil sanctions is considered in table B (column 6). Estimates have been made of the amount of time offenders will take administering the proposed civil sanctions in relation to current enforcement mechanisms. This is based on Environment Agency estimates of their time requirements and discussions with businesses. The resulting change in costs show that there are increases in costs where civil sanctions are used (except where they replace previous prosecutions) and where FMPs are used. These estimates include administrative costs that regulators will claim back from offenders; where this is allowable it is assumed that, in practice, regulators claim back 90% of costs⁷.

Cost savings to the courts

26. There will be a saving to the courts of not having to administer prosecutions. This is based on the estimated switch to civil sanctions from criminal sanctions and on information in the Regulatory Enforcement and Sanctions Act Impact Assessment on the costs to courts of prosecutions. Estimates are presented in column 7 of table B.

Costs to the First Tier Tribunal

⁷ As an example, where the Environment Agency uses restoration notices instead of cautions, the calculation is as follows: [the cost of time spent by business administering the new civil sanction, which is: the cost of a business day (£331) x the number of days spent administering a restoration notice (5)] + [costs recovered by the Environment Agency, which is 90% of costs of enforcing the sanction plus costs of internal review of the decision, (£1658)] – [the costs of administering the mechanism that would have been used in the absence of civil sanctions, which is the costs of a business day (£331) x the number of days spent administering a caution (3)] x [the number of times restoration notices are used instead of cautions (4)].

27. These estimates are based on an estimated level of sanctions and of appeals against the sanctions. It is based on initial FTT estimates of the costs of administering appeals. Estimates are presented in column 8 of table B.

Policy costs⁸ to offenders of additional measures to comply with new sanctions

28. This section (and the following section on policy benefits) includes the costs to offenders (other than fines) of complying with other requirements such as those contained in restoration notices, undertakings, compliance notices and stop notices). Policy costs are presented in column 9 of table B.

Where restoration notices and undertakings are used

29. This includes the costs of additional restoration where RES Act restoration notices, or undertakings are used. Table B (column 3) shows the estimates for how often this will be and what enforcement approach they replace. The additional element will depend on how much restoration is undertaken where current enforcement mechanisms are used; there is no systematic evidence to inform this so judgement is used on the basis of available records and discussions with regulators. The following assumptions are made:

- For the Environment Agency those cases that switch from prosecution to undertakings full restoration would already have been done 65% of the time and some restoration would have been done a further 10% of the time; for those cases that switch from where warning letters, cautions or an informal approach based on advice and guidance is used, full restoration would have been done 40% of the time and some restoration 10% of the time.

30. Assumptions are also made about the scale of the damage and the costs of restoring it where restoration is additional:

- For the Environment Agency it is assumed that cases that switch from prosecutions to civil sanctions⁹ will typically be category 1¹⁰ incidents and cases which switch from warning letters or cautions will typically be category 2 incidents. The cost estimates draw on estimates for the costs of pollution incidents assessed for the EDR IA. The EDR IA estimated the average costs for taking the additional measures required in response to the most serious cases of the category 1 water incidents (subject to those regulations) to be £105k in 2005 prices. It is assumed that the remaining

⁸ Policy costs are the essential costs of meeting the policy objectives whereas 'administrative costs' are those associated with the form that the policy measures take.

⁹ It is assumed that using civil sanctions can achieve the relevant enforcement objectives and are used in 20% of cases where there are currently prosecutions.

¹⁰ This refers to the Environment Agency's system for classifying incidents from category 1 to category 4 whereby category 1 are the most serious.

category 1 incidents would be smaller scale and that the restoration requirements of the civil sanctions may also be less onerous and that the average additional costs where no restoration was previously undertaken might therefore be around £40k (in 2008 prices¹¹). Category 2 incidents will typically be less serious and a figure of £20k (in 2008 prices) is therefore provided. In those cases where some restoration was previously done, it is assumed that 50% was done and the restoration notice or undertaking brings it up to full (100%) restoration¹²¹³. While these assumptions have been made, it is nevertheless uncertain what type of incidents will arise and what measures will be required.

Where compliance notices are used

31. Compliance notices will generally be relevant where there is an issue of ongoing non-compliance, for example that a company continues to be emitting above a specified emission limit value. It is difficult to determine to what extent any costs of compliance notices are additional to costs that would have been incurred in the do nothing option, because it is likely that the regulator would already have secured compliance but through less formal means. Where, for example, compliance notices require investment in plant this may have been required or agreed under current arrangements. It is assumed that a compliance notice may require some additional management of compliance and an estimate of 5 additional days of business time is provided.

Where stop notices are used

32. Stop notices will generally be used where the regulator considers it necessary to stop an operation or part of it to avoid severe harm to the environment or human health; the regulator is liable to compensate the operator if it turns out the notice should not have been served. The costs of stop notices have been estimated on the basis of the loss of business income while the stop notice is in force. It is difficult to predict how long activities will have to stop for but it is likely that both the regulator and the business will seek to minimise the time. A best estimate of 3 weeks is provided informed by discussions with businesses and the regulators. The average turnover of small companies is used to reflect output. Discussions with regulators and businesses suggest that smaller companies without formal risk management may be more likely to give rise to the types of circumstance which merit stop notices. They are likely also to be applied only to the part of an operation that is responsible for the issue at hand. The assessment also takes account of the fact that in some cases the

¹¹ NB. All values are subsequently adjusted to reflect 2009 prices.

¹² This does not take account of non-linearities in the costs of restoring environmental damage – i.e. that the costs of restoring environmental quality to 50% of its previous condition will often not be 50% of restoring 100% of environmental quality.

¹³ As an example, where the Environment Agency uses restoration notices instead of warning letters, the calculation is as follows: [*the estimated number of switches from warning letters to restoration notices* (9)] x the sum of 1) [*additional cost where no restoration was previously undertaken*, which is the cost of additional restoration where a warning letter was used (£20.4k in 2009 prices) x the proportion of time where no restoration was required (50%)] and 2) [*additional cost where some restoration was already undertaken but some extra is required*, which is the cost of the 50% extra restoration required (£20.4k x 50%) x the proportion of time where this top up is required (10%)].

knock-on effect on businesses of having to stop activities may be more than loss of output during the stop period, for example if it takes time to restart activities or regain markets. Again it is assumed that businesses will try to minimise these knock on losses and it is assumed that they might double the costs associated with direct loss of output. The assumptions used to inform the estimates for these notices are very speculative so can only provide a broad indication of scale of costs.

Transfer of funds to central government from using FMPs and VMPs.

33. Initial assumptions have been made that the average level of FMPs will be £300 and of VMPs will be £10k based on a view of the potential weight of penalties at different levels. This leads to a total annual transfer of £4m. As this is a transfer it is not in the overall summary of costs and benefits.

Environmental benefits of additional measures to comply with new sanctions.

Restoration notices and undertakings

34. The environmental benefits from additional measures taken as a result of restoration notices and undertakings are assessed by reference to economic valuation work undertaken in other contexts.

35. A range of cases of damage to the water environment were examined for the Impact Assessment of the Environmental Damage Regulations. The Environment Agency provided estimates of the costs of capital and maintenance works required to restore the water environment. The benefits were estimated on the basis of the methodology developed by the Environment Agency for calculating the value of benefits for the programme of work required for the 4th Periodic Review of the water industry in England and Wales in 2004. This methodology assessed the value of environmental changes resulting from river improvement projects for :

- Informal recreation
- Angling
- Amenity
- Health
- Water resources
- Reduced sewage litter
- Ecosystem and natural habitat

36. Across the range of cases considered, the environmental benefits were estimated to outweigh policy costs by a factor of 2.3:1. The range of benefits to be achieved from the Environment Agency's use of restoration notices and for enforcement undertakings are likely to be similar to those under the Environmental Damage Regulations in a large proportion of

cases so this benefit-cost ratio is used to provide an indication of the scale of benefits to be achieved in relation to expected policy costs.

37. The EDR IA also estimated the environmental benefits of taking remediation action in response to a range of cases of biodiversity damage on the basis of transferring and adjusting values from studies valuing similar measures (benefits transfer). The underlying studies generally valued environmental improvements in terms of:

- The value that those who use or are exposed to the change in environmental quality derive directly from it (sometimes called 'direct use' values)
- The value that biodiversity provides in terms of supporting living and economic conditions in general ('indirect use' values)
- The value derived from the knowledge that the environment is maintained for those who do not experience the changes directly ('non-use' values)

38. In another example across 12 cases of terrestrial biodiversity damage and one case of marine biodiversity damage the benefits were on average 2.5 times higher than the policy costs.

39. Consideration was given to the fact that the relationship between costs and benefits will vary significantly depending on the specific case and that there is unlikely to be a linear relationship between costs and benefits: for example, in some circumstances the return on investment might decrease the more restoration is done in a particular case. Given that the revised guidance refers to how regulators should have regard to proportionality and that it is reasonable to assume that in putting forward proposals for enforcement undertakings, persons will look to minimise costs in achieving environmental results, it is unlikely in any case, and less likely on average, that restoration will be undertaken where the costs outweigh the benefits to be achieved.

Compliance notices and stop notices

40. It would not be appropriate to apply the above ratios to the use of compliance notices and stop notices because the cost does not provide any indication of the scale of damage that might be caused either by stopping an activity or requiring compliance. It can generally be assumed that regulators will only use stop notices where there are severe negative consequences of an operation and that the costs of stopping an installation will generally be justified by the benefits in terms of avoided negative consequences. Similarly, it seems likely that, on average, regulators will only decide to serve compliance notices where it is worth doing so, or where the benefits outweigh the costs.

Indirect costs and benefits

Reaction to proposals

41. Paragraph 13 refers to the effects of businesses and others responding to the proposals by moving towards greater compliance with regulations. This section outlines some broad-brush analysis that has been undertaken to provide a rough indication of the potential scale of these costs and benefits.
42. The analysis looks at the costs of complying with regulations and the benefits in terms of reduced damage to the environment. It assumes that a high proportion of damage (75%) is caused by a relatively small number of businesses (10% of businesses in sectors that pose environmental risks) that are characterised as non-compliant – on the basis of evidence that damage is rarely caused when businesses are fully compliant with regulations. It then examines the costs if a modest proportion of non-compliant businesses (0.5%¹⁴ or 195 businesses) went from zero expenditure on environmental protection to the average level of environmental expenditure (£12k on the basis of the Environmental Protection Survey 2006). This gives a total cost of £2.4m. Finally, it assumes that those businesses now investing in environmental management no longer cause damage leading to a corresponding reduction in the total costs of environmental damage in Wales and England¹⁵. This gives a total benefit of £4.0m.

Level playing field

43. There is likely to be some economic benefit to those who already comply with regulations to the extent that these proposals create a more level playing field.

One-off implementation costs

44. One-off implementation costs are estimated as described in paragraph 14. It includes, for example, the costs of putting in place new procedures and systems and training staff.

Summary table for option 2 (Wales & England¹⁶)

Table C below summarises the one-off costs

¹⁴ The civil sanctions are expected to have some effect on behaviour of generally non-compliant companies either where businesses are subject to them directly or in response to their availability. There is no direct evidence to inform this proportion. Around 3% of non-compliant companies might receive civil sanctions each year (estimated on the basis of the estimated number of non-compliant businesses overall, the estimated number of civil sanctions served each year and the estimated proportion served on non-compliant businesses). It is also likely that some businesses that take action will do so on an ongoing basis. This might suggest that 0.5% is a low estimate.

¹⁵ This is based on the number of recorded incidents each year multiplied and the costs of environmental damage using information on remediation costs for different sized incidents from the EDR IA as a proxy.

¹⁶ The Environment Agency regulate in both Wales and England, under the titles of Environment Agency (for England) and Environment Agency Wales (for Wales), however the organisation itself is one Regulatory body, therefore all statistics provided by the Environment Agency have been calculated on a Wales and England basis and can not be separated to reflect information specific to Wales only.

	Costs	Benefits
ANNUAL		-
<i>Direct:</i>		£7.08m ¹⁷
EA	-£ 0.3m	-
Tribunal	£ 0.06m	-
Courts	-£ 0.04m	-
Offenders (civil sanctions)	<i>Policy</i> £ 4.9m	-
	<i>Admin</i> -£ 0.05m	-
<i>Indirect</i>		-
Reaction to proposals	£2.41m	£3.99m
Total	£6.98m	£11.07
ONE-OFF		-
EA		-
Consultation	153.00	-
Producing guidance	51.00	-
New procedures and systems	20.40	-
Training staff	306.00	-
IT	204.00	-
Total	734.40	-
BUSINESS ¹⁸	2173.00	-
TRIBUNAL	59.94	-
COURT SERVICE		
Fixed cost producing internal guidance	50.00	-
Number of cases each judge hears (PA)	100.00	-
Viable costs (no. of judges)	81.78	-
Total	131.78	-
Total	4065.30	-

Option 3: Civil sanctions + structured sentencing

45. The assessment of the costs and benefits of option 3 are the same as those used in assessing option 2. In addition under option 3 we assess the impact of the sentencing framework which is outlined in paragraph 15. Therefore in addition to the costs and benefits of using the civil sanction assessed in option 2, the assessment quantifies some additional effects associated with improvements to the sentencing framework. The level of switching to civil sanctions from prosecutions is taken into account to provide an estimate of the residual level of prosecutions to which the sentencing framework will be relevant. In the case of the Environment Agency it is assumed that 20% of prosecutions switch to civil sanctions so the residual level is 80%.

¹⁷ Column 10 of Table B

¹⁸ The original proposals and impact assessment included provisions for civil sanction powers for English Nature and Countryside Council for Wales. In Wales we will not be implementing provisions for CCW and therefore these costs to business may be over estimated as they took account of possible use of civil sanction use by CCW.

- **Additional policy costs to offenders from increased restoration of damage.** In those cases that remain as prosecutions, it is assumed that full restoration is undertaken. An extra 10% of the time and ‘top-up’ restoration, (i.e. where the effect of the sentencing framework is to make the difference between 50% restoration and full (100%) restoration) is undertaken 10% of the time. Using the same assumptions about the costs of restoration for prosecutions brought by the Environment Agency, Natural England and Countryside Council for Wales and an additional assumption for prosecutions brought by Local Authorities, for example on issues such as local nuisance, including waste, litter and dog fouling, gives an estimate of an additional £10m p.a. for increased restoration.
- **Environmental benefits from increased restoration of damage.** To derive an estimate of the benefits, the same assumptions have been made as for restoration action taken under civil sanctions for prosecutions brought by the Environment Agency, Natural England and CCW and an additional assumption using a ratio of 1.2:1 has been made for prosecutions brought by Local Authorities. This gives an estimate of an additional £17m p.a.
- **Reaction to proposals.** It is expected that a tougher approach to sentencing will increasingly encourage a change in behaviour towards greater compliance with existing regulations and improved environmental performance. It is assumed that this will further reduce the level of damage to the environment. To provide an indication of this the assessment shows the effect of a greater number of the regulated community (an increase from 0.5% to 1.5%¹⁹) investing in management of environmental risks. The estimated costs increase to £7.2m. The benefits estimated on the same basis as for option 2 increase to £12.0m

One-off implementation costs

46. These are as for option 2. There will be no additional set-up costs to the courts service as they will be developing sentencing guidelines in any event. This proposal affects the way the guidelines are developed.

Summary tables for option 3

47. Table D below summarises the costs and benefits arising annually and the one-off costs related for option 3.

	Costs	Benefits
ANNUAL		£24.5m ²⁰
<i>Direct:</i>		-
EA	- £0.3 m	-

¹⁹ This inherently assumes that more structured sentencing will have more of an impact on the behaviour of non-compliant businesses than the civil sanctions. Reasons for this include: sentencing is more likely to affect non-compliant companies than civil sanctions, the civil sanctions apply to a limited range of offences and regulators whereas sentencing will apply to all environmental offences and the details of sentences are more likely to attract attention and be publicised than civil sanctions.

²⁰ Total annual benefit of Option 2 + offenders (sentencing) cost + Reaction to proposals cost.

Tribunal	£0.06 m	-
Courts	- £0.04 m	-
Offenders (civil sanctions)	<i>Policy</i> £4.9 m	-
	<i>Admin</i> - £0.05 m	-
Offenders (sentencing)	£10.0 m	-
<i>Indirect</i>		-
Reaction to proposals	£7.24 m	£12.0m
Total	£21.8 m	£36.5m
ONE-OFF		-
EA:	£2.75m	-
Tribunal	£0.06 m	-
Court service	£0.0 m	-
The regulated community	£2.17m	-
Total	£4.94m	-

Consultation

Stakeholders have been involved at every stage in the development of the present legislation, culminating in the public consultation that ran from 22 July 2009 to 14 October 2009.

The consultation was a joint exercise with DEFRA proposing to introduce a more proportionate, fairer and more effective approach to enforcing environmental criminal offences in Wales and England, and included a draft Order and set of amendment Regulations.

60 stakeholders responded. A summary of the replies and the Welsh Assembly Government's response is publicly available.

Overall, respondents supported the Government's proposals for the introduction of civil sanctions for the offences listed in the Order and Regulations. Respondents also supported introducing civil sanctions for use in relation to breaches of environmental permits, the Welsh Assembly Government intends to consider further measures to introduce civil sanctions for these offences. There was also support for strengthening the power of the criminal courts in sanctioning the worst offenders – the Government plans a further consultation on enhanced powers during 2010.

The Competition Assessment

The competition assessment test concludes that the regulations are unlikely to have significant impacts on competition for firms who comply with existing environmental regulations. This is because the new civil sanctions and improved sentencing structure will only affect non-compliant companies.

Systematically non-compliant companies, however, are likely to have reduced costs as a result of non-compliance with environmental regulations (e.g. reduced monitoring costs, not investing in appropriate equipment or not paying waste disposal charges) and may have been able to achieve a higher market share by charging lower prices.

Improving the effectiveness of existing enforcement would force noncompliant companies to move to greater compliance or, in some cases, move out of illegal activities (e.g. illegal waste disposal). Some of these previously non-compliant companies would either need to increase their costs or might choose to exit the industry. This could therefore cause compliant companies to achieve greater market share and increase their prices with reduced competition.

Small Firms Impact Test

The impact on small business should be limited as the changes being introduced would predominantly affect only a small proportion of businesses that are systematically in breach of environmental legislation and risk causing harm to the environment or human health. There are already existing criminal

sanctions which if enforced would have an impact on small businesses breaching environmental regulations.

Improving the effectiveness of existing enforcement would force non-compliant companies to move to greater compliance or, in some cases, move out of illegal activities (e.g. illegal waste disposal). Some of these previously non-compliant companies would need to change their operational practice with any associated cost increase. This could benefit compliant companies helping them to achieve greater market share.

Post implementation review - Monitoring and review of the civil sanctions

The use of the new civil sanctions will be reviewed two years after their introduction. Monitoring data will be collected from the start to inform this review.

Welsh Assembly Government and DEFRA have worked with regulators to establish the aims of the review and the questions the review should address. WAG and DEFRA will work with regulators and other stakeholders to develop a proportionate methodology for answering these questions and to ensure that maximum use is made of readily available data.

A forum will be established where government, regulators and stakeholders can review results of the monitoring activity at key stages towards a formal review. This forum will help to assess whether the civil sanctions are being used consistently in line with the published enforcement policy and guidance.

The aims of the review and the questions to be asked will aim to establish:

- What has happened;
- Whether we have achieved the intended objectives of civil sanctions;
- What the costs and benefits have been;
- Whether improvements could be made; and
- What we have learnt about responding effectively and proportionately to environmental non-compliance

The principle information sources to address these questions are expected to be:

- Data from regulators on the use of sanctions and related issues;
- Questionnaires of regulators and regulated;
- Detailed analysis of a sample of cases;
- Social research project by external researchers; and
- Other available sources.