



Improving Compliance and Enforcement: Implementing new Civil Sanctions

8 August – 30 September 2011

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1. Introduction

- 1.1 This report summarises the responses we received in relation to our public consultation on Improving Compliance and Enforcement: Implementing new Civil Sanctions. This ran from 8 August to 30 September 2011.
- 1.2 We received 25 responses to the consultation, 16 of which were broadly supportive, 2 that weren't and 7 with mixed views. The list of respondents is given at Annex 1 below.
- 1.3 Natural England welcomes all the responses it received to the consultation and notes the comments made. The following section discusses the main issues raised and provides the decision that Natural England has made in light of the responses. The full responses can be found on our website at:
<http://www.naturalengland.org.uk/ourwork/regulation/enforcement/consultationresponse.aspx>.

2. Summary of responses with Natural England's comment

2.1 Compliance and Enforcement Position

Question 1: Do you agree with our approach to compliance and enforcement as set out in our draft position? If not please explain why?

2.1.1 Whilst the majority of respondents were broadly happy with our approach to compliance and enforcement, the main comment was in relation to:

- ensuring a consistent approach given the large number of enforcement options available, and the importance of having a transparent and objective methodology set out in the guidance; and
- including in the position statement how we intend to monitor our enforcement outcomes.

Natural England response:

2.1.2 We agree with the importance of having a consistent approach to compliance and enforcement, and have taken a number of steps to help achieve this. For example, we have established a national project board that will have an overview of all the enforcement actions being considered. We have also included a diagram in the guidance to make the governance process clearer.

2.1.3 We recognise that in order to show that our enforcement is effective we need to be able to monitor our enforcement outcomes. We have included this in our position statement (see *Accountable*); further details on how we will do this can be found in our response to question 8.

2.2 Enforcement Guidance – Classifying offences

Question 2: Do you agree with the criteria to use to classify offences? If not please explain why.

2.2.1 Overall, the respondents were generally supportive of the criteria that Natural England is using to classify offences. However, some respondents again identified consistency as a central concern and suggested the following approaches to improve it:

- training for case officers;
- transparent criteria and methodology for classifying an offence; and
- a written audit trail of how a case officer reached their conclusion of the classification of the offence.

2.2.2 Other comments were mainly around the mitigating and aggravating factors with specific factors being queried, with clarification sought on how the factors are weighed against each other, and how we avoid a case appearing more or less serious than it is.

2.2.3 One respondent requested clarification on how we gather baseline data to fully consider the environmental impact.

Natural England response:

2.2.4 Natural England recognises the respondents concerns regarding consistency, and has in place all three of the approaches recommended above. Our Regulation and Enforcement Advisers have already received comprehensive training on the use of civil sanctions, and the key points will be communicated to local Land Management, Land Use and Wildlife Management staff before the end of the year. A case assessment form must be completed to evidence the decisions taken for all incidents. This includes a justification for why an offence was given a particular classification, and the sanction being proposed. Where prosecution is being considered we will also audit the public interest factors for and against prosecution as outlined in the Code for Crown Prosecutors. We have also revised the guidance to provide greater clarity on how offences are classified.

2.2.5 Natural England is following the standard approach used by other regulators in considering aggravating and mitigating factors to help classify offences. We have reviewed the aggravating and mitigating factors list, and how these are weighed against each other. We intend to proceed with determining the classification of offence primarily on the environmental impact since environmental harm is Natural England’s chief concern. However, we recognise that culpability is also an important factor and would regard those cases with the highest impact and the highest culpability as the most serious offences. We haven’t given the other mitigating and aggravating factors any weighting as their bearing on a particular case will vary and should therefore be considered on a case by case basis.

2.2.6 We agree that in order to be proportionate and objective in our enforcement response we need to use the best available scientific data. We will use our own data where this is available, such as from our Integrated Site Assessments on SSSIs and will obtain data from other organisations such as local record centres where appropriate. We will also use in house and external specialist ecologists and equipment to collect evidence where necessary.

2.3 Enforcement Guidance – Using enforcement to achieve environmental outcomes

Question 3: Do you agree with our approach to using enforcement to achieve environmental outcomes? If not please explain why.

2.3.1 On the whole, the respondents agreed with our approach to using enforcement to achieve environmental outcomes.

2.3.2 There was concern expressed in two responses on how sanctions would be used to achieve deterrence as an outcome. It was suggested by one respondent that we were duplicating an existing test so that deterrence was being used as a “super public interest”, so that any case deemed not to have a significant deterrent effect would be considered lower priority. It was suggested by another that it may be used to raise the level of sanction unfairly. It was also requested that we reintroduced the CPS (Crown Prosecution Service) public interest factors back into the guidance.

Natural England response:

- 2.3.3 Deterrence is one of five outcomes that Natural England aims to achieve through enforcement, and will be relevant to almost all cases. Deterrence as an aggravating factor is likely to be most relevant for repeat offenders or if a particular offence is widespread in a local area. The penalty that we would wish to impose will be proportionate to the classification of an offence with prosecution reserved for the most serious cases and a warning letter for the least serious.
- 2.3.4 We have reintroduced into the guidance more specific reference to the public interest factors from the Code of Crown Prosecutors that we will use to determine whether a prosecution is in the public interest.

2.4 Enforcement Guidance – Choosing what sanction to impose

Question 4: Do you agree with our general approach to choosing what sanction to impose? If not please explain why.

- 2.4.1 The majority of respondents agreed with our general approach to choosing what sanction to impose. However, there were a number of comments requesting an improvement in how we set out this information in the guidance, and in relation to the examples that we used in Annex 6.
- 2.4.2 Concern was expressed by two respondents that particular circumstances would need to be taken into account when choosing the sanction. We were asked to consider the negative impact of imposing a Stop Notice on a statutory undertaker and imposing a variable monetary penalty on a not-for-profit organisation.
- 2.4.3 One respondent asked us to clarify which regulator would impose a civil sanction where more than one was responsible for enforcing an incident.

Natural England response:

- 2.4.4 We have made some revisions to the guidance to make our approach clearer in relation to choosing what sanction to impose.
- 2.4.5 Natural England will carefully consider the impact of imposing a civil sanction, assessing each case on its merits in line with the guidance. Where there are particular issues we would always aim to enter into discussion with the offender about how to resolve the problem, and offer advice and guidance as appropriate. Ability to pay must always be taken into account when determining the level of a variable monetary penalty, as outlined in the model produced by Defra.
- 2.4.6 Natural England acknowledges that it is currently unclear which regulator would impose a sanction where an offence comes under the remit of more than one. Natural England is working with the Environment Agency and the Forestry Commission to produce a protocol for these situations.

2.5 Enforcement Guidance – Variable monetary penalties

Question 5: Do you agree with the factors we will be using to calculate variable monetary penalties? If not please explain why.

2.5.1 Whilst the majority of respondents agreed with the factors that we will be using to calculate variable monetary penalties, several respondents wished to see more clarification on the methodology used for the calculations. More worked examples were requested by two respondents.

Natural England response:

2.5.2 We recognise concerns about the complexity of the calculation used to determine a variable monetary penalty and we plan to publish some worked examples in due course. Defra's guidance for Regulators on the use of Civil Sanctions set out the methodology to establish a consistent and transparent approach to the calculation of variable monetary penalties. One of the elements of Defra's review of civil sanctions will be to consider how well the methodology has worked in practice.

2.6 Enforcement Guidance – Representations and appeals

Question 6: Do you agree with our approach to considering representations (for both RES and non-RES sanctions)? If not please explain why.

2.6.1 The majority of respondents were happy with the approach to representations, but several wanted to see further clarification in the guidance particularly in relation to the process and timescales including appeals. It was also noted that further explanation was needed around how representations and appeals fit together.

2.6.2 One respondent stated that an explanation of the representation procedure should not be confined to those offences that require a Notice of Intent to be served. Where a Notice of Intent is served the representation procedure should be clearly described, including deadlines for submission and contact details.

2.6.3 Another respondent stated that the approach should be consistent with that used by Defra and the Environment Agency.

Natural England response:

2.6.4 We have made some revisions to the guidance by improving the table at 6.6 to include timescales.

2.6.5 We note the importance of ensuring that those that breach regulations are fully aware of the opportunity to make representations against a proposed sanction and to appeal against a sanction once it has been served. We will ensure that we communicate clearly to the offender in writing that this opportunity exists and give clear guidance on the process for doing so.

2.6.6 Our approach to representations and appeals is largely consistent with the approach taken by Defra and the Environment Agency in relation to RES civil sanctions¹. The appeals will be heard by the First Tier Tribunal Service which is independent of the regulators and is free of charge to appellants. The process for appealing against non-RES sanctions, where they exist, is set out in the relevant legislation, and therefore follows a different approach.

¹ The civil sanctions were introduced by The Regulatory Enforcement and Sanctions (RES) Act 2008.

2.7 Enforcement Guidance – Governance

Question 7: Do you agree with our Governance arrangements? If not please explain why.

- 2.7.1 The majority of respondents were happy with the Governance arrangements as set out in the guidance. A recurring theme in the consultation responses was how Natural England would ensure that a consistency of approach is adopted by different case officers and regions.
- 2.7.2 Two respondents were concerned that Natural England would be judge and jury in relation to the sanctions it imposed.
- 2.7.3 One respondent noted that professional development of the whole organisation was needed to ensure that civil sanctions are used effectively, consistently and proportionately. It also requested that Natural England is open to receiving feedback from its stakeholders.

Natural England response:

- 2.7.4 Natural England recognises that on occasions an inconsistent approach to enforcement has been taken by individual case officers and regions in the past. We have introduced several improvements to the process including a number of checks and balances which should help resolve this issue. Local Land Management Advisers and Wildlife Management Advisers are still responsible for carrying out enforcement action in relation to technical breaches and minor damage. Regulation and Enforcement Advisers will now agree and sign off the actions being proposed by local Land Management Advisers before the action is undertaken. Where offences are classified as medium or significant those Regulation and Enforcement Advisers and our Species Enforcement Officer (for wildlife management cases) will take the lead responsibility. The training that all our staff receives has been revised to reflect the inclusion of civil sanctions.
- 2.7.5 We have clarified the governance process by including a diagram in the guidance. We are establishing a national panel who will have an overview of all the enforcement actions taken.
- 2.7.6 There is a right of appeal for all civil sanctions, which are determined by a separate independent organisation - the Tribunals Service.
- 2.7.7 Natural England agrees that the implementation of the new civil sanctions represents a big change for both Natural England and those it takes enforcement action against. We agree that this requires professional development of the whole organisation which we will achieve through ongoing training programmes backed up by comprehensive guidance. Natural England is always open to receiving feedback from its stakeholders and plans to meet again with its Enforcement Stakeholder Group in April 2012.

2.8 Enforcement Guidance – Monitoring and review

Question 8: Do you agree with how we monitor and review our enforcement work? If not please explain why.

- 2.8.1 The respondents on the whole agreed with how we monitor and review our enforcement work.
- 2.8.2 A number of respondents stated that it was disproportionate to identify on a public register an individual or business that has been issued with a civil sanction. There was concern about damage to public reputation and stakeholders being misled. To address this one respondent thought that any corrective action taken by the offender which brings them back into compliance should also be published. Another respondent proposed that a two-tier compliance regime is adopted to incentivise business to address any environmental breaches and avoid damage to reputation. Other respondents were keen that offenders were “named and shamed” and one respondent called for full disclosure of Enforcement and Third Party Undertakings to increase transparency and trust in Natural England’s decision making.
- 2.8.3 In relation to reviewing our enforcement work, two respondents thought that this would need to take place after one or two years to assess effectiveness and proportionality. One respondent stated that the review of effective use of sanctions should be part of our ongoing enforcement work. Another respondent asked for clarity on how this consultation fits with the Government’s wider review of civil sanctions.

Natural England response:

- 2.8.4 In accordance with the Government Guidance on the implementation of the RES Act (Part 3)² we intend to publish on our website a register of all cases which have resulted in a civil sanction being issued, including where an Enforcement Undertaking or Third Party Undertaking has been accepted. We will follow current best practice and publish the name of the offender (subject to Data Protection laws); the nature of the offence and harm caused, the area in which it took place and the sanction imposed. We will also publish a summary of accepted Undertakings, and the identity of the company/person that has offered the Undertaking.
- 2.8.5 We will gather data on the use of civil sanctions to inform the review by Defra in 2013, as set out in the Environmental Civil Sanctions (England) Order 2010.
- 2.8.6 We will continue to publish our annual report which will in future include the use of civil sanctions and will discuss it with our key stakeholders. We expect the use of civil sanctions to come under a great deal of internal scrutiny in the first year or two as the process beds down.

2.9 Enforcement Undertakings

Question 9: Do you agree with our approach to Enforcement Undertakings? If not please explain why.

- 2.9.1 While the majority of respondents agreed with our approach to Enforcement Undertakings, the most common response was that the process and timescales for accepting an Enforcement Undertaking or Third Party Undertaking were unclear. One respondent said that we needed to publish the process for how Enforcement Undertakings are accepted, monitored and concluded in a timely manner. They also expressed concern that the time taken by Natural England to review the Enforcement Undertaking could result in additional environmental harm. It also suggested that the process for accepting an Enforcement Undertaking should be the same as for determining other civil sanctions.

² [The Regulatory Enforcement and Sanctions \(RES\) Act 2008](#)

- 2.9.2 Three respondents claimed Natural England would need a pragmatic approach to receiving an Enforcement Undertaking as they may, in some circumstances, take time to prepare. It was also thought by three respondents that a process was needed in which a draft Enforcement Undertaking could be submitted to Natural England for comment. One respondent asked whether there was scope for Natural England or an environmental consultant to provide extensive advice on a cost recovery basis.
- 2.9.3 It was also requested by three respondents that a third party affected by the offence was given the opportunity to comment on the Undertaking.

Natural England response:

- 2.9.4 We have made improvements to the guidance to clarify timescales and processes. However we have not introduced rigid deadlines into the process as we feel these should be kept flexible to respond to the nature of the incident and the complexity of the actions proposed. We would always expect the proposed actions to be continuously monitored to ensure they will achieve the proposed indicators of success.
- 2.9.5 We will develop and publish some examples of Undertakings in due course to help demonstrate what information we would want to see included in a proposal. We are prepared to work with those offering an Undertaking to help address any issues that may arise, although the proposal must be owned by those offering the Undertaking.
- 2.9.6 Third parties directly affected by an offence will be given the opportunity to comment on proposed enforcement undertakings where practical and appropriate. We will do this by informing the third party of the measures set out in the proposed Undertaking that will have a direct bearing on them. We will then take their comments into consideration when we make our decision.

Question 10: Do you have any comments on our draft Enforcement Undertaking proposal template?

- 10.1 On the whole the respondents were happy with the draft proposed template. One respondent requested that the template includes guidance on Enforcement Undertakings including general principles and the factors behind accepting and refusing an undertaking. Another respondent thought the draft template was a reasonable summary document but that consideration was needed on how complex information packages should be included.

Natural England response:

- 10.2 Natural England has included some additional guidance notes to the revised Enforcement Undertaking template. Where an Offer does require a complex information packages, Natural England would anticipate receiving this as supplementary information to template. There is provision for noting key milestones and key personnel involved under Schedule 1 – the Enforcement Undertaking Offer.

11. Forward Look

Question 11: Do you agree that in future civil sanctions should be used for breaches of species licences that we issue under the Conservation of Habitats and Species Regulations and for breaches of The Heather and Grass Burning Regulations in future?

- 11.1 The majority of respondents responded positively to this question, with comments that it would provide clarity and continuity of approach and increase Natural England's enforcement toolkit.
- 11.2 Two respondents wanted to see a further consultation on including breaches of species licences that we issue under the Conservation of Habitats and Species Regulations and for breaches of The Heather and Grass Burning Regulations in future. This should take place after the civil sanctions have undergone a review of how well they are working.

Natural England response:

- 11.3 Natural England aims to gather further views on this at the appropriate time should civil sanctions become available as an enforcement tool for these policy areas in the future. As a minimum we will consult our key stakeholders.

List of respondents

Association of Chief Police Officers
The British Association for Shooting and Conservation
British Mountaineering Council
British Waterways
Canoe England
Central Association of Agricultural Valuers
Chief Fire Officers Association
Countryside Alliance
Countryside Council for Wales
Eastcott Vineyard
E.on
GreenSpace
Hawk Board
Len Wyatt
National Farmers' Union
Reigate & Banstead Borough Council
Seafish Industry Authority
Thames Water
University of Northumberland, School of Law
Whitehill Town Council
Five anonymous responses