

# Enforcement and sanctions policy

## 1. Introduction

This document is Natural Resources Wales enforcement and sanctions policy

It sets out the general principles we follow in relation to enforcement and sanctioning.

This policy only applies to Wales and supersedes all previous enforcement policy documents.

## 2. Our Regulatory Principles

We use our Regulatory Principles to guide our regulatory approach to the sustainable management of natural resources and deliver well-being outcomes.

### 2.1 Act proportionately

Some incidents or breaches of regulatory requirements cause, or have the potential to cause, serious environmental damage. Others may interfere with people's enjoyment or rights, or our ability to carry out our activities. Our first response will be to prevent harm to people and the environment from occurring or continuing. Any enforcement action we take will be proportionate to the risks posed to people and the environment. We will also consider the seriousness of the breach of the law and its impact on legitimate businesses

### 2.2 Be consistent

We aim to take a similar approach in similar circumstances in:

- the advice we give
- how we respond to pollution and other incidents
- how we use powers
- how we decide whether to prosecute
- what sanction might be appropriate.

Our officers will take account of many variables:

- the scale of environmental impact
- the attitude and actions of individuals and managers of businesses
- the history of previous incidents or breaches

Decisions on enforcement action are a matter of professional judgement and our officers need to be able to exercise discretion.

## **2.3 Be transparent**

We will continue to train our staff and to develop our procedures to ensure that:

- where remedial action is required, we clearly explain why the action is necessary and when it must be carried out, making a distinction between best practice advice and legal requirements
- we provide the opportunity to discuss what is required to comply with the law before formal enforcement action is taken, unless urgent action is required, for example to protect the environment or to prevent evidence being destroyed
- where we require an operator to take urgent action, we will provide a written explanation of the reasons for this as soon as possible after the event; and
- we will provide a written explanation of any rights of appeal against formal enforcement action at the time the action is taken

## **2.4 Target enforcement action**

We will prioritise our regulatory effort towards activity that have the potential to cause serious environmental damage. We will focus action on lawbreakers or those directly responsible for the risk and/or those who are best placed to control it.

## **2.5 Be accountable**

We will take responsibility for our decisions and will justify them where appropriate. Our notices and enforcement and sanctioning paperwork includes information on how to appeal and complain. We will consult when we change our enforcement policy.

We will support periodic Welsh Government reviews of our regulatory and enforcement activities. We will also report on our enforcement and sanctioning activities, as required by legislation.

## **2.6 Have regard to wider responsibilities**

Our approach to making decisions on the Regulatory Enforcement and Sanctions (RES) Act, climate change and mercury civil penalties (as set out in annexes 1 to 3) takes account of our application of the principles of the sustainable management of natural resources (SMNR). We believe it also has regard to the main provisions of the Deregulation Act 2015 and to the desirability of promoting economic growth. Specifically, we will not allow operators to pursue economic growth at the expense of protecting people and the environment. We will make sure our enforcement action supports rather than hinders legitimate businesses.

### **3. Outcome focused enforcement**

We can use the sanctions that are available to us to achieve environmental outcomes. The outcomes that we seek can be divided into 3 general types:

#### **3.1 Tools to stop offending**

Notices

Stop notice

Suspension notice

Groundwater prohibition notice

Anti-pollution works notice

#### **3.2 Tools to restore or remediate**

Restoration notice

Enforcement notice

Notice to remove waste

Notice requiring forestry restocking

Anti-pollution works notice

#### **3.3 Tools to deter and/or punish**

Criminal Sanctions

Variable Monetary Penalties, Fixed Monetary Penalties.

Additional civil penalties for the EU Emissions Trading Scheme , the Carbon Reduction Commitment Energy Efficiency Scheme, and mercury civil penalties.

### **4. Enforcement and sanction penalty principles**

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

## 5. Enforcement options

Enforcement means any action we take where we suspect an offence has occurred or in some cases is about to occur. This may range from providing advice and guidance, serving notices through to prosecution, or any combination that best achieves the desired outcome.

In some cases, under the Environmental Damage Regulations 2009, enforcement action may be required in the absence of any suspected offence, but in most cases an activity that leads to 'environmental damage' under the Regulations will also constitute an offence under environmental legislation.

Within this overall approach, we will consider what a proportionate response to the offending looks like and that may be advice and guidance but depending on the circumstances may be a prosecution. Where an offence has been committed we will normally consider issuing some form of sanction as well as taking any other preventative or remedial action necessary to protect the environment or people. We aim to use civil and criminal sanctions in a manner that is appropriate to the offence.

The enforcement options we have available include:

- providing advice and guidance
- issuing a warning
- statutory enforcement notices and works notices
- prohibition notices
- suspension or revocation of environmental permits variation of permit conditions
- injunctions
- carrying out remedial works
- civil sanctions
- other civil and financial sanctions including Fixed Penalty Notices
- issuing a formal caution
- prosecution and orders ancillary to prosecution
- sanctions used in combination

Find the full list of every breach and offence we regulate and the enforcement action available to us in [Offence Response Options](#).

## 5.1 Interventions

### 5.1.1 Advice and guidance – Compliance assistance

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

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

### 5.1.2 Warnings

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

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

In the event of further non-compliance, a warning may influence our subsequent choice of sanction.

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

### 5.1.3 Notices, powers and orders

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

Examples of these notices, powers and orders include:

Environmental Permitting Regulations 2010 (EP Regulations):

Notices: Variation notice (regulation 20), Enforcement notice (regulation 36), Suspension notice (regulation 37), Revocation notice (regulation 22), Groundwater prohibition notice (Schedule 22, paragraph 9);

Court order: Enforcement by the High Court (regulation 42);

Remediation powers: Power to prevent or remedy pollution and recover costs (regulation 57), Power to dispose of radioactive waste (Schedule 23, part 3, paragraph 4), Orphan sources (Schedule 23, part 4, paragraph 8).

Environmental Protection Act 1990:

Notice to remove waste (Section 59 and 59Z).

Wildlife and Countryside Act 1981:

Court order : Restoration of damaged SSSI resulting from un-consented works

Forestry Act 1967 as amended:

Notices: Restocking notice (section 17A) and Enforcement notice (section 24)

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

## **5.2 Civil penalties for climate change schemes**

Certain schemes impose specific civil penalties for specific offences.

In the UK Emissions Trading Scheme, both in relation to stationary installations and aviation, the legislation sets out civil penalties in the form of financial penalties.

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

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

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

## **5.3 RES Act civil sanctions**

We may choose to impose a RES Act civil sanction to get the outcome(s) we want.

RES Act civil sanctions are not available for all offences. Find the full list of every breach and offence we regulate and the enforcement action available to us in the Offence Response Options document.

### **5.3.1 Fixed monetary penalties (FMPs)**

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

### **5.3.2 Variable monetary penalties (VMPs)**

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

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

### **5.3.3 Compliance notices**

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

### **5.3.4 Restoration notices**

These require the offender to take steps to put right any damage caused as a result of the non-compliance and address any harm. These notices can be used where damage has been caused to the environment and the action and work needed to address the damage can be identified and carried out by the offender. They may be used where restoration has not been undertaken voluntarily or we consider that a formal notice is necessary to ensure

it is undertaken. They may be used where there is no other suitable enforcement notice available and where previous advice or guidance to encourage restoration has not been followed. They can be combined with a Variable Monetary Penalty and a Compliance Notice.

### **5.3.5 Stop notices**

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

to immediately stop an activity that is causing, or presents a significant risk of causing, serious harm to human health or the environment and where a specified offence is being, or is likely to be, committed;

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

### **5.3.6 Enforcement undertakings (EUs)**

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

See Annex 2 for more information about Enforcement Undertakings and the Offence Response Options for the offences they are available.

### **5.3.7 Enforcement cost recovery notices (ECRNs)**

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

An Enforcement Cost Recovery Notice may not be served where a Fixed Monetary Penalty is imposed as the legislation does not allow this. Where an Enforcement Undertaking is offered, we are not entitled to require payment of our costs, but we will look more favourably upon Enforcement Undertakings which offer a contribution towards the



costs associated with an alleged offence and the acceptance of the undertaking through to its discharge under a completion certificate.

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

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

### **5.3.8 Non-compliance penalty notices (NCPNs)**

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

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

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

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

## **5.4 Criminal proceedings**

If we decided to prosecute we will:

- exercise prosecutorial independence

- ensure any case put forward for prosecution meets the test in the Code for Crown Prosecutors

### **5.4.1 Prosecutorial independence in decision making**

To ensure a fair decision-making process, the decision to prosecute must be taken independently of the investigator. This is particularly important within NRW, as the prosecutor works for the same organisation as the investigator.

Natural Resources Wales is a Welsh Government Sponsored Body. Our power to prosecute is set out in law and is controlled by our board. When we decide to prosecute, we are not influenced by a government department, minister or any third party. It is an independent decision.

The board delegates authority under the Statutory and Legal Scheme of Delegation (SaLS) to start proceedings or to caution to the joint approval of a senior operational manager and a senior lawyer. Both of these roles have separate line management.

The approval must be based on the:

- senior operational manager's decision there is justification to prosecute or caution following the investigation
- senior lawyer's review of the case file and decision that the proposed prosecution or caution meets the test laid down in the Code for Crown Prosecutors

The Head of Legal Services supervises conduct of all prosecution cases and our lawyers have the power to stop a case which it is no longer in the public interest to pursue. This role is independent of operational line management.

### **5.4.2 Fixed penalty notices (FPNs)**

A Fixed Penalty Notice is a financial penalty for an offence, imposed by the regulator, which if unpaid can be dealt with by way of prosecution in the criminal courts. FPNs are available to us for a limited number of offences. Where a Fixed Penalty Notice is served, payment of the penalty discharges the liability. Where this happens a record of the payment of the FPN will be kept and treated in the same way as a record arising from a warning. Where a Fixed Penalty Notice is imposed by us but not paid, the recipient will normally be prosecuted for the original offence

### **5.4.3 Formal caution**

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

to the offence have been considered to be appropriate for a prosecution and, indeed, a repetition of similar offending would be likely to lead to such a response.

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

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

#### **5.4.4 Prosecution**

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

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

We recognise that prosecution is a serious matter which should only be embarked upon after full consideration of the implications and consequences. Where it is decided that a prosecution is the most appropriate choice of sanction, we must meet the test set out in the Code for Crown Prosecutors, to determine whether there is sufficient evidence to provide a realistic prospect of conviction. In every case where there is sufficient evidence to justify a prosecution or to offer an out-of-court disposal, prosecutors must go on to consider whether a prosecution is required in the public interest

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

#### **5.4.5 Orders imposed by the court ancillary to prosecution**

We will always consider whether or not to apply for compensation or other ancillary orders. Listed below are the ancillary orders that a court may make following a conviction:

- disqualification of directors;
- confiscation of assets - Proceeds of Crime Act 2002;
- anti-social behaviour orders;
- forfeiture of equipment used to commit the offence;
- disqualification from driving;

- compensation;
- vehicle seizure;
- remediation – under the Environmental Permitting Regulations.

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

#### **5.4.6 Other action we may take after a conviction**

If the holder of an environmental permit is convicted, we may review and reconsider their competence to hold that permit. We may give them time to prove their competence or suspend or revoke their permit.

### **6. How we make enforcement decisions**

When we are considering our response to an offence there will normally be a range of possible sanctioning responses available for us to use. RES Act civil sanctions are not available for all offences and, where they are available, not all of the civil sanctions can be applied. Similarly, non-RES Act notices, powers and orders are not available for all offences. A list of all available sanctions for each offence is contained within our Offence Response Options (ORO).

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

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

### **7. Public interest factors**

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

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

### **7.1.1 Intent**

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

### **7.1.2 Foreseeability**

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

### **7.1.3 Environmental effect**

The response will address the potential and actual harm to people and the environment. Normally where an offence is classified under the Incident Categorisation Guidance (ICG) as High- Major/Significant or Compliance Classification Scheme (CCS) (or the equivalent under the Reservoirs Dam Risk Categorisation Scheme) as category 1 or 2, we would consider a prosecution, formal caution or a Variable Monetary Penalty. Certain offences are of a type designed to prevent environmental harm, for example particular abstraction offences. Where such an offence could give rise to either a category 1 or 2 CCS or High-Major/ Significant incident we would normally consider a prosecution, formal caution or a Variable Monetary Penalty.

### **7.1.4 Nature of the offence or breach**

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

### **7.1.5 Financial implications**

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

### **7.1.6 Deterrent effect**

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

### **7.1.7 Previous history and repeat offending**

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

### **7.1.8 Attitude**

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

### **7.1.9 Personal circumstances**

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

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

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

## **7.2 How we may deal with particular situations**

### **7.2.1 Serious offences**

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

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

- the offending has been intentional, reckless or grossly negligent or involves outright criminal activity;

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

### **7.2.2 Minor breach**

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

### **7.2.3 Repeat offending**

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

### **7.2.4 Failure to comply with a notice**

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

### **7.2.5 Operating without a permit, licence or other authority**

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

### **7.2.6 Multiple operations**

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

## **7.2.7 Body corporate**

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

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

## **7.2.8 Juveniles**

We will not normally prosecute a juvenile's first offence.

## **7.2.9 When we can combine sanctions and offences**

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

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

Where it appears desirable to use a combination of sanctions, we will carefully consider the extent to which this is lawful and appropriate.

For regimes which involve annual registration and compliance such as those established by Producer Responsibility obligations, where we choose a civil sanction response, we will endeavour to reflect all compliance failures by choosing one civil sanction option, which most fairly characterises the offences arising, rather than issuing a number of sanctions for each compliance period.

# **8. Liability for enforcement action**

## **8.1 Establishing liability**

To begin a prosecution, we must be satisfied that:

- the case before us meets the test in the Code for Crown prosecutors, namely that there is a realistic prospect of conviction
- be sure it is the most appropriate enforcement action to take based on the evidence in the case and that it is in the public interest



- consider the resulting implications and consequences

For most sanctions issued under the Regulatory Enforcement and Sanctions Act 2008 (RES Act) there is a higher burden of proof. We must be satisfied beyond reasonable doubt that an offence has been committed before we can issue a sanction.

For Enforcement Undertakings received under that Act we must have reasonable grounds to believe that an offence has been committed before we can accept the offer.

We will still want to be able to establish that an offence has been committed in case further enforcement action is necessary where an offender fails to comply with the undertaking.

For climate change and mercury civil penalties, we need to be satisfied that a breach has occurred on the balance of probabilities (the 'standard of proof' in civil cases). This means it is more likely than not to have occurred.

## **8.2 When we will prosecute an insolvent company or individual**

Where an individual or company is going through an insolvency procedure:

- we can still start or continue to prosecute, where the test under the Code for Crown Prosecutors is met, but we would need to get permission from the court or insolvency practitioner
- we will not normally apply a financial penalty where we have discretion, that is where the penalty is not mandatory
- they are excluded from qualifying for Energy Savings Opportunity Scheme (ESOS)

Under CRC if the insolvent body is a company within a group, then the remaining solvent members of that group are responsible for its liabilities.

## **8.3 Taking action against the Crown**

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

The Crown may be liable to a climate change or mercury civil penalty.

We may apply to the High Court for a declaration that any act or omission of the Crown is unlawful. This will depend upon:

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

## 9. Rights, records and cost recovery

### 9.1 When we will publish enforcement action

Publishing information in our annual regulation report on our enforcement activities raises awareness of the need to comply.

We publish:

- details of enforcement action on a public register for some regimes, for example, environmental permitting
- certain information about penalties for the climate change schemes
- a RES Act civil sanction that has been imposed or an enforcement undertaking offer accepted, unless we consider this to be inappropriate

The Rehabilitation of Offenders Act 1974 requires us to remove published information on convictions and formal cautions after a certain period of time. The time period will depend on the nature of the offence or penalty.

We will meet the requirements of the data protection legislation by not publishing information on an individual (as opposed to a company) unless required to by law. Public register and other requirements may override this exclusion.

Taking all of this into account, and except where we think ongoing enforcement action may be compromised, we will normally publish details of:

- all criminal convictions
- enforcement undertakings
- notices relating to breaches or enforcement other than information notices and notices of intent.

We will not publish details of notices under:

- CRC, where we have only used them to allow a participant to buy allowances in a special allocation
- ESOS, where there is an ongoing investigation and until we know that an operator is within the scope of the scheme - we may use an enforcement notice to check if an operator is within scope

For any RES Act, climate change or mercury civil penalty we impose, we will normally publish information on the:

- name of the person we imposed the penalty or sanction upon
- legal requirement that was not complied with

- penalty amount

Where we revoke an UK ETS permit or CCA as an enforcement action we will generally publish equivalent information about this.

We will publish results of criminal proceedings as soon as reasonably possible. These will normally remain available for 12 months.

In civil proceedings we will not publish information until any appeal has been determined or the time for appealing has passed. When we do publish this information, it will normally remain available for 12 months.

After 12 months, we may make information about penalties publicly available under the government's open data rules.

We issue press releases and other publicity relating to offences and offenders, proportionate to the sanction.

## 9.2 Representations and appeals

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

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

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

RES Act sanctions cannot be imposed in the following circumstances:

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

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

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

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

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

These are set out in more detail at Annex 3.

### **9.3 Victim's right to review**

Where we have completed an investigation into a criminal offence and made the decision not to prosecute the responsible party, an identified victim can request that we review that decision. Normally we will know the identity of any victims. We will tell the victim of our decision not to prosecute and advise that they may have that decision reviewed. They will need to inform us within 5 working days if they wish us to review it.

### **9.4 When we can recover costs**

Where the law allows, we will always seek to recover the costs of investigation and enforcement proceedings. Where we incurred costs, for example where we have carried out remedial works, we will seek to recover the full costs incurred from those responsible in accordance with the 'polluter pays' principle. Detailed provisions concerning costs arising from RES Act civil sanctions are set out in Annex 1.