

## 'RES' civil sanctions

A range of flexible civil sanctions to use as alternatives to prosecution were introduced by The Regulatory Enforcement and Sanctions (RES) Act 2008. Through the Environmental Civil Sanctions (England) Order 2010 and the Environmental Civil Sanctions (Miscellaneous Amendments) Regulations 2010 we have been granted powers to use them for a wide range of offences. The sanctions include fixed monetary penalties (FMP), variable monetary penalties (VMP), compliance notices (CN), restoration notices (RN), stop notices (SN), and enforcement undertakings (EU), third party undertakings and non-compliance penalties. To help users gain an understanding of the 'RES' Civil Sanctions, a quick reference summary is given below followed by a detailed explanation of each of the civil sanctions using a similar question and answer format.

	FMP	VMP	CN	RN	SN	EU
Combining Civil Sanctions						
FMP	-	X	X	X	X	X
VMP	X	-	✓	✓	✓	X
CN	X	✓	-	✓	✓	X
RN	X	✓	✓	-	✓	X
SN	X	X	X	X	-	X
EU						-
Notice of Intent Issued before service of the Final Notice	✓	✓	✓	✓	X	✓
Representations within 28 days of the service of the Notice of Intent	✓	✓	✓	✓	X	-
Representations on service of Final Notice	-	-	-	-	✓	-
Appeal to First Tier Tribunal on service of the Final Notice	✓	✓	✓	✓	✓	-
Completion Certificate	-	-	-	-	✓	✓
Appeal to First Tier Tribunal if a completion certificate is refused	-	-	-	-	✓	✓
Criminal prosecution possible if you fail to comply	X	X	✓*	✓*	✓	✓

\* but not if the CN or RN was combined with a VMP

## **1 RES Stop Notice**

### **What is a RES Stop Notice?**

- 1.1 A written notice that prohibits a person from continuing an activity. It can also prohibit an activity from continuing until specific steps have been taken.

### **What offences can a RES Stop Notice be used for?**

- 1.2 For some SSSI offences and some species licence breaches. See Annex 5 for full details.

### **When will a RES Stop Notice be used?**

- 1.3 Stop notices are appropriate where we believe offences are likely to continue and the aim of enforcement is to stop them. We are unlikely to issue stop notices in response to technical or minor offences but we will do if all attempts at stopping an activity voluntarily have been exhausted. We will consider the immediate use of stop notices for offences classified as medium or significant. If an offence is classified as significant a prosecution is likely to accompany a stop notice.

### **What standard of proof is required before a RES Stop Notice can be served?**

- 1.4 A RES Stop Notice can only be served on a person carrying on an activity or likely to carry on an activity where we reasonably believe:
- that activity is causing or presents a significant risk of causing serious harm to human health or the environment;
  - the activity is illegal.

### **Who can authorise a RES Stop Notice?**

- 1.5 Director Regulation in consultation with Head of Legal.

### **What is the process for serving a RES Stop Notice?**

- 1.6 A written notice will be served that specifies:
- grounds for serving a stop notice;
  - what offences have been committed (or are believed to have been committed);
  - what activities must stop;
  - positive actions required (if appropriate);
  - rights of appeal;
  - consequences of non-compliance.

### **Can I make representations or appeal against a RES Stop Notice?**

- 1.7 You can do both. While the legislation provides no formal arrangements for making representations, we will consider written representations to the person who served the stop notice or their manager if you prefer. The case will be reviewed independently of those who made the decision to serve the stop notice. We will inform you in writing of our

decision either to change the details of the notice, withdraw it completely or not change the notice.

1.8 Instructions on how to appeal will accompany the stop notice, or see section 6 in the main part of this document. You can also appeal against our refusal to issue a completion certificate (see below).

1.9 The grounds of appeal for a RES Stop Notice are:

- That the decision was based on an error of fact;
- That the decision was wrong in law;
- That the decision was unreasonable;
- That any step specified in the notice is unreasonable;
- That the person has not committed the offence and would not have committed it had the stop notice not been served;
- That the person would not, by reason of any defence, have been liable to have been convicted of the offence had the Stop Notice not been served;
- Any other reason.

### **Can you recover the costs of serving a RES Stop Notice?**

1.9 Yes via a RES Enforcement Cost Recovery Notice - see section 7 in the main part of this document.

### **What happens if I don't comply with a RES Stop Notice?**

1.10 Non-compliance with a RES Stop Notice is a criminal offence itself, and you could also be prosecuted for the offence we are attempting to stop.

### **If the RES Stop Notice required me to take certain actions, how will I know if I have complied with them?**

1.11 We are required to issue a completion certificate following successful completion of any actions a RES Stop Notice requested. You can also apply for a completion certificate at any time to which we must respond within 14 days. A person can appeal against our refusal to issue a completion certificate.

1.12 The grounds of appeal for a RES Stop Notice completion certificate are that:

- the decision to not to issue a completion certificate was based on an error of fact;
- the decision was wrong in law;
- the decision was unfair or unreasonable;
- the decision was wrong for any other reason.

### **Can a RES Stop Notice be used in combination with any other sanction?**

1.13 Yes. Service of a RES Stop Notice does not preclude any other civil or criminal sanctions being served except a RES Fixed Monetary Penalty (see section 5 of this Annex).

### **Can I claim compensation if my activity is stopped?**

- 1.14 Where a Stop Notice has been served we must compensate a person if, as a result of the service of the notice or the refusal of a completion certificate, that person has suffered loss, and:
- we withdraw or amend the Stop Notice because the decision to serve it was unreasonable or any step specified in the notice was unreasonable;
  - the person successfully appeals against the Stop Notice and the Tribunal finds that our service of the notice was unreasonable; or
  - the person successfully appeals against the refusal of a Completion Certificate and the Tribunal finds that our refusal was unreasonable.
- 1.15 In these circumstances compensation should cover loss including exceptional costs resulting from the service of the Stop Notice (for example, legal or expert advice).
- 1.16 A person who wishes to claim compensation must do so in writing to the address which appears on the Stop Notice with which they have been served.
- 1.17 Any dispute over whether compensation should be paid, or over the amount of any such compensation, shall be referred to the arbitration of a single arbitrator appointed by agreement between the parties to the dispute or, in default of agreement, a person will have the right of appeal to the First Tier Tribunal against our decision not to provide compensation or against the amount of compensation.
- 1.18 The compensation scheme is without prejudice to a person's rights to seek redress through the Ombudsman, judicial review or civil litigation.
- 1.19 A person may appeal against a decision not to award compensation or the amount of compensation on the grounds that:
- our decision was unreasonable;
  - the amount offered was based on incorrect facts;
  - for any other reason.

## **2 RES Compliance Notice**

### **What is a RES Compliance Notice?**

- 2.1 A written notice issued by Natural England which requires a person to take specified steps within a stated period to ensure that an offence does not continue or happen again.

### **What is the purpose of a RES Compliance Notice?**

- 2.2 To require actions to secure future compliance.

### **What offences can a RES Compliance Notice be used for?**

- 2.3 For some SSSI offences and some species licence breaches. See Annex 5 for full details.

### **When will a RES Compliance Notice be used?**

- 2.4 The notice is appropriate when the aim of enforcement is to secure future compliance thus preventing harm. We are unlikely to use them for offences classified as technical or minor but we will do if our attempts at obtaining voluntary future compliance have been ignored. We will consider their immediate use for offences classified as medium or significant.

### **What standard of proof is required before a RES Compliance Notice can be served?**

- 2.5 Beyond reasonable doubt.

### **Who can authorise a RES Compliance Notice?**

- 2.6 Director Regulation in consultation with Head of Legal.

### **What is the process for serving a RES Compliance Notice?**

- 2.7 Before imposing a notice we must first serve a 'notice of intent' setting out what is proposed. This must contain:
- grounds for proposing (including what offences we believe have been committed);
  - actions required, why and by when;
  - indicators of success;
  - circumstances in which we cannot serve a notice (e.g. defences to the offence);
  - how to make representations;
  - opportunity to propose Enforcement Undertakings or Third Party Undertakings (see section 8 below).
- 2.8 Once the period for making representations (28 days) has expired we must consider any representations and decide whether to confirm the notice unchanged, confirm it with changes or not confirm it. The final notice will look similar to the notice of intent although it will contain information on how to appeal rather than how to make representations, and it will also contain the consequences of failure to comply.

## **Can I make representations or appeal against a RES Compliance Notice?**

2.9 Yes. You are able to make representations following receipt of a notice of intent to serve a RES Compliance Notice. Full details of how to do this will be included with the notice of intent, and see section 6 in the main part of this document. If a RES Compliance Notice is confirmed you have the right to appeal against it. Full details will be included in the confirmed notice.

2.10 The grounds of appeal for a RES Compliance notice are:

- that the decision was based on an error of fact;
- that the decision was wrong in law;
- that the nature of the requirement is unreasonable;
- that the decision was unreasonable for any other reason;
- any other reason.

## **Can you recover the costs of serving a RES Compliance Notice?**

2.11 Yes via an Enforcement Cost Recovery Notice - see section 7 in the main part of this document.

## **What happens if I don't comply with a RES Compliance Notice?**

2.12 You can be prosecuted for the original offence (unless a RES Compliance Notice was served in conjunction with a RES Variable Monetary Penalty), or we can serve a 'RES Non-compliance Penalty Notice' for failure to comply with the RES Compliance Notice – see section 8 of this annex.

## **Can a RES Compliance Notice be used in combination with any other sanction?**

2.13 There are some restrictions:

- A RES Fixed Monetary Penalty cannot be served at the same time.
- You cannot be prosecuted if you were served with a compliance notice, unless you do not comply with the notice.
- If you were served with a RES Variable Monetary Penalty at the same time as a RES Compliance Notice you cannot be prosecuted at all.

### **3 RES Restoration Notice**

#### **What is a RES Restoration Notice?**

- 3.1 A written notice requiring a person to take steps to restore harm caused by non-compliance, so that the position is restored, so far as possible, to what it would have been if no offence had been committed.

#### **What is the purpose of a RES Restoration Notice?**

- 3.2 To restore the environment to the condition it was in prior to an offence being committed.

#### **What type of restoration will you require?**

- 3.3 See paragraphs 5.9 – 5.18 of the main part of this document.

#### **What offences can a RES Restoration Notice be used for?**

- 3.4 For some SSSI offences and some species licence breaches. See Annex 5 for full details.

#### **What standard of proof is required before a RES Restoration Notice can be served?**

- 3.5 Beyond reasonable doubt.

#### **When will a RES Restoration Notice be used?**

- 3.6 Restoration notices will be used when the aim of enforcement is to restore environmental harm. We are unlikely to use restoration notices for offences classified as minor although we will do if all attempts at voluntary restoration have been exhausted. For offences classified as medium and significant we will consider serving a restoration notices immediately.

#### **Who can authorise a RES Restoration Notice?**

- 3.7 Director Regulation in consultation with Head of Legal.

#### **What is the process for serving a RES Restoration Notice?**

- 3.8 Before imposing a notice we must first serve a 'notice of intent' setting out what is proposed. This must contain:
- grounds for proposing (including what offences we believe have been committed);
  - actions required, why and by when;
  - indicators of success;
  - circumstances in which we cannot serve a notice (e.g. defences to the offence);
  - how to make representations;
  - opportunity to propose Enforcement Undertakings and Third Party Undertakings (see sections 6 & 7 of this annex).
- 3.9 Once the period for making representations (28 days) has expired we must consider any representations and decide whether to confirm the notice unchanged, confirm it with

changes or not confirm it. The final notice will look similar to the notice of intent although it will contain information on how to appeal rather than how to make representations, and it will also contain the consequences of failure to comply.

### **Can I make representations or appeal against a RES Restoration Notice?**

3.10 Yes. You are able to make representations following receipt of a notice of intent to serve a RES Restoration Notice. Full details of how to do this will be included with the notice of intent, and see section 6 in the main part of this document. If a RES Restoration Notice is confirmed you have the right to appeal against it. Full details will be included in the confirmed notice, and see section 6 in the main part of this document.

3.11 The grounds of appeal for a RES Restoration notice are:

- that the decision was based on an error of fact;
- that the decision was wrong in law;
- that the nature of the requirement is unreasonable;
- that the decision was unreasonable for any other reason;
- any other reason.

### **Can you recover the costs of serving a RES Restoration Notice?**

3.12 Yes via an Enforcement Cost Recovery Notice - see section 7 in the main part of this document.

### **What happens if I do not comply with a RES Restoration Notice?**

3.13 You can be prosecuted for the original offence (unless a RES Restoration Notice was served in conjunction with a RES Fixed or Variable Monetary Penalty), or we can serve a 'RES Non-compliance Penalty Notice' for failure to comply with the RES Restoration Notice – see section 8 of this annex.

### **Can a RES Restoration Notice be used in combination with any other sanction?**

3.14 There are some restrictions:

- A RES Fixed Monetary Penalty cannot be served at the same time.
- You cannot be prosecuted if you were served with a RES Restoration Notice, unless you do not comply with the notice.
- If you were served with a RES Variable Monetary Penalty at the same time as a RES Restoration Notice you cannot be prosecuted at all.



## **4 RES Fixed Monetary Penalty (FMP)**

### **What is a RES FMP?**

4.1 A fine of £100 for individuals or £300 for a body corporate.

### **What offences can a RES FMP be used for?**

4.2 For some SSSI offences, some species licence offences and some breaches of the Impact Assessment (Agriculture) (England) (No.2) Regulations 2006. See Annex 5 for full details.

### **When will a RES FMP be used?**

4.3 When the aim is to deter technical or minor offences where previous advice and guidance has been ignored, or to remove any marginal illicit financial gain.

### **What standard of proof is required before a RES FMP can be served?**

4.4 Beyond reasonable doubt.

### **Who can authorise a RES FMP?**

4.5 Director Regulation in consultation with Head of Legal.

### **What is the process for serving a RES FMP?**

4.6 We must start by serving a 'notice of intent' to serve the penalty. This will include what offences we believe have been committed and the amount of the penalty.

4.7 A person in receipt of a notice of intent then has 28 days to either pay a 'discharge payment', make representations against the notice of intent, or do nothing.

4.8 If a person pays a discharge payment the amount payable is reduced by 50% (so £50 is payable if you are an individual or £150 is payable if you are a body corporate).

4.9 If a person makes representations we must consider them before confirming or withdrawing the penalty. If a person has not responded we will confirm the penalty.

4.10 Once confirmed the penalty is payable within 56 days. If you have previously made representations and you pay within 28 days the penalty is reduced by 50% (so £50 is payable if you are an individual or £150 is payable if you are a body corporate).

4.11 If payment is not received within 56 days the amount is increased by 50% (so £150 is payable if you are an individual or £450 is payable if you are a body corporate).

4.12 If payment is not made within 28 days of being increased by 50% we can recover the increased amount as a debt through the civil courts.

### **Can I make representations or appeal against a RES FMP?**

4.13 You can make representations following receipt of a 'notice of intent' to serve a penalty, and you can appeal if the penalty is confirmed to the First Tier Tribunal. Full details on

how to make representations or appeal will accompany the penalty, and see section 6 in the main part of this document.

4.14 The grounds of appeal for a Fixed Monetary Penalty are that:

- the decision was based on an error of fact;
- the decision was wrong in law;
- the decision was unreasonable;
- any other reason.

#### **Can you recover the costs of serving a RES FMP?**

4.15 No.

#### **What happens if I do not pay a RES FMP?**

4.16 The penalty is increased by 50% (see 4.12) and if it is still not paid becomes recoverable as a civil debt. See the process outlined above.

#### **Can a RES FMP be used in combination with any other sanction?**

4.17 If you have been served with a notice of intent to serve a RES FMP no other criminal sanction or RES civil sanction can be served.

#### **Where does the money go?**

4.18 To the Government's 'consolidated fund' –Natural England do not receive any of these proceeds.

## **5 RES Variable Monetary Penalty (VMP)**

### **What is a RES VMP?**

5.1 A penalty fine of up to £250,000. They are used to remove illicit financial benefit (either through gain or cost avoidance), and/or to deter future non-compliance. They can be used as an alternative to prosecution where there are strong mitigating factors.

### **What offences can a RES VMP be used for?**

5.2 For some SSSI offences, some species licence offences, some breaches of the Impact Assessment (Agriculture) (England) (No.2) Regulations 2006, and some breaches of the Weeds Act 1959 (see Annex 5).

### **What standard of proof is required before a RES VMP can be served?**

5.3 Beyond reasonable doubt.

### **When will a RES VMP be used?**

5.4 When the aim is to remove financial gain or saving from non-compliance and deter future offending. They will usually be considered for offences classified as medium – although they also provide a proportionate alternative to prosecution where there are strong mitigating factors for offences classified as significant.

### **Who can authorise a RES VMP?**

5.5 Director Regulation in consultation with Head of Legal.

### **What is the process for serving a RES VMP?**

5.6 Before imposing a notice we must first serve a 'notice of intent' setting out what is proposed. This must contain:

- grounds for proposing (including what offences we believe have been committed);
- amount to pay and a justification;
- circumstances in which we cannot serve a notice (e.g. defences to the offence);
- how to make representations;
- opportunity to propose Enforcement Undertakings and Third Party Undertakings (see sections 6 & 7 of this annex).

5.7 Once the period for making representations (28 days) has expired we must consider any representations and decide whether to confirm the notice unchanged, confirm it with changes or not confirm it. The final notice will look similar to the notice of intent although it will contain information on how to appeal rather than how to make representations, and it will also contain the consequences of failure to comply.

### **Can I make representations or appeal against a RES VMP?**

5.8 You can make representations following receipt of a notice of intent and you can appeal if a notice is confirmed. Full details will accompany the notice of intent or confirmed notice, and see section 6 in the main part of this document.

5.9 The grounds of appeal for a RES VMP are:

- that the decision was based on an error of fact;
- that the decision was wrong in law;
- that the amount of the penalty is unreasonable;
- that the nature of the requirement is unreasonable;
- that the decision was unreasonable for any other reason;
- any other reason.

### **Can you recover the costs of serving a RES VMP?**

5.10 Yes via an Enforcement Cost Recovery Notice, but this amount will be deducted from the penalty. See section 7 in the main part of this document.

### **What happens if I do not pay?**

5.11 You cannot be prosecuted for the original offence. Instead we can recover the debt through the civil courts.

### **Can a RES VMP be used in combination with any other sanction?**

5.12 Once a final notice of a RES VMP has been served you cannot be prosecuted for the original offence. Other civil sanctions except a RES Fixed Monetary Penalty can be served.

### **Where does the money go?**

5.13 To the Government's consolidated fund – not to Natural England.

### **What is the upper limit of a RES VMP?**

5.14 £250,000 per offence. Although if the offence is only triable summarily (only in a Magistrates Court) it cannot be higher than the maximum a Magistrates Court can impose for that offence.

### **How are VMPs calculated?**

5.15 The Government has issued guidance to regulators on how they should calculate Variable Monetary Penalties<sup>24</sup>. This methodology follows that guidance. It is important to note that:

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

### **Overview of components of a Variable Monetary Penalty**

---

<sup>24</sup> <http://www.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf>

5.16 Variable Monetary Penalties have three components:

- i Financial benefit component – to remove financial benefit from the offence including:
  - avoided costs (e.g. failure to provide information required by a species licence);
  - operating savings (e.g. undertaking land management activities with insufficient equipment or staff);
  - financial gain as a direct result of the offence (e.g. sale of protected species, or organised recreational activities that damage protected habitats).
- ii Deterrent component – based on one of three starting points determined by the characteristics of the offence, which is then adjusted according to aggravating and mitigating factors. The three starting points are:
  - the financial benefit from (i) above;
  - the costs required to comply with a restoration notice (usually used where there is no significant financial benefit);
  - the maximum criminal fine a Magistrate’s Court could impose for the specific offence (usually used where there is neither significant restoration nor significant financial benefit).

The deterrent component is added to the financial benefit to:

- change the behaviour of the offender;
  - act as a general deterrent to others to help improve compliance overall; and
  - reassure those that do comply that the non-compliant have not secured any advantage from offending.
- iii Deduction component – to reduce the penalty by some of the costs incurred by the offender:
    - returning to compliance;
    - restoring harm;
    - compensating those affected by the offending; and
    - recovery of NE’s investigative costs.

### **Process for calculating a VMP**

5.17 The basic calculation is:

$$\text{(Financial benefit + Deterrent) – Deductions = VMP}$$

**Where:**

$$\text{Deterrent} = \text{£ (Starting point x Total aggravating factor) – £ (Total mitigation)}$$

5.18 We calculate the Variable Monetary Penalty in the following three stages:

5.19 **Stage 1** - We estimate the financial benefit gained by the offender in committing the offence.

- 5.20 **Stage 2a** – We choose a starting point for the deterrent component as either:
- the financial benefit gained by the offender in committing the offence;
  - the costs required to comply with a restoration notice; or
  - the maximum criminal fine a Magistrate’s Court could impose for the specific offence where there is neither significant restoration nor significant financial benefit.
- 5.21 We choose the starting point for the deterrent component depending upon the nature of the offence. We will usually choose the one with the highest value, unless there are reasonable grounds for choosing a lower value.
- 5.22 **Stage 2b** - We assess the aggravating factors and the mitigating factors and use them to modify the chosen starting point to give us the Variable Monetary Penalty total. Some aggravating factors may be such as to indicate the use of a prosecution rather than a civil sanction such as a Variable Monetary Penalty.
- 5.23 **Stage 3** - We apply deductions. These are costs already incurred by the offender that relate directly to the offence.
- 5.24 We provide more detail on each of these stages below.

### **Stage 1 - estimating financial benefit**

- 5.25 Variable Monetary Penalties aim to remove any direct financial benefit from an offence including:
- avoided costs;
  - operating savings; and (where applicable);
  - any gain made as a direct result of the offence.
- 5.26 Examples of avoided costs may include a failure to provide information required by species licences. Examples of operator savings may include undertaking land management operations with insufficient personnel or equipment, or insufficient monitoring of a licence exclusion technique. Examples of gain made as a direct result of the offence could include the sale of a protected species or an organised event which has damaged protected habitats or disturbed protected species.
- 5.27 Financial benefit will not always be an identifiable feature of a case. For example some damaging activities may have been undertaken purely for domestic or recreational purposes.
- 5.28 Wherever possible we will base the calculation of financial gain on evidence. Offenders can be required by powers under Schedule 2 1(6) Environmental Civil Sanctions Order 2010 and Schedule 2 1(5) Environmental Civil Sanctions (Wales) Order 2010 to provide the information necessary to determine a proportionate VMP, including financial information. If they fail to comply with this requirement, we will estimate the financial benefit based on the evidence we have, or based on similar cases or industry practices.

### **Stage 2a - choosing the starting point for the Deterrent component**

- 5.29 The choice will depend on the characteristics of the offence. Reference should be made in each case to the Enforcement Guidance. To reflect the seriousness of the offence, the

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

- 5.30 Each case is decided on its individual merits, allowing for discretion to be applied in cases such as those where, despite severe environmental damage, only limited restoration can practicably be undertaken, or where a large number of relatively minor or technical offences could give rise to a disproportionate penalty should the statutory maximum be used.
- 5.31 We acknowledge that no two cases are the same and that they will often contain several differing elements. We cannot therefore prescribe the exact circumstances where each starting point will be used or for which offence a starting point will be used. However the characterisation of the offending, and hence choice of starting point, can be broadly determined as follows.

Cases that are characterised by financial benefit.

- 5.32 This will include cases where offending behaviour generates significant financial benefit in comparison to the restoration costs if present or the available statutory maxima. Whilst it is ultimately our estimate it should, where possible, be determined with evidence directly from the offender or from industry associations and professional bodies to give a degree of certainty.
- 5.33 Example: A farmer has consent to graze SSSI grassland until the end of October. Despite warnings stock remain on site 4 weeks after this deadline. This is causing overgrazing and poaching. Other farmers in the area have removed their stock and are angry that he is achieving these savings – which they estimate at £500 per week. We serve a stop notice to require stock removal and a VMP to give confidence to the local farmers that they will not be financially disadvantaged by complying. As c.£2000 has been gained this is used as the starting point for the deterrent component. Restoration costs are £0 as the only restoration required is the cessation of the activity. The statutory maximum in the Magistrates Court is £20,000 which would be disproportionate.

Cases characterised by restoration costs.

- 5.34 This will be the starting point for calculating the deterrent component where there is environmental damage resulting in costs from the issue of a restoration or remediation notice<sup>25</sup> that are significant when compared to any financial benefit from the offence or the available statutory maxima.
- 5.35 Use of restoration costs as a starting point only extends to those associated with restoring the position to that which it would have been if the offence had not been committed. It does not include restoring or repairing infrastructure. Costs incurred by us in restoring the environment are excluded from this stage of the penalty calculation.
- 5.36 We do not include costs incurred by the offender voluntarily as this would act as a disincentive for voluntary restoration and restitution to adversely affected third parties. They may however be taken into account in the deductions component (stage 3).

---

<sup>25</sup> See annexes 2 & 3 for details of the restoration / remediation notices we can serve

- 5.37 The restoration costs associated with the notice must be determined with some certainty, either because they have already been carried out (where specified in a Notice), or where they are the result of the specification in a Notice and costed (and these costs are accepted) by the offender.
- 5.38 We do not take historic damage into account. We will only take account of costs that we can demonstrate arose from the commission of the offence.
- 5.39 In the first place we will rely on the costs assessed for the restoration notice. If no costs have been assessed for the restoration notice, we will base the level of detail of the assessment we carry out on whether the outcome of the assessment is likely to have a significant impact on the level of the penalty.
- 5.40 Calculating restoration costs will not always be straightforward as the costs can often increase or decrease during restoration. Estimates will often need to be made.
- 5.41 Where a particular type of impact may be significant enough to affect the level of the penalty, it should first be described in quantitative terms and then, if possible, in monetary terms. Government guidance on valuation will be used for the quantification.
- 5.42 Example: A landowner constructs an artificial fishing pontoon on the banks of a SSSI river. It has smothered and shaded out important bankside vegetation. It is also a potential flood risk. We request its removal and this is undertaken voluntarily. However a few months later we discover a further pontoon has been constructed in a more secluded and important stretch of the river. We serve a restoration notice to remove the pontoons and a variable monetary penalty to deter future offences by this landowner and others. The restoration costs are estimated at £700 as the landowner provides us with an invoice from the contractors who were used to remove the first pontoon. These restoration costs are used as the starting point for the deterrent component. There is little financial gain as the pontoon was constructed for recreational purposes only. The maximum fine a Magistrates Court can impose for the offence is £20,000 and as such this starting point would be disproportionate.

*Cases where the maximum criminal fine a Magistrates Court could impose for the specific offence is used.*

- 5.43 This will be the starting point for calculating the deterrent component where the financial benefit and/or restoration costs are either not present, cannot be ascertained with any certainty or are not a significant feature of the case.
- 5.44 This will be the maximum penalty that can be applied in a Magistrates' Court for the offence committed, although for consistency and proportionality the figure used will not exceed £5000. We must be satisfied that we have the evidence to prove each individual offence beyond reasonable doubt, and care will be taken to distinguish between a single continuing offence (such as failure to adhere to licence conditions) and periodic repeated failures (such as failure to provide annual returns).
- 5.45 Example: A fishing club successfully applies for a licence to shoot a number of cormorants causing damage to a fishery. They breach the conditions of the licence by shooting more than it allows. Advice and guidance is given backed up by a warning letter. The following year the same licensee breaches the conditions with an even greater impact on the cormorants in that several are shot beyond that allowed by the licence.



The statutory maximum is £5000, although this can be applied to each bird shot, this is used as the starting point for determining the proportionate deterrent.

**Stage 2b Assess aggravating and mitigating factors to modify the chosen starting point of the deterrent component**

- 5.46 After the starting point is chosen, it will then be adjusted to reflect the individual circumstances of the case as broken down into aggravating and mitigating features.
- 5.47 Aggravating features will be assessed and scored, and their scores added to make a multiplying factor. This will be multiplied by the starting point to make the aggravated penalty. This multiplier cannot exceed a maximum of four times the starting point.
- 5.48 Similarly, mitigating features will reduce the deterrent component. Mitigating features will be assessed and scored as percentages, which will then be added to give a total percentage reduction in the aggravated penalty. Application of mitigating features will normally allow up to an 80% reduction of the deterrent element, but the regime can allow for 100% reduction in exceptional circumstances.
- 5.49 The aggravating and mitigating factors are calculated as follows:

Total aggravating factor = Sum of assessed individual aggravating factors (with a maximum total of 4).

Total mitigating factor = Sum of assessed individual mitigating factors (Percentage of aggravated penalty).

Total mitigation = £ (Starting point x total aggravating factor) - total mitigating factor.

Aggravating factors

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

<b>Blameworthiness</b>	
Blameworthiness or culpability will be assessed on a sliding scale to ensure that there is fairness to the offender and differentiation between offences. The score for this factor is selected from the following whole numbers scale to best fit the case.	
Multiplier to be applied	Explanation
x 3	Deliberate offence. However it is anticipated that prosecution will be the normal outcome for deliberate acts.
x 2	Reckless offence. For acts that are committed intentionally without regard for the consequences and or the environmental harm that results.

x 1	Negligent offence. For offences committed where the offender was in a position to stop or prevent the offence but failed to recognise the danger or have the correct procedures in place.
x 0.1	Low/no culpability. For offences that occur as a result of a genuine accident rather than the absence of prudent preventative measures, or where normally adequate preventative measures and procedures were in place but were exceptionally overcome.

<b>History</b>	
Previous offences will be relevant to the current offence. These may relate to the specific site (for example a permit breach where there have been previous similar breaches at that site) or they may relate to the offender in which case they may indicate management or corporate failures. The score for this factor is selected from the following whole numbers scale to best fit the case.	
Multiplier to be applied	Explanation
x 3	Previous criminal conviction for offences occurring within the last three years. However it is anticipated that prosecution will be the normal outcome where this is the case.
x 2	Previous simple caution or civil sanction for offences occurring within the last two years. This encompasses earlier admissions to previous offences and long-running offending behaviour.
x 1	Previous warning letters or Fixed Monetary Penalties within the last two years.
x 0	No previous offences. Factor absent.

<b>Attitude</b>	
This factor accounts for the offender's attitude to and actions following the offence. It includes lack of prompt action to eliminate or reduce the risk of damage resulting from regulatory non-compliance and lack of cooperation with us in investigating the offence, assessing the damage or assessing a proportionate Variable Monetary Penalty. The score for this factor is selected from the following whole numbers scale to best fit the case.	
Multiplier to be applied	Explanation
x 3	Despite knowledge, no action was taken to stop the offending or stop significant/serious environmental damage, refusal to cooperate with the investigation, assessment or remediation. These types of factors would normally warrant prosecution but we will allow an element of flexibility.

x 1.5	Partial, insufficient or incomplete action was taken to stop the offence and prevent harm from occurring or continuing and/or there was some co-operation but this was not full and voluntary. For example where prompt action would have prevented the offending continuing or damage from occurring or persisting. Where information had to be required or compelled rather than offered, assistance or cooperation with remediation was delayed or only partial.
x 0	Prompt action which immediately stops the offending, full and frank cooperation with the investigation and remediation. Factor absent, for example when immediate remedial measures or process changes are undertaken, or there is complete cooperation with the investigation and/or remedial activity.

<p><b>Foreseeability and risk of environmental harm</b></p> <p>This factor considers whether the offending or any resulting environmental harm could have been foreseen by the offender and how effectively the environmental risks and their consequences were being managed. Where the risk of harm or the actual impact can be accurately assessed, we will base our assessments on our classification of the offence as technical, minor, medium or significant. This factor therefore takes into account any actual impacts arising from the offence. The score is selected from the following whole numbers scale to best fit the case.</p>	
Multiplier to be applied	Explanation
x 4	Where the offence was obvious and bound to occur without action and where there was a significant incident. Incidents and breaches of this nature would normally warrant prosecution, but we will allow an element of flexibility for exceptional cases.
x 3	Where the offence, while not obvious, was bound to occur without the required or reasonable measures put in place and where there was a medium incident.
x 2	Offence foreseeable and resulted in a minor incident.
x 1	Technical offence but where the offence was a foreseeable consequence of inaction.
x 0	Where the offending was unforeseeable. Factor absent. This will include cases which have arisen as a result of third party intervention that could not have been reasonably foreseen, for example isolated vandalism or the actions of a disgruntled employee.

<b>Ignoring previous advice and guidance</b>	
This factor will be applied where advice and/or guidance have previously been given to an offender, or where specific codes of practice apply to the sector (for example Code of Good Agricultural Practice or the Heather and Grass Burning Code). The score is selected from the following whole numbers scale to best fit the case.	
Multiplier to be applied	Explanation
x 2	Where advice for avoiding or mitigating the offence has been given to the offender and not followed. This will include breaches of a licence condition or a Notice requiring provisions that would have directly impacted or prevented the offence or its consequences, and failure to follow direct advice, for example advice given during a site visit.
x 1	Where codes of practice or standard technologies exist relating to the activity from which the offence arose but were not (or only partly) followed or implemented. This will include failure to install industry-standard equipment which would prevent the offence occurring or the impact of the offence, or use of inferior equipment or outdated equipment.
x 0	Where codes of practice documents or standard technologies exist which were followed. This will include cases where this was implemented or where advice and guidance were followed but failed to prevent the offence from occurring.

5.51 Where a single factor of the highest value (4) is present, this will represent the maximum aggravating factor and no others factors, although they may be pertinent to the case, need to be considered. Where several factors are present we will add them up, but they are capped at a maximum of four times the starting sum. The deterrent component is multiplied by the aggravating multiplier before mitigating factors and deductions are considered.

#### Mitigating factors

5.52 The deterrent component is then reduced to take into account any mitigating factors. Where present, each applicable mitigating factor is scored and awarded a percentage reduction. These are fixed percentage numbers for most of the mitigating factors, except factors 'Personal circumstances' and 'Case-specific features', which are whole number percentages within a maximum range.

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

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

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

Cooperation with Natural England: maximum 10%	
The following percentages can be added together to produce a maximum of 10% where both are present.	
Deduction	Explanation
5%	Voluntary and full cooperation in investigation and assessment of a proportionate VMP This will apply to actions taken following the discovery of an offence, such as investigating the circumstances that led to it, attending interviews and providing records.
5%	Voluntary and prompt cooperation in remediation. This will apply where environmental impact has arisen from the offence.

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

Immediate and voluntary remediation and restoration: maximum 20%	
The following accounts for voluntary works only. Works required by the relevant notice are deductible from the final overall figure (see stage 3 deductions below).	
Deduction	Explanation
20%	Complete remediation and restoration undertaken without requirement. This will apply where works are undertaken voluntarily without formal requirement and they restore the environment as far as possible to that which existed prior to the offence.
10%	Partial remediation and restoration undertaken without requirement. This will apply where works are undertaken which partially restore the position, but where additional works could be done but have not been done, for example because the offender considers the cost of doing so will only achieve minimal benefit.

Attitude to the offence: maximum of 10%	
Deduction	Explanation

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

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

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

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

**Stage 3 – Deductions**

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

5.57 These costs include:

- the costs of complying with a civil sanction we have served e.g. a RES Compliance or Restoration Notice;
- any costs recovered by us from the offender using a RES Enforcement Cost Recovery Notice;

- payments to compensate those affected as part of a Third Party Undertaking (TPU);
- an amount to reflect any other costs resulting from the offence that the regulator considers are justified (this could include payments already made to the Fire and Rescue Services);
- agri-environment payments we have withheld or deductions in Single Farm Payment by the Rural Payments Agency;
- offender's ability to pay.

5.58 Further details on these costs are given below.

*The costs of complying with a civil sanction.*

5.59 Where a civil sanction is served in relation to a specific offence, the costs of actions taken to comply with it will be deducted, either evidenced by the offender or estimated by us. For notices which require compliance the costs could include the costs of capital investment, contracted services and additional staff time required above and beyond that which would have been applied under normal circumstances. For notices that require remediation the costs could include the costs of actual restoration works, administrative costs and the costs of monitoring. Where notices include future works to be undertaken, the costs will be assessed and agreed by us before they are deducted; where this is uncertain we will make a fixed estimate.

*The costs recovered through an Enforcement Cost Recovery Notice.*

5.60 Where a RES Enforcement Cost Recovery Notice (see section 9 in the main part of this document) is served, the total, where paid, will be deducted from the overall Variable Monetary Penalty prior to its issue. The Notice will include our legal, expert, or administrative costs incurred up to the point at which the Variable Monetary Penalty is served.

*An amount to reflect a voluntary RES Third Party Undertaking.*

5.61 Details of RES Third Party Undertakings are at section 7 of this Annex. We will deduct an amount to reflect the amount expended by the offender in compensating third parties affected by the offence. This will be accounted for at a rate of £1 deduction for every £1 spent. Only that aspect of the Third Party Undertaking that is directly related to restitution for the specific offence will be taken into account, and the undertaking must be to an unconnected third party (that is, not subsidiaries or relations).

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

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

Agri-environment payments we have withheld or deductions in Single Farm Payment by the Rural Payments Agency.

- 5.63 We believe it would be disproportionate for farmers and other land managers to receive, for the same incident, a VMP and reductions in agri-environment scheme payments we administer and/or reductions in single farm payments imposed by the Rural Payments Agency. As such we are unlikely to use VMPs where reductions in agri-environment or single farm payments will be made, unless there is significant financial gain which will not be sufficiently removed by the reductions in agri-environment and/or single farm payments. Where VMPs are used in combination with reductions in agri-environment or single farm payments the sum of those reductions will be subtracted from the VMP.

Ability to Pay

- 5.64 Where offenders can evidence that they genuinely cannot afford to pay a VMP we will consider further reductions.



## **6 RES Enforcement Undertaking**

### **What is a RES Enforcement Undertaking?**

- 6.1 A proposal to take steps that would make amends for non-compliance and its effects. If we accept the proposals it will be a voluntary agreement between us and the person who made the proposal.

### **If an undertaking is carried out can other sanctions be served?**

- 6.2 No other civil or criminal sanction may be served, for the same offence, if we accept the Enforcement Undertaking and it is fully carried out.

### **When should I make an Enforcement Undertaking?**

- 6.3 The sooner you propose an Enforcement Undertaking the more likely we are to accept it. If you are aware that you may have committed an offence you should report it to us as soon as possible. We can then offer further advice as appropriate.

### **What should I include in an Enforcement Undertaking?**

- 6.4 An enforcement undertaking must be proposed in writing. We can supply a template if you wish. It should contain the following information as an absolute minimum. Those preparing restoration plans are strongly advised to consult paragraphs 5.9 – 5.18 of the main part of this document on what restoration we expect following illegal damage to the environment.

- the offence(s) you believe you have committed;
- a factual description of the incident that led to the offence(s);
- the impact of the offences(s) on the environment (and wider community if relevant);
- the actions you are proposing to undertake to restore the damage you have caused;
- an explanation of how the actions will restore the damage you have caused;
- indicators of success and monitoring measures for each action to restore damage;
- the actions you are proposing to undertake to ensure future compliance, and how you intend to monitor this;
- if relevant, how you intend to compensate those affected by your offences;
- intermediate and final deadlines.

Where harm has been caused but restoration is not achievable, in addition to the relevant bullets above, the Enforcement Undertaking should include:

- the actions you are proposing to take to provide equivalent benefit;
- an explanation of how the actions will provide the equivalent benefit;
- indicators of success and monitoring measures for each action.

### **Will you always accept Enforcement Undertakings?**

- 6.5 We want to make the most of the opportunities that enforcement undertakings provide. However in some cases because of public interest factors, the behaviours involved or the risks and consequences arising from the offence being committed; a Variable Monetary Penalty or Prosecution may be the most appropriate enforcement response. An undertaking may also be rejected if it does not meet the minimum requirements outlined above, or the restoration we expect as outlined in paragraphs 5.9 – 5.18 of the main part

of this document. Where practical and appropriate we will speak to third parties directly affected by an offence about proposed enforcement undertakings before deciding whether to accept them.

### **For what offences can Enforcement Undertakings be proposed?**

6.6 See Annex 5.

### **Will you confirm that you are satisfied that the Enforcement Undertaking has been complied with?**

6.7 Yes. We will send you a completion certificate. When you apply for a completion certificate we must respond within 14 days. If we don't respond or refuse to issue a certificate, you can appeal to the Tribunals Service – see section 6 in the main part of this document. Grounds for appeal are that:

- the decision to not to issue a certificate was based on an error of fact;
- the decision was wrong in law;
- the decision was unfair or unreasonable;
- the decision was wrong for any other reason.

### **What if you believe I haven't complied?**

6.8 We can confirm what actions have not been completed and depending on the circumstances involved consider serving a sanction for the original offence.

## 7 Third Party Undertakings

### What is a Third Party Undertaking?

7.1 When a person has received a notice of intent to serve a RES Compliance Notice, Restoration Notice or a Variable Monetary Penalty, they are able to offer a Third Party Undertaking. A Third Party Undertaking involves taking action to benefit a third party affected by the offence. For example, we could issue a notice of intent to a person, notifying our intention to issue a Variable Monetary Penalty. The person could then offer to pay compensation to persons affected by the offence, and if we accepted this the amount of the Variable Monetary Penalty would be reduced by £1 for every £1 spent on the Undertaking). Such undertakings cannot be offered by a person after a final notice has been served. A Third Party Undertaking may not always be appropriate: the civil courts are likely to remain the means by which affected persons obtain compensation when appropriate for damage to health or substantial economic interests.

### When would a Third Party Undertaking be appropriate?

7.2 A Third Party Undertaking would normally be an appropriate option where there is identifiable harm to local people or communities. Harm may include any:

- loss of amenity;
- nuisance;
- damage to local economic activity.

7.3 Measures offered in a Third Party Undertaking could for example:

- compensate for the harm by providing or making improvements to the local environment or amenities;
- involve financial payment of compensation.

7.4 As far as possible a Third Party Undertaking should reflect the harm caused and benefit the same people who have suffered as a result of it. We will normally expect the person offering a Third Party Undertaking to consult those affected by the harm and benefitting from the Third Party Undertaking. We will take this into account in deciding whether to accept it and how to take it into account when making our sanctioning decision.

7.5 Third Party Undertakings will be recorded on a public register. As such they provide an opportunity for offenders to restore their public reputation more quickly.

### How is a Third Party Undertaking different to an Enforcement Undertaking?

7.6 The main differences between Enforcement Undertakings and Third Party Undertakings are that:

- Third Party Undertakings can only be offered in response to a Notice of Intent for a 'RES' Compliance Notice, a Restoration Notice or a Variable Monetary Penalty (and as such only for the offences where these sanctions are available). An Enforcement Undertaking can be offered for most offences and as an alternative to any sanction, up to the point that the final notice or warning letter is served or prosecution papers are delivered.

- An Enforcement Undertaking can address non-compliance directly and/or make amends for it (this can involve both restoration and compensation) whereas a Third Party Undertaking can solely be used to compensate third parties who have been affected by the non-compliance.
- Third Party Undertakings can be accepted in conjunction with RES Compliance Notices, Restoration Notices and Variable Monetary Penalties whereas once an Enforcement Undertaking is accepted no other sanction can be applied unless it is not fully complied with.

## **8 RES Non-Compliance Penalty Notice**

### **What is a RES Non-Compliance Penalty Notice?**

8.1 These can be served following non-compliance with a RES Restoration or Compliance Notice. The amount is based on the costs an offender is avoiding by not complying with the original notice. If the notice has been ignored completely the penalty will be 100% of the costs avoided, but if a notice has been partially complied with the penalty will be reduced accordingly.

### **What will a notice look like?**

8.2 It will contain the following:

- grounds for imposing;
- amount to be paid;
- payment deadline;
- how to pay;
- consequences of failing to pay;
- rights of appeal;
- if appropriate, how payment can be avoided, e.g. by a future deadline by which to comply with the original restoration or compliance notice.

### **What if I believe the amount is unreasonable?**

8.3 You can appeal - and see section 6 in the main part of this document.

8.4 The grounds of appeal for a RES Non-Compliance Penalty Notice are that:

- the decision to serve the notice was based on an error of fact;
- the decision was wrong in law;
- the decision was unfair or unreasonable for any reason;
- the amount of the penalty was unreasonable;
- Any other reason.

### **What if I do not pay?**

8.5 The penalty can be recovered through the civil courts.

### **Where will the money go?**

8.6 To the Government's consolidated fund – not to Natural England.

### **‘Specialist’ civil sanctions**

The civil sanctions described in Annex 2 are designed to be available for a wide range of offences. Some legislation also provides us with the opportunity to issue civil sanctions that are tailored to the circumstances of very specific offences. This annex explains those sanctions and the circumstances in which they may be appropriate. It also discusses when we will consider withholding financial incentives and permissions for certain activities.

#### **1 ‘Environmental Damage Regulations’ (‘EDR’) Prevention and Remediation Notices**

##### **What are EDR prevention and remediation notices?**

- 1.1 A prevention notice and a remediation notice may be served where cases that fall within the Environmental Damage (Prevention and Remediation) Regulations 2009. These Regulations only apply if damage to biodiversity is so severe that certain species or habitats are prevented from reaching or maintaining their favourable conservation status within the UK, or if the integrity of a SSSI is adversely affected (flora and fauna only). See Annex 1 or Defra guidance<sup>26</sup> for more details.

##### **When will these notices be used?**

- 1.2 A prevention notice can be served when there is an imminent threat of damage, or where there is actual damage - as defined in the Regulations - and there is a need to prevent it from getting worse.
- 1.3 A remediation notice will be served when there is damage - as defined in the Regulations.

##### **What standard of proof is required before these notices can be served?**

- 1.4 Balance of probabilities.

##### **Who can authorise these notices?**

- 1.5 Prevention notices will often need to be served in an emergency and as such any Natural England Adviser can serve them. Remediation notices will be served after the damage has been contained and must be drawn up with the operator who caused the damage and with persons affected. They must be authorised by our Director Regulation in consultation with the Head of Legal.

##### **What is the process for serving these notices?**

- 1.6 If a prevention notice is needed to prevent an imminent threat of damage being realised, a written notice will be served that describes the threat and specifies the measures required to prevent damage.

---

<sup>26</sup> <http://www.defra.gov.uk/environment/policy/liability/pdf/indepth-guide-regs09.pdf>

- 1.7 If a prevention notice is needed to prevent an actual case of damage from worsening, a written notice will be served that describes the damage and specifies the measures required to prevent further damage.
- 1.8 For remediation notices, Natural England must first notify the operator of the activity we believe to be responsible for the damage stating that (i) we believe the damage is severe enough to fall within the Regulations and (ii) we believe they are responsible for the damage. The operator is then required to propose remediation measures. We must consider these and consult relevant persons prior to serving an EDR Remediation Notice.

### **Can I make representations or appeal against these notices?**

- 1.9 There is no formal process for making representations against a prevention notice, but you can write to the person who served the notice or their manager if you prefer. There is no right of appeal.
- 1.10 For remediation notices you can appeal against the pre-notification described above as well as the final notice itself. Full details of how to appeal will be provided at the pre-notification stage and when the notice is served, and see section 6 in the main part of this document.

### **Can you recover the costs of serving these notices?**

- 1.11 Yes. We can recover the reasonable costs of preparing a prevention notice, assessing whether the damage is severe enough to fall within the Regulations, establishing who is the responsible operator, establishing what remediation is appropriate, carrying out the necessary consultation, and monitoring the remediation. If you cannot pay these costs we can place a charge on your premises.

### **What happens if I do not comply with these notices?**

- 1.12 Failure to comply is a criminal offence.

### **Can these notices be used in combination with any other sanction?**

- 1.13 Yes. Serving a notice does not preclude the use of any other sanction.

## **2 SSSI Restoration Order**

### **What is an SSSI Restoration Order?**

2.1 A court order requiring a SSSI to be restored.

### **When can an SSSI Restoration Order be used?**

2.2 Following a successful prosecution for a SSSI offence – see Annex 1.

### **What standard of proof is required before an SSSI Restoration Order can be imposed?**

2.3 Criminal – beyond reasonable doubt. We must have secured a criminal conviction before obtaining this order.

### **What type of restoration will be required?**

2.4 See paragraphs 5.9 – 5.18 in the main part of this document.

### **Who can authorise an SSSI Restoration Order?**

2.5 The Court following our request during prosecution proceedings.

### **What is the process for serving an SSSI Restoration Order?**

2.6 We ask the court to make the order during court proceedings.

### **Can I make representations or appeal against an SSSI Restoration Order?**

2.7 You may have the opportunity to make representations against the order during court proceedings. If you are considering appealing against a court order we strongly advise you seek legal advice.

### **Can you recover the costs of serving an SSSI Restoration Order?**

2.8 Yes we can apply to the court for our costs to be reimbursed.

### **What happens if I do not comply with an SSSI Restoration Order?**

2.9 This is a criminal offence itself and is also considered as contempt of court. The latter is punishable by an unlimited fine and up to 2 years imprisonment.

### **Can an SSSI Restoration Order be used in combination with any other sanction?**

2.10 We must have secured a successful prosecution before applying for an order.



### **3 'EIA' stop and remediation notices**

#### **What are EIA stop and remediation notices?**

- 3.1 The Environmental Impact Assessment (Agriculture) (England) (No.2) Regulations 2006 – see Annex 1 – contain the power to serve stop and remediation notices for breaches of these Regulations.

#### **What is the purpose of these notices?**

- 3.2 A stop notice will prohibit all work with immediate effect. A remediation notice will aim to return damaged semi-natural land to its former condition.

#### **What offences can these notices be used for?**

- 3.3 Offences under the Environmental Impact Assessment (Agriculture) (England) (No.2) Regulations 2006 only.

#### **When will these notices be used?**

- 3.4 Stop notices are appropriate where we believe offences are likely to continue and the aim of enforcement is to stop them. We are unlikely to issue stop notices in response to technical or minor offences but we will do if all attempts at stopping an activity voluntarily have been exhausted. We will consider the immediate use of stop notices for offences classified as medium or significant. If an offence is classified as significant a prosecution is likely to accompany a stop notice.
- 3.5 Remediation notices will be used when the aim of enforcement is to restore environmental harm. We are unlikely to use remediation notices for offences classified as minor although we will do if all attempts at voluntary restoration have been exhausted. For offences classified as medium and significant we will consider serving a remediation notice immediately. If an offence is classified as significant a prosecution is likely to accompany a remediation notice.

#### **What standard of proof is required before a stop or remediation notice can be served?**

- 3.6 Balance of probabilities.

#### **Who can authorise these notices?**

- 3.7 Director Regulation in consultation with Head of Legal.

#### **What is the process for serving a notice?**

- 3.8 For a stop notice, a written notice will be served which outlines the offences we believe have been committed, what activities must stop, the consequences of non-compliance and the rights of appeal. A remediation notice will outline the offences we believe have been committed; what remedial actions are required, a deadline for completing them and indicators of success; consequences of non-compliance; and rights of appeal.

#### **Can I make representations or appeal against these notices?**

3.9 You can do both. There is no formal procedure for making representations but you can write to the person who served the notice or their manager if you prefer. Details on how to appeal will accompany a notice, and see section 6 in the main part of this document.

**Can you recover the costs of serving these notices?**

3.10 No.

**What happens if I don't comply with these notices?**

3.11 Failure to comply is a criminal offence, and you may also be prosecuted for the original offences you committed.

**Can these notices be used in combination with any other sanction?**

3.12 Yes. Service does not preclude any other civil or criminal sanction being served.

**Can I claim compensation if my activity is stopped?**

3.13 No.

## **4 Enforcement (Pesticide) Notice**

### **What is an Enforcement (Pesticide) Notice?**

- 4.1 A notice to remedy significant deficiencies in the storage arrangements or the use of pesticides. The notice will direct any reasonable remedial or preventative measures that need to be taken. The notice is issued under section 19(5) or (6) of the Food and Environment Protection Act 1985 (FEPA). A public register of these notices is listed on the Health and Safety Executive website<sup>27</sup>.

### **What offences can an Enforcement (Pesticide) Notice be used for?**

- 4.2 Breaches of FEPA in relation to pesticides.

### **When will an Enforcement (Pesticide) Notice be used?**

- 4.3 When there are significant deficiencies in the storage arrangements or the use of pesticides, and as a result there are concerns about the safety of people and the environment.

### **What standard of proof is required before an Enforcement (Pesticide) Notice can be served?**

- 4.4 Balance of probabilities.

### **Who can authorise the service of an Enforcement (Pesticide) Notice?**

- 4.5 Offences will usually come to our attention through our enforcement work under the Wildlife Incident Investigation Scheme (WIIS)<sup>28</sup>. A Natural England Wildlife Management Adviser or above, working on behalf of the Chemicals Regulation Directorate (a Directorate of the Health and Safety Executive), will make the decision to issue a Notice along with the Health and Safety Executive.

### **What is the process for serving an Enforcement (Pesticide) Notice?**

- 4.6 A written notice will be issued specifying the offence and the reasons why we believe that remedial or preventative measures are necessary. A time limit for the remedial action to be taken will be given.

### **Can I make representations or appeal against an Enforcement (Pesticide) Notice?**

- 4.7 The Notice is covered by the Environment and Safety Information Act 1988 (ESIA) and will be recorded in a public register once any information about a trade secret or manufacturing process has been deleted. There is a right of appeal within 14 days of receipt of the Notice against the wording of public register entries if it would disclose information about a trade secret or manufacturing process.

### **Can you recover the costs of serving an Enforcement (Pesticide) Notice?**

---

<sup>27</sup> <http://www.hse.gov.uk/notices/default.asp>

<sup>28</sup> WIIS is a post-approval monitoring scheme which makes enquiries into the death or injury to wildlife, companion animals or beneficial invertebrates as a result of exposure to pesticides. Further details can be found at: <http://www.naturalengland.org.uk/ourwork/regulation/wildlife/enforcement/poisoning.aspx#wiis>

4.8 No.

**What happens if I don't comply with an Enforcement (Pesticide) Notice?**

4.9 Failure to comply is a criminal offence, enforcement of which is the responsibility of the Health and Safety Executive.

**Can an Enforcement (Pesticide) Notice be used in combination with any other sanction?**

4.10 The use of a notice under FEPA does not preclude the use of other sanctions by Natural England, Health and Safety Executive or other enforcement bodies.

## **5 Enforcement (Weeds) Notice**

### **What is an Enforcement (Weeds) Notice?**

5.1 A notice that requires action to prevent certain injurious weeds<sup>29</sup> from spreading. The notice is issued under the Weeds Act 1959.

### **When will an Enforcement (Weeds) Notice be used?**

5.2 In general we will only use these powers as a last resort. We will expect those complaining about injurious weeds to have attempted to resolve the problem with the landowner. Priority will be given to cases where weeds are threatening land used for keeping or grazing horses and other livestock, or farmland used to produce conserved forage or other agricultural activities. Complaints about weeds spreading to private gardens or allotments are not normally investigated.

### **What standard of proof is required before an Enforcement (Weeds) Notice can be served?**

5.3 We must be satisfied that there are injurious weeds growing on the land before we can serve a notice.

### **Who can authorise the service of an Enforcement (Weeds) Notice?**

5.4 An Adviser who specialises in this area.

### **What is the process for serving an Enforcement (Weeds) Notice?**

5.5 A written notice will be served outlining the actions required.

### **Can I make representations or appeal against an Enforcement (Weeds) Notice?**

5.6 You can make representations by writing to the person who served the notice or to their manager if you prefer. You cannot appeal against this notice.

### **Can you recover the costs of serving an Enforcement (Weeds) Notice?**

5.7 No.

### **What happens if I don't comply with an Enforcement (Weeds) Notice?**

5.8 You will be committing an offence. In addition we can take the action outlined in the notice and recover the costs from the land occupier.

---

<sup>29</sup> common ragwort (*Senecio jacobaea*), spear thistle (*Cirsium vulgare*), creeping or field thistle (*Cirsium arvense*), broad-leaved dock (*Rumex obtusifolius*) and curled dock (*Rumex Crispus*)

## **6 Possession Order**

### **What is a possession order?**

6.1 A civil mechanism to secure the eviction of those in illegal occupation of land. It is an order of the Court.

### **What is the purpose of a possession order?**

6.2 To evict those in illegal occupation of land.

### **When will a possession order be used?**

6.3 We will seek the removal of illegal encampments on National Nature Reserves that we own or where we otherwise have the required legal status to do so. We will apply to the civil courts for a possession order to evict illegal encampments after reasonable effort has been made to seek the voluntary removal of the encampment. We may also support and assist landowners and other authorities in their action to remove illegal encampments from land in private ownership, where encampments are causing significant harm to the environment.

### **What standard of proof is required before a possession order can be served?**

6.4 Balance of probabilities.

### **Who can authorise a possession order?**

6.5 Director Regulation in consultation with Head of Legal.

### **What is the process for serving a possession order?**

6.6 We apply to the Court.

### **Can I make representations or appeal against a possession order?**

6.7 The Court will usually hold a hearing prior to granting a possession order. This is effectively the time to make representations about why the order should not be made. If an order is served and you are considering appealing against it we strongly recommend you seek legal advice.

### **Can you recover the costs of serving a possession order?**

6.8 Yes - and see section 7 in the main part of this document.

### **What happens if I do not comply with a possession order?**

6.9 The Court will arrange for the removal from the land of the illegal occupants.

### **Can a possession order be used in combination with any other sanction?**

6.10 Yes. Service of a possession order does not preclude any other sanction from being served upon the illegal encampments.

## **7 Conditioning, revocation or refusal of a species licence or other permission**

### **What is this sanction?**

7.1 Many of the regulatory regimes we operate involve granting permissions for activities that would otherwise be unlawful. Where such activities are not being undertaken in accordance with the permission we have the option of adding extra conditions to the permission, revoking the permission completely, or refusing to provide permission in the future.

### **What is the purpose of conditioning, revoking or refusing a licence or other permission?**

7.2 Adding additional conditions to a permission can be used to ensure an activity is carried out lawfully in the future. Revoking a permission or refusing to grant it in future can be used to immediately stop an activity or prevent it from occurring in the future.

### **What offences can this sanction be used for?**

7.3 Any offences that have involved the breach of a licence or other permission.

### **When will this sanction be used?**

7.4 We will always consider use of this sanction where our aim is to encourage future compliance or to stop unlawful activity.

### **What standard of proof is required before a licence or other permission can be conditioned, revoked or refused?**

7.5 Balance of probabilities.

### **Who can condition, revoke or refuse a licence or other permission?**

7.6 Such action usually requires the approval of a Senior Specialist within our Regulatory Function.

### **If my permission is conditioned, revoked or refused can I make representations or appeal?**

7.7 You can always make representations. If you believe our action is unreasonable you should write back to the person who has sent the letter, or to their manager if you prefer. Whether you can appeal depends on the type of permission involved. If you do have the right to appeal this will be explained to you in writing at the time a permission is conditioned, revoked or refused.

### **Can you recover the costs of imposing this sanction?**

7.8 No.

### **What happens if I don't comply with the new conditions of my permission, or if I continue my activities despite the revocation or refusal?**

7.9 You are likely to be committing a criminal offence.

**Can this sanction be used in combination with any other sanction?**

7.10 Yes. It does not preclude any other sanction from being served.



## **8 Withholding financial incentives**

### **What is this sanction?**

8.1 We operate a number of agri-environment schemes such as Environmental Stewardship and the Conservation and Enhancement Scheme. Where offences are committed by those in receipt of payments under these schemes we can withhold those payments as a form of sanction.

### **What is the purpose of withholding financial incentives?**

8.2 Such action can be used to remove any financial gain a person has achieved from not complying with their scheme, to ensure they do not gain a competitive advantage over those that do. They could also be withheld until a person has returned to compliance.

### **What offences can this sanction be used for?**

8.3 Any offences that we are responsible for enforcing where the offender is in receipt of agri-environment scheme payments. This is perhaps most likely on Sites of Special Scientific Interest.

### **When will this sanction be used?**

8.4 We will always consider using this sanction where an offender is in receipt of an agri-environment scheme we administer, especially where our aim is to remove illicit financial gain and to encourage future compliance.

### **What standard of proof is required before payment can be withheld?**

8.5 Balance of probabilities.

### **Who can withhold payment?**

8.6 Land Management Advisers responsible for the administration of agri-environment schemes.

### **If payment is withheld can I make representations or appeal?**

8.7 You can make representations. You will be informed in writing of how to do so when payment is withheld. You cannot appeal against the withholding of payments.

### **Can you recover the costs you have incurred in withholding payment?**

8.8 No.

### **What happens if I continue to commit offences despite my payments being withheld?**

8.9 Your payments may be withheld further or your scheme terminated completely. Other sanctions may also be served.

### **Can this sanction be used in combination with any other sanction?**

8.10 Yes. It does not preclude any other sanction from being served.

## **How much payment will be withheld?**

- 8.11 The amount will be proportionate to the severity, extent and permanence of the breach. Further details are available in your Entry Level Scheme Handbook.

# Criminal sanctions and injunctions

This annex explains the sanctions that will be reserved for the most serious offences – simple cautions, prosecutions and injunctions.

## 1 Simple caution

### What is a simple caution?

- 1.1 A formal warning to an offender about an offence that they have committed. It is not a criminal conviction or a form of sentence although it will be recorded by Natural England and can be considered if offences continue.

### Why is it called a 'simple' caution?

- 1.2 To distinguish it from a 'conditional caution' this requires certain actions to be completed in order to avoid prosecution and to receive a caution instead. We do not have the power to serve conditional cautions.
- 1.3 A simple caution also need to be distinguished from a 'PACE caution' which is given verbally prior to asking suspects questions to ensure their answers are admissible evidence in court.

### What is the purpose of a simple caution?

- 1.4 Simple cautions deal quickly with offenders and divert offenders away from court. They may act as a deterrent to re-offending.

### What offences can a simple caution be used for?

- 1.5 All offences we are responsible for enforcing.

### When will a simple caution be used?

- 1.6 Typically where prosecution is not in the public interest and alternative civil sanctions are not available. The Home Office Guidelines 16/2008 (or any replacement guidelines) on cautioning adult offenders will be considered.

### What standard of proof is required before a simple caution can be issued?

- 1.7 Beyond reasonable doubt.

### Who can authorise a simple caution?

- 1.8 Director Regulation in consultation with Head of Legal.

### What is the process for serving a simple caution?

1.9 A caution will be sent to you by Recorded Delivery or delivered in person. You will be asked to confirm that you accept it by signing for it. By doing this you admit the offence outlined in the caution.

**Can I make representations or appeal against a simple caution?**

1.10 There are no formal procedures for either representations or appeal. If you do not intend to accept a caution you should write back to the person who served it with your reasoning. We will take account of any representations that are made in determining whether to issue proceedings for the offence. Our normal response when a caution is not accepted will be to prosecute.

**What happens if I do not accept a simple caution?**

1.11 See above.

**Can you recover the costs of serving a simple caution?**

1.12 No.

**Can a simple caution be used in combination with any other sanction?**

1.13 Not if you accept it. Other sanctions can be issued if you don't.

## **2 Criminal Prosecution**

### **What is a prosecution?**

2.1 Criminal proceedings seeking a conviction and penalty.

### **What is the purpose of a prosecution?**

2.2 To punish the most severe environmental offending and to create a deterrent against future non-compliance.

### **What offences can a prosecution be used for?**

2.3 All offences we are responsible for enforcing.

### **When will a prosecution be used?**

2.4 For offences we classify as significant, where the aim of enforcement is to punish and deter offending, and where the Code for Crown Prosecutors indicates that prosecution is in the public interest.

### **What standard of proof is required?**

2.5 Criminal – beyond reasonable doubt.

### **Who can authorise a prosecution?**

2.6 Natural England's Director Regulation in consultation with Head of Legal.

### **What is the process for prosecuting?**

2.7 You will receive information on the offences you are accused of and a summons to attend a court hearing. You are strongly advised to seek legal advice when in receipt of these documents.

### **Can I make representations or appeal against a prosecution?**

2.8 You will be notified of the proceedings. You are strongly recommended to seek legal advice and if you wish to contest the case to attend court on the date of the hearing. Even if you intend to plead guilty it is recommended that you seek legal advice and attend court, or your representative does so, in order to enter a plea in mitigation on your behalf.

### **Can you recover the costs of a prosecution?**

2.9 Yes we can apply to the Court to recover our costs. See section 7 in the main part of this document.

### **What happens if I don't pay a fine?**

2.10 The recovery of unpaid fines is a matter for the court and not Natural England as the fines are owed to the Treasury.

## **Can a prosecution be used in combination with any other sanction?**

- 2.11 Yes. Other civil sanctions which require outcomes such as restoration or compliance may be served alongside a prosecution. We cannot prosecute if we have served a notice of intent to serve a RES Fixed Monetary Penalty or Variable Monetary Penalty.

## **3 Injunction**

### **What is an Injunction?**

3.1 An order of the Court directing an individual, company or organisation to stop or carry out a particular activity. Courts may grant Injunctions where there has been or is highly likely to be, a breach of a public law which constitutes a criminal offence. The Court's discretion to grant an Injunction is most likely to be exercised where there has been, or is highly likely to be, a blatant or deliberate breach of the legislation and there is a real risk or actual environmental harm.

### **What is the purpose of an Injunction?**

3.2 To prevent serious damage to the environment, usually from ongoing offences.

### **What offences can an Injunction be used for?**

3.3 All offences we are responsible for enforcing.

### **When will an Injunction be used?**

3.4 We will apply to the Court for an Injunction as a last resort and only when all voluntary co-operation and enforcement mechanisms have been explored and exhausted. If we have access to RES Stop or Compliance Notices for the offences that are being committed we are likely to consider these first.

### **What standard of proof is required before an Injunction can be issued?**

3.5 Balance of probabilities.

### **Who can authorise an Injunction?**

3.6 Director Regulation in consultation with Head of Legal.

### **What is the process for obtaining an Injunction?**

3.7 We apply to the Court.

### **Can I make representations or appeal against an Injunction?**

3.8 The Court will usually hold a hearing prior to granting an injunction. This is effectively the time to make representations about why the injunction should not be served. Normally (unless an emergency injunction is being sought) you will be notified of the proceedings. We strongly recommend you seek legal advice if you wish to object to an injunction being issued or you wish to appeal against one that has been served.

### **Can you recover the costs of serving an Injunction?**

3.9 Yes. See section 7 in the main part of this document.

### **What happens if I do not comply with an Injunction?**

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

**Can an Injunction be used in combination with any other sanction?**

3.11 Yes. Service of an injunction will not preclude any other sanction from being issued.