

Mr Alex Hamilton
Waste Policy and Regulation Branch
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30 March 2015

Welsh Governments Call for evidence on the use and effectiveness of Civil Sanctions for environmental offences under The Environmental Civil Sanctions (Wales) Order 2010, The Environmental Civil Sanctions (Miscellaneous) (Wales) Regulations 2010 and the Single Use Carrier Bags Charge (Wales) Regulations 2010

Dear Sir

Natural Resources Wales works as a regulator, partner and advisor to businesses, non-governmental organisations, Local Authorities and communities to delivering Welsh Government and European Union policies and priorities. Our ecosystem approach promotes integrated natural resource management that delivers social, economic and environmental benefits to the people of Wales.

Civil sanctions are a fundamental regulatory tool for the application of the ecosystem approach in Wales. The ability for the regulator to be proportionate in response to an offence or breach is key to support the delivery of the social, economic and environmental benefits we seek.

Consultation Questions

Question 1: In the area where you work, have civil sanctions deterred non-compliance and encouraged behaviour change and future compliance?

Civil sanctions are only available for a restricted subset of offences dealt with by Natural Resources Wales. For those offences where they are available for use, there is evidence that recipients have adopted appropriate measures to improve their future compliance, for example addressing inadequate site infrastructure to prevent future non-compliance. In our opinion civil sanctions are most valuable for bringing offenders into compliance where they may have been previously unaware of the law and the implications of their actions. The use of civil sanctions in these cases, as a

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proportionate response to an offence rather than a criminal prosecution, has been found to be an effective mechanism for behavioural change and future compliance.

Question 2: Are there circumstances in which civil sanctions should be used more or less?

Natural Resources Wales believes that civil sanctions should be made available more widely across our remit to enable us to be a fully proportionate and risk based regulator.

Civil sanctions provide Natural Resources Wales with a valuable regulatory tool for addressing offenders who are not considered to have blatant disregard for the law. The most impact can be gained by addressing those who benefit from an understanding of what they have done wrong and give them the opportunity to comply. Our experience has shown that such businesses welcome the opportunity to put things right whilst benefiting the environment, without the stigma, costs and reputational difficulties that a criminal case would bring. The provision of an environmental service by targeting action on restoration and prevention, better serves and benefits the wider society than criminal prosecution or using a warning letter.

Natural Resources Wales have identified opportunities where wider use of civil sanctions would be appropriate. We have been working with Welsh Government to identify actions that we can take to improve compliance, in particular in the waste sector, including ensuring that we have the appropriate powers to undertake effective enforcement action.

Firstly, civil sanctions would be beneficial where currently there is a mismatch of tools available to use. For example civil sanctions are not available for both the Packaging Waste Obligations and the Producer Responsibility Obligations (including Waste Electrical and Electronic Equipment Regulations 2013 and the Waste Batteries and Accumulators Regulations). This can create difficulties because often one business will have committed both an offence under the Packaging Waste obligations and the Producer Responsibility Obligations. The current arrangements would mean that one offence could be dealt with by a civil sanction and the other would require a criminal route. In such cases it would be more efficient and beneficial to be able to take civil actions for all offences where appropriate.

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Secondly, changes to key legislation in England and Wales has meant that the majority of pollution and waste cases are now dealt with through the Environmental Permitting (England and Wales) Regulations 2010 (EPR).

Recent legislation has been passed in England on 6 April 2015 to enable civil sanction use in EPR, where Companies and individuals will be able to offer Enforcement Undertakings. Disparity in the legislation can cause cross border issues with companies, in particular with water quality offences which can straddle boundaries, where civil sanctions can be undertaken in England but not in Wales. Resolution of this discrepancy would result in a more proportionate approach across Wales and provide for a consistent approach where issues may be cross border.

Natural Resources Wales would welcome the use of civil sanctions for EPR offences in Wales to enable us to better regulate. Through work with Welsh Government we have highlighted the need for extending civil sanctions (for example to introduce stop notices, fixed /variable monetary penalties, enforcement undertakings) powers to EPR permits.

Question 3: Have civil sanctions secured better collaboration between local authority's and retailers?

No comment.

Question 4: Do you agree that using civil sanctions provides an effective and fair means of enforcement?

Natural Resources Wales believes that Civil Sanctions are a valuable and essential regulatory tool. They enable regulators to take a proportionate approach in line with the requirements of the Regulators' Code. Used in the appropriate circumstances a civil sanction will not only result in a company's willingness to comply and remain compliant, but also enhance connection to their local environment and community. Civil sanctions can provide benefit to the environment and restore it to how it was or offer other local amenity benefits. Fines imposed by the courts would not provide such benefits to the affected locality or community.

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Question 5: Are there ways you think that the current system of civil sanctions could be improved?

As discussed in more detail in previous questions, expanding the use of civil sanctions to include EPR, in conjunction with appropriate and timely updates to enable the use of civil sanctions in Wales, would be beneficial and assist NRW to be a more effective regulator in Wales. These changes would allow for a consistent approach across regulatory boundaries.

Question 6: Have civil sanctions brought those not complying back into compliance?

In our experience civil sanctions have brought companies not complying back into compliance. For example eight companies that have utilised Enforcement Undertakings, for offences relating to not registering as a packaging producer, all came into compliance and have continued to fully comply with their responsibilities and obligations under the Packaging Regulations.

Question 7: Have they related proportionately to the offence and overall, helped to level the playing field?

It is Natural Resources Wales opinion that the use of civil sanctions has helped to level the playing field. In relation to producer responsibility, they have linked proportionately to the offence and the level of donation to charity has reflected the avoided costs of the Companies by failing to comply with the legislation. The non-packaging waste Enforcement Undertakings that have been accepted have reflected the offence and the likely penalty that, based on the Environmental Sentencing Guidelines, would be imposed by a Court.

Question 8: Have they removed risks and prevented harm from occurring or continuing?

Civil sanctions provide this mechanism, where the removal of risk and prevention of reoccurrence of the offence, or to stop the offending from continuing, is one of the key criteria for consideration before any Enforcement Undertakings are accepted.

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In a recent case in South Wales a company, whose site infrastructure had led to a number of pollution incidents in an adjacent water course, invested a significant amount of money in improving its site infrastructure such that a pollution incident could no longer occur.

One benefit of civil sanctions is that donations can be made for environmental improvement, for example, an impacted watercourse or piece of land. However, where there is not a specific victim or impacted environment, our natural resource management approach promotes donations focused on linking environmental improvements with benefits to the local community.

Question 9: Have they ensured damage is restored, restitution is provided to local communities and that the polluter pays?

Where damage can be restored or restitution carried out, it is included within the offer. Where possible, donation will be directed to rectify impacted watercourses or land. However, where there is not a specific victim or impacted environment, our natural resource management approach promotes donations focused on linking environmental improvements with benefits to the local community.

An Enforcement Undertaking will not be accepted without these aspects being considered, including the costs incurred by Natural Resources Wales in investigating the offence and any future compliance checks that may be required.

Question 10: Have they secured better results or the same results at lower cost?

In our experience the civil sanctions have secured good results for compliance and continuing compliance as well as resulting in direct improvements to the environment in Wales.

The use of civil sanctions has enabled proportionate action for offences where only Prosecution would have been an option previously. It is considered in these cases that the result is better at lower cost.

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Question 11: Have negative 'unintended consequences' been avoided?

Natural Resources Wales have not identified any negative "unintended consequences".

Question 12: Is there anything else you would like to raise in terms of this review?
No further comment.

Yours faithfully

Isobel Moore
Head of Business, Regulation and Economics

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