

Summary: Intervention & Options

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| Department /Agency: Defra 1280 | Title: Impact Assessment of Marine licensing enforcement (civil sanctions and appeals) | |
| Stage: Final | Version: Final | Date: December |
| Related Publications: See at beginning of evidence base. | | |

Available to view or download at:

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What is the problem under consideration? Why is government intervention necessary? Non-compliance with a marine licensing regime has potential to harm the environment, human health or pose risk to other sea-users. The present enforcement regime, focused on criminal penalties and with limited flexibility, is unlikely to provide a strong deterrent because the regulator (Marine Management Organisation (MMO)) has no credible penalty for breaches other than the most serious where prosecution is appropriate.

What are the policy objectives and the intended effects? The objectives are to reduce the risk of a “compliance gap” by enabling the MMO to use monetary penalties alongside the other civil sanctions introduced by the Marine and Coastal Access Act (MCAA) to deal with licensing breaches where criminal prosecution is neither appropriate nor proportionate. The MMO will then have the flexibility to impose a sliding scale of sanctions depending on the severity of the offence or licence breach, from the issuing of monetary penalties to licence revocation, with the option to impose criminal penalties for the most serious offences. The intended effects are to remove financial benefit from non-compliance; provide an effective deterrent against non-compliance and provide a level playing field for those acting within the law. A fair and transparent appeal mechanism will also be introduced to ensure the regulator is accountable for its decisions. Evidence from consultations show that stakeholders support the proposals.)

What policy options have been considered? Please justify any preferred option. Three main options have been considered: Option 1: Do nothing. Option 2: Introduce an appeals system for the civil sanctions which the MCAA provides for without secondary legislation, e.g. compliance or remediation notices. Option 3: Introduce secondary legislation for Fixed Monetary Penalties and Variable Monetary Penalties, as well as an appeals system for all the civil sanctions. Our preferred option is Option 3 as this provides the most proportionate and transparent mechanism for dealing with non-compliance.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects? The Explanatory Memorandum to the MCAA explains that a Post Implementation Review will take place approximately five and ten years after Royal Assent for the Act.

Ministerial Sign-off For the Final Impact Assessment:

Signed by the responsible Minister:

Date:

Summary: Analysis & Evidence

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| Policy Option: 2 | Description: Introduce a system of appeals for statutory notices. |
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| COSTS | ANNUAL COSTS | | Description and scale of key monetised costs by 'main affected groups' One-off costs to the First tier Tribunal of setting up tribunal and hearing appeals (45k). Annual costs of administering appeals to MMO (9.4k); Business (7.5k); Tribunal Service (9k) |
| | One-off (Transition) | Yrs | |
| | £ 45k | 1 | |
| | Average Annual Cost (excluding one-off) | | |
| | £ 26k | 10 | |
| Total Cost (PV) | | | £ 241k |
| Other key non-monetised costs by 'main affected groups' | | | |

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|---|--|------------|--|
| BENEFITS | ANNUAL BENEFITS | | Description and scale of key monetised benefits by 'main affected groups' None quantified |
| | One-off | Yrs | |
| | £ | 1 | |
| | Average Annual Benefit (excluding one-off) | | |
| | £ | 10 | |
| Total Benefit (PV) | | | £ N/A |
| Other key non-monetised benefits by 'main affected groups' A formal and transparent appeals mechanism will help to ensure that civil sanctions are applied fairly and promote confidence in the system. As the government has not yet introduced the civil sanctions without an appeals system, the costs also need to be seen in the context of the overall net benefit of the civil sanctions. | | | |

Key Assumptions/Sensitivities/Risks A key assumption is that the introduction of the appeals system will not trigger behavioural change and deliver a reduction in rates of non-compliance compared to the "do nothing" option. The key assumptions linked to the costs of introduction are made on the number of appeals (based on past data on notices served) and experience of the proportion of those notices that are appealed.

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|-------------------------|-------------------------|--|--|
| Price Base Year 2011 | Time Period Years 10 | Net Benefit Range (NPV) £ N/A | NET BENEFIT (NPV Best estimate) £ N/A |
|-------------------------|-------------------------|--|--|

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|---|-------|------------|-----------------|
| What is the geographic coverage of the policy/option? | | England | |
| On what date will the policy be implemented? | | April 2011 | |
| Which organisation(s) will enforce the policy? | | MMO | |
| What is the total annual cost of enforcement for these organisations? | | £ 9k | |
| Does enforcement comply with Hampton principles? | | Yes | |
| Will implementation go beyond minimum EU requirements? | | N/A | |
| What is the value of the proposed offsetting measure per year? | | £ N/A | |
| What is the value of changes in greenhouse gas emissions? | | £ minimal | |
| Will the proposal have a significant impact on competition? | | No | |
| Annual cost (£-£) per organisation (excluding one-off) | Micro | Small | Medium Large |
| Are any of these organisations exempt? | No | No | N/A N/A |

| | | |
|---|--------------------|-----------------------|
| Impact on Admin Burdens Baseline (2005 Prices) | | (Increase) |
| Increase of £ 0 | Decrease of £ 0 | Net Impact £ 0 |

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Summary: Analysis & Evidence

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| Policy Option: 3 | Description: Introduce FMPs & VMPs, as well as the appeals system |
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| COSTS | ANNUAL COSTS | | Description and scale of key monetised costs by 'main affected groups' Set up and ongoing costs to the MMO (250k) and businesses (296k) in administering monetary penalties. Set up and ongoing costs to the tribunal (145k), MMO (98k) and businesses (71k) of administering appeals. Costs to businesses in choosing to take action to come into compliance (154k). £346k of the business costs are incurred by non-compliant businesses. |
| | One-off (Transition) | Yrs | |
| | £ 264k | 1 | |
| | Average Annual Cost (excluding one-off) | | |
| £ 78k | 10 | Total Cost (PV) | £ 860k |
| Other key non-monetised costs by 'main affected groups' None | | | |

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|---|--|---------------------------|---|
| BENEFITS | ANNUAL BENEFITS | | Description and scale of key monetised benefits by 'main affected groups' Introducing FMPs and VMPs is expected to deter non-compliance and therefore help realise the range of environmental benefits expected from the underlying regulations. The benefits estimate only includes the minimum level of environmental benefits expected from increased compliance and does not reflect any net benefit component associated with compliance. It is therefore likely to underestimate the environmental benefits. |
| | One-off | Yrs | |
| | £ | 1 | |
| | Average Annual Benefit (excluding one-off) | | |
| £ 18k | 10 | Total Benefit (PV) | £ 138k |
| Other key non-monetised benefits by 'main affected groups' We expect benefits to complaint businesses from the fairer application of environmental regulation. In addition the non-monetised benefits identified for option 2 also apply to this option. | | | |

Key Assumptions/Sensitivities/Risks Assumptions are made on the number of penalties p.a. based on current enforcement experience, on the numbers of appeals as for option 2, on administration time based on the necessary activities and drawing on work done for the parallel non-marine regime, and about how the regulated community will respond to more proportionate sanctions. A preliminary assumption is also made that the availability and use of monetary penalties reduces non-compliance by 25%.

| | | | |
|-------------------------|-------------------------|--|--|
| Price Base Year 2011 | Time Period Years 10 | Net Benefit Range (NPV) £ N/A | NET BENEFIT (NPV Best estimate) £ N/A |
|-------------------------|-------------------------|--|--|

| | | | | |
|---|-------|------------|--------|-------|
| What is the geographic coverage of the policy/option? | | England | | |
| On what date will the policy be implemented? | | April 2011 | | |
| Which organisation(s) will enforce the policy? | | MMO | | |
| What is the total annual cost of enforcement for these organisations? | | £ 21k | | |
| Does enforcement comply with Hampton principles? | | Yes | | |
| Will implementation go beyond minimum EU requirements? | | No | | |
| What is the value of the proposed offsetting measure per year? | | £ N/A | | |
| What is the value of changes in greenhouse gas emissions? | | £ minimal | | |
| Will the proposal have a significant impact on competition? | | No | | |
| Annual cost (£-£) per organisation (excluding one-off) | Micro | Small | Medium | Large |
| Are any of these organisations exempt? | No | No | N/A | N/A |

| | | |
|---|-----------------|-----------------------|
| Impact on Admin Burdens Baseline (2005 Prices) | | (Increase) |
| Increase of £ 0 | Decrease of £ 0 | Net Impact £ 0 |

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Related Impact Assessments

The Marine and Coastal Access Act 2009

<http://www.ialibrary.berr.gov.uk/ImpactAssessment/?IAID=6262cb95b88e43f89d4ac ec24da4d3fe>

Civil sanctions for use by the Environment Agency and Natural England:

<http://www.ialibrary.berr.gov.uk/ImpactAssessment/?IAID=fa9f24726c13454896b875 770ae30b06>

Background to proposals

1. The Marine and Coastal Access Act 2009 (**hereafter MCAA**) consolidates and modernises requirements under two existing Acts which set out the framework for the current marine licensing system – Part 2 of the Food and Environment Protection Act 1985 and Part 2 of the Coast Protection Act 1949. Those activities which require a licence are defined in s.66 of the Marine and Coastal Act 2009 and include:

- Construction activities and deposits such as the building of jetties, harbour works, pipelines and rock dumping;
- Extraction such as dredging and the removal of structures; and
- The incineration and scuttling of vessels

The MCAA also modernises enforcement powers through a core set of common enforcement powers and provides for a wider range of tools to enforce the marine licensing system ranging from advice, statutory notices and monetary penalties through to prosecution.

2. Under the existing marine consenting legislation, the Marine Management Organisation (MMO) which is the authority responsible for managing and enforcing marine licences where the Secretary of State is responsible is limited in its ability to sanction offenders. The MMO generally has to rely on a warning or advisory letter or prosecution, with nothing in between. It may not be proportionate to pursue prosecution in all cases, which means that some offences are effectively left without sanction, (although one may otherwise be warranted) - a situation which has been termed 'compliance deficit'¹. This is unfair to people abiding by the law and limits the level of environmental protection we are able to ensure.
3. When the draft Marine Bill was consulted on in 2008, stakeholders agreed with the objectives for the marine licensing system and proposals for making enforcement fairer and more effective. The secondary legislation has been designed to help deliver these objectives and further consultation in March 2010 on the detailed proposals in this IA received strong stakeholder support (more detail is provided from paragraph 27 of this IA).
4. The proposals have been heavily informed by policy development and public consultation carried out by the Fairer and Better Environmental Enforcement (FBEE) project within Defra. This project has made available similar statutory notices and monetary penalties to specific regulators using powers under the

¹ Macrory, R. (2006) *Regulatory Justice: Making Sanctions Effective*, p.24
<http://www.bis.gov.uk/files/file44593.pdf> .

Regulatory Enforcement and Sanctions (RES) Act 2008 in order to enforce offences under existing environmental legislation. The Environmental Civil Sanctions Order was introduced in April 2011 and provides powers to specific regulators (Countryside Council for Wales; the Environment Agency and Natural England).

5. The enforcement proposals in this IA will affect any person who carries out or plans to carry out a licensable marine activity and those organisations who handle the licensing and enforcement of those activities.
6. The primary aims of the enforcement proposals under the MCAA are to bring people into compliance with the law and to prevent harm to the environment and human health and prevent interference to users of the sea. Under the Act, the wider range of enforcement tools will enable a more proportionate approach to enforcement to be taken, ensuring sufficient flexibility to deal appropriately with the range of cases that enforcement officers may face.

Rationale for Intervention

7. Non-compliance can have external impacts on third parties that derive revenue (business and firms) or utility/pleasure (other sea-users) from the sustainability and environmental quality of marine and coastal ecosystems. Private activities that contribute to environmental degradation or risks to human health are external costs that are not captured by the market and transmitted through market prices.
8. As explained, the current enforcement regime is inflexible and focused on disproportionate criminal penalties that do not provide a sufficient deterrent for breaches other than the most serious. Reforms and the use of civil sanctions attempts to internalize the costs of non-compliant behaviour by private individuals and helps to ensure that the market supports wider policy goals on marine and coastal management.
9. Changes to legislation on enforcement will bring the marine sector in line with other regulated sectors who have adopted the use of civil sanctions to enforce licence conditions. The new sanctions regime (as it is proposed) is also consistent with the Government's better regulation agenda and is broadly consistent with provisions of the RES Act 2008 and the recommendations of the Macrory Review, which was accepted in full by the Government.
10. The Macrory Review made a number of recommendations to improve compliance among UK business. In keeping with these recommendations the new enforcement regime will aim to:
 - **Change behaviour of the offender**
A more flexible toolkit of enforcement options (that includes the use of civil sanctions) will enhance the MMO's ability to influence operators' conduct so that it is more aligned with policy objectives contained in licence conditions.

- **Eliminate any financial gain or benefit from non-compliance**
There may be an incentive for operators not to comply with licence conditions because of the costs associated with handling and disposing of materials that can be hazardous to the environment or human health. Civil penalties should reduce or eliminate any monetary incentive from non-compliance.
- **Be responsive and consider what is appropriate for the particular offender or regulatory issue**
- **Be proportionate to the nature of the offence and the harm caused**
- **Restore the harm caused by regulatory non-compliance**
The intention is to provide the MMO with maximum flexibility and discretion to secure compliance from the operator in a way that is proportionate, dissuasive and effective. Under the preferred option the regulator will have access to a sliding scale of sanctions that includes the ability to impose Fixed Monetary Penalties for minor procedural infractions through to unlimited penalties (Variable Monetary Penalties), criminal penalties and licence revocation depending on the seriousness of the offence or licence breach. This gives the regulator the flexibility to impose sanctions that are proportionate to the harm caused and the nature of the offence. A new system of appeals will provide rights to parties materially affected by regulator decisions to challenge the merits of these decisions to the First-Tier Tribunal. This ensures regulator accountability for decisions made.
- **Deter future non-compliance**
The present enforcement regime – focused on criminal penalties and with limited flexibility – is unlikely to present a strong deterrent because the regulator has no credible penalty for breaches other than the most serious. With time, a credible sanctions regime would be expected to influence behaviour via the threat of action.

11. **This Impact Assessment (hereafter IA) covers two Statutory Instruments (SIs) that make provision in England for 1) monetary penalties 2) an appeals system for all civil sanctions.** In addition to the monetary penalties, this includes the civil sanctions provided for by the MCAA without the need for secondary legislation (hereafter referred to as ‘the statutory notices’ and listed at paragraph 35.

Monetary penalties

12. Failure to comply with licence conditions or the marine licensing regime may have impacts on the environment, human health, and other users of the sea or lessen the ability of the licensing authority to ensure that adequate safeguards are being taken through its monitoring and inspection processes. In all cases where a licensing offence has been committed, the enforcement authority has the option of prosecution. However, for those offences where prosecution is not proportionate, a monetary penalty may be a more appropriate enforcement tool.

13. Dealing with less serious cases out of the courts is in line with better regulation and enforcement principles and is consistent with the findings of the Hampton and Macrory Reviews². These reviews focus on better regulation and more effective sanctions and recommend the use of flexible tools to enable more proportionate responses in cases of regulatory non-compliance. These principles were followed in establishing the Regulatory Enforcement and Sanctions (RES) Act 2008, which contains provisions enabling use of fixed and variable monetary penalties to enforce legislation. These provisions have been adapted from the RES Act in order to apply them to the marine area in the MCAA.
14. It is still expected that the MMO should take steps to encourage operators to come back into compliance, for example through informal discussion, or use of an advisory letter. This may be in addition to other steps such as a monetary penalty, or prosecution in serious cases. One benefit of using a civil system is that the person issued with a monetary penalty will not incur a criminal record. This is particularly valuable in cases where an operator has unintentionally caused harm. However, it is important to note that the most serious cases will still normally lead to prosecution.

Appeals against statutory notices

15. There is a legal requirement in the Act to establish an appeals mechanism for notices issued in relation to the marine licensing regime (stop notice, compliance notice, emergency safety notice, remediation notice, revocation notice, suspension notice and variation notice). Some of these notices will be directly related to a breach of a marine licence; while others may be issued because of changing conditions or in light of new scientific information.
16. We intend that appeals against all statutory notices will be heard by the General Regulatory Chamber of the First-tier Tribunal (FtT). The FtT chamber will also hear appeals against monetary penalties which have been imposed.

Approach to Impact Assessment

Options

17. The Impact Assessment for the MCAA included an initial assessment of the impacts of the civil sanctions provisions. The current IA is based on a more developed scheme for applying monetary penalties and on detailed analysis and therefore provides updated figures.
18. Three options are assessed in this IA:

² Hampton, P. (2005) *Reducing Administrative Burdens: Effective Inspection and Enforcement*, http://www.astrid-online.it/Qualit--de/Studi--ric/Seminario-/UK_BR_Hampton-Report_2005.pdf
Macrory, R. (2006) *Regulatory Justice: Making Sanctions Effective*, p.24
<http://www.bis.gov.uk/files/file44593.pdf>

- **Option 1: Do nothing**
 - **Option 2: Introduce a system of appeals for statutory notices.**
 - **Option 3: Introduce Fixed Monetary Penalties and Variable Monetary Penalties, as well as a system of appeals for statutory notices.**
19. Options 2 and 3 consider the costs and benefits compared to option 1 (not introducing the proposals). Option 2 is considered as a separate option as irrespective of whether the penalties are introduced, having a right to appeal seems essential to the workability and fairness of the existing system of statutory notices.

General

20. In general terms, there are start-up costs for various parties (including the MMO, businesses and the Tribunal (the First-tier Tribunal)) and there are ongoing costs and benefits from the operation of the penalty and appeals systems. **The evidence base and approach to assessing each of the options is presented in the sections below.** This IA considers the impacts of the proposals being introduced in 2011/12 and then being in place over 9 subsequent years until 2020/21. This is the chosen time frame because, with the policy and management framework developing rapidly in the marine environment, it is difficult to predict how these systems will evolve beyond this period. The IA takes a present value of costs and benefits over the period using a 3.5% discount rate, consistent with HM Treasury's Green Book. Estimates are provided in 2011/12 £s.
21. To keep the narrative of this evidence base clear and concise the analysis starts by considering central estimates of costs and benefits. These central estimates are based on the views of relevant experts (including relevant MMO staff and consultants from Eunomia Ltd who have expertise in developing Impact Assessments) and available data for each of the input parameters. The estimates are also 'steady state' estimates: that is they reflect the settled pattern of enforcement activity once the new proposals have bedded in and do not attempt to reflect adjustments to the settled pattern which is harder to predict.
22. The current assessment covers the licences enforced by the MMO. Certain oil and gas activities will be licensed by the Department of Energy and Climate Change – these are outside the scope of this assessment.

Uncertainty and assumptions

23. There is significant uncertainty in the precise costs and benefits of introducing these proposals. Reasons for this include:
- The past is the only available basis for predicting the number and nature of offences and appeals in the future and there are wider contextual changes

brought about particularly by the MCAA which mean that there are likely to be circumstances in which the future differs from the past. This has required considerable judgement by the MMO, in particular, in providing a view of what the future will be like on the basis of available records from the past.

- Even if it were known what cases would arise there is particular uncertainty in predicting the extent of behavioural change by the regulated community in response to a more effective sanctioning regime.
 - Where the regulated community do take this ‘anticipatory action’ it is not possible to predict and quantify the benefits with any certainty. The Impact Assessment therefore only includes an estimate of the minimum plausible benefits as there is no basis for providing a central estimate. The difference between the minimum and a notional central estimate is therefore unquantified.
24. In general the assumptions used in the assessment are well understood and have been informed by solid experience, for example of how long certain tasks will take and how much staff at different levels are paid. However, there are some important assumptions where there is not directly relevant past data and so the assumptions have to be made using judgement on the basis of broadly parallel experience. The main ones include:
- the numbers of penalties that will be served;
 - the extent of anticipatory action referred to in the paragraph above, and how that translates into reduced damage to the environment; and
 - the numbers of appeals and how they will be determined (for option 2).

Consultation on the IA

25. We have consulted on the costs and benefits set out in this IA, asking specifically whether all the relevant costs and benefits involved with each policy option have been captured and, if not, what additional or alternative evidence could be used to improve the Assessment. Of the 17 responses to the consultation, five made specific comments on this question, three of whom agreed with the assessment.
26. Two respondents felt that the Impact Assessment did not capture all the relevant costs. One of these respondents felt that the IA underplayed the costs to the enforcement authority of implementing FMPs – focussing on the cost in imposing an FMP compared to the level of penalty. Another respondent, although supportive of the general proposals, felt that potential costs to advisors’ involvement in enforcement action do not appear to have been estimated – citing the cost of securing expert witnesses or experts to provide evidence in prosecution cases. The third respondent was concerned that costs should be broken down to represent costs of, and to, relevant sectors. That respondent also felt that the costs of enforcing the system were underestimated

in the draft Impact Assessment and more resource may be required than had been anticipated.

27. On the first of these issues, we are content that the evidence-base behind implementing FMPs is as accurate as it can be. An FMP will be generally used to respond to clear cut, mainly administrative offences and we do not anticipate that imposing FMPs will involve costs incurred by the MMO to gather supporting evidence or buy in outside expertise, as may otherwise be the case for VMPs or prosecution cases. The draft IA already included estimated costs to the MMO in recovering any unpaid penalties. Since monies from FMPs (as with VMPS) will go to HM Treasury's consolidated fund rather than the regulator, the penalty level is not set at a level intended to offset the costs to the MMO in imposing the penalty.
28. We do not think that costs involved in buying in expertise – particularly for more serious cases – will increase costs incurred under the existing enforcement system. For VMPs, costs expended by the MMO up until the point a VMP is imposed (such as buying in legal or veterinary expertise) can be recovered. The ability to impose such penalties should not create additional costs to the MMO. The IA assumes that a VMP is used instead of prosecution once every 3 years in cases where a VMP would achieve enforcement objectives without the need to prosecute. The cost to the MMO of prosecution is £10,350 so this cost should actually be avoided every 3 years and provide overall savings.
29. Having examined these concerns in detail, and in light of the fact that no other evidence was offered in terms of additional costs or burdens to specific sectors, we are satisfied that the estimated costs in the IA are a reasonable estimate based on anticipated changes to enforcement responses and resources compared to the current system.

Option 1: Do nothing

30. The do nothing option is presented to provide an understanding of the current situation against which we are assessing the proposed changes in policy – in other words as the 'counterfactual'.

Current situation on appeals

31. The MCAA provides for the use of a series of statutory notices (remediation notices, compliance notices, stop notices, emergency safety notices, revocation notices, suspension notices and variation notices) which will be available to the MMO and other regulators when Part 4 of the Act comes into effect. One of the two SIs provides for an appeals mechanism for these notices. In practice, the Government would not introduce these notices without an appeals mechanism as the system would not be credible, workable or fair. Therefore in reality the enforcement outcomes associated with these notices would not be secured in the absence of an appeals mechanism. The MCAA does not attempt to quantify the net effect of these notices but does identify that they would reduce the

amount of time spent repeatedly chasing offenders and remove the competitive advantage gained through non-compliance.

Current situation on enforcement and other tools

32. Currently the MMO can use:

- **Advisory letters:** to provide those causing offences advice and guidance to come back into compliance (as well as being able to offer advice and guidance more informally);
- **Warning letters:** to give those causing offences an official warning that they have caused an offence and that more severe action will be taken if the problem persists; or
- **Prosecution**

33. Table A below shows the MMO's estimates of the current annual usage of these enforcement mechanisms under FEPA based on figures for 2007 and the MFA's estimates of the time taken to complete the enforcement action applied to their actual staff wage rates.

Table A: existing enforcement mechanisms

| Enforcement mechanism | Annual usage | Total Annual cost, £'000s |
|-----------------------|--------------|---------------------------|
| Advisory letters | 4 | 1 |
| Warning letters | 4 | 3 |
| Prosecution | 1 | 10 |
| Total | | 14 |

34. The MMO also estimates that including other enforcement costs, such as the costs of inspection, their total expenditure on enforcing FEPA in England and Wales is around £80k p.a.

35. In addition to these, once Part 4 of the MCAA takes effect, the following notices will be available:

- **Compliance notice:** requiring specified steps to return to compliance
- **Remediation notice:** requiring specified steps to remedy the impacts associated with the offence
- **Emergency safety notice:** requiring measures be taken in emergency situations to ensure navigational safety
- **Stop notice:** requiring that a specific activity causing damage or risks should stop until the activity no longer poses a threat
- **Revocation notice:** revokes a marine licence
- **Suspension notice:** suspends a marine licence granted for such a period as the authority determines
- **Variation notice:** varies a marine licence or conditions within a licence

Option 2: Introduce a system of appeals for statutory notices

36. This option involves introducing an appeals system for the statutory notices in the MCAA. To ensure that the enforcement tools are used fairly and in accordance with good enforcement principles, and that the enforcement authority is accountable for its decisions, a person will be able to appeal against the imposition of a statutory notice to the independent First-tier Tribunal (FtT).
37. The FtT's main function is to hear appeals against decisions of the Government where the Tribunal has been given jurisdiction. It has jurisdiction throughout the United Kingdom for some purposes.
38. Appeals against the enforcement mechanisms for marine licensing offences will follow the rules and procedures of the FtT General Regulatory Chamber set out in their Regulations: Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. These Regulations came into force on 1 September 2009³.
39. The grounds of appeal on which an appeal can be lodged are:
 - that the decision was based on an error of fact;
 - that the decision was wrong in law;
 - that the decision was unreasonable;
 - in the case of a VMP or ECRN, that the amount of the penalty or costs is unreasonable;
 - any other reason permitted by the First-tier Tribunal.
40. Appeals will be made to the General Regulatory Chamber of the First-tier Tribunal. Appeals will be made by sending or delivering a notice of appeal to the Tribunal so that it is received within 28 days of the date on which notice of the enforcement action or other decision was received.
41. This assessment of Option 2 started with an estimate of the numbers of appeals likely to arise. The MMO provided their best view based on their experience of the licensing regimes of the number of each type of notice that would be served and that appeals might be made against 10% of these. This takes account of the fact that it will be possible to make representations to the MMO initially, and is based on estimates made by the Environment Agency for the parallel system of civil sanctions they are responsible for enforcing⁴.

³ http://www.opsi.gov.uk/si/si2009/uksi_20091976_en_1

⁴ Impact Assessment available at: <http://www.defra.gov.uk/corporate/consult/env-enforcement/annex6-impact-assess.pdf>

Table B: estimated number of appeals

| Type of notice | Number p.a. | % appealed | Number of appeals p.a. |
|--------------------------|-------------|-----------------|------------------------|
| Suspension notices | 5 | 10% | 0.5 |
| Revocation notices | 5 | 10% | 0.5 |
| Variations | 70 | 0% ⁵ | 0 |
| Compliance notices | 5 | 10% | 0.5 |
| Remediation notices | 1 | 10% | 0.1 |
| Emergency Safety notices | 1 | 10% | 0.1 |
| Stop Notices | 2 | 10% | 0.2 |
| TOTAL | | | 1.9 |

The estimated costs and benefits of the option are presented in Table C with explanation in the ensuing text.

TABLE C: Costs and benefits of option 2: introduce an appeals system for statutory notices

| Activity Type | Activity | 2011/12 | 2012/13 | etc. | 2020/21 | 10 Year NPV |
|------------------------|---|-----------------|-----------------|-------------|-----------------|------------------|
| Preparation | Setting up Tribunal | -£45,000 | £0 | etc. | £0 | -£45,000 |
| Ongoing administration | Cost to MMO | £0 | -£9,386 | etc. | -£9,386 | -£71,408 |
| | Cost to businesses | £0 | -£7,525 | etc. | -£7,525 | -£57,249 |
| | Cost to Tribunal | £0 | -£8,914 | etc. | -£8,914 | -£67,816 |
| TOTAL COSTS | | -£45,000 | -£25,826 | etc. | -£25,826 | -£241,473 |
| Benefits | Realisation of MCAA statutory notice benefits - not quantified in MCAA IA | | | | | |
| TOTAL BENEFITS | | Unquantified | | | | |

Costs to the MMO

42. The MMO will face costs in administering appeals where they are made. Cost estimates inevitably rely on assumptions made (please see paragraphs 20 and 21) and have been developed in discussions between Eunomia Ltd and the MMO. The estimates are based on the estimated number of appeals presented in table B above. There is a choice to be made of whether appeals are on the basis of a written process or hearing – it has been assumed that two-thirds will be the latter. The estimate net present value of ongoing costs to the MMO is £71k with annual outgoing costs of £9.4k. This is made up as follows:

- **£3.7k for officer time for appeals that are subject to hearings:** based on 10 days of officer's time at £292 per day multiplied by two thirds of 1.9 appeals;
- **£5.1k for legal time for appeals subject to hearings:** based on 5 days of legal time at £800 per day per appeal;
- **£0.4k for officer time for appeals that are subject to the written process:** based on two days of officer time for one-third of 1.9 appeals; and

⁵ No appeals would be made as variations are proposed by licence holders.

- **£0.3k for legal time for appeals that are subject to the written process:** based on half a day of legal time per appeal.

Costs to businesses

43. Businesses will also face costs in administering the appeals they make. Judgement was used to estimate how long it would take companies to administer different types of appeal, taking account of the likely process and these estimates were applied to typical private sector wage rates for the relevant grade of staff⁶. The estimated net present value of ongoing costs to businesses is £57k with annual ongoing costs of £7.5k. This is made up as follows:
- **£4.0k for staff time for appeals that are subject to hearings:** based on 10 days of staff time at £318 per day (please see Annex 3), multiplied by two-thirds of 1,9 appeals;
 - **£3.0k for legal time for appeals subject to hearings:** based on 3 days of legal time at £800 per day per appeal;
 - **£0.2k for staff time for appeals that are subject to the written process:** based on one day of staff time for one-third of 1.9 appeals;and
 - **£0.3k for legal time for appeals that are subject to the written process:** based on half a day of legal time per appeal.
44. The consultation proposals provided that remediation notices need not be complied with pending appeal. Following consultation, it was decided that in cases where the damage to the environment will get worse pending an appeal, remediation action should not be delayed. The consultation IA did not include any of the impacts associated with remediation on the basis that they were covered by the MCAA IA. This change does not therefore affect the IA's estimates. Nevertheless there will be some impact on businesses where remediation action is brought forward, although no evidence is available to determine how often this will happen.

Costs to the Tribunal

45. There are costs incurred in setting up the Tribunal and, on an ongoing basis, for administering and deciding appeals. The costs of setting up the Tribunal are shared between this project and the civil sanctions that have been introduced concurrently for use by the Environment Agency and Natural England: £45k is the cost allocated to this project. Future civil sanctions systems will therefore be able to benefit from the system without set-up costs. The ongoing costs presented are based on the actual costs that the Tribunal intends to charge.

⁶ The estimate is £318 per day based on the full costs of employing an environmental manager of £70k divided by 220 productive days per annum.

The estimated net present value of ongoing costs to the Tribunal is £68k with annual ongoing costs of £8.9k. This is made up as follows:

- **£8.9k for appeals subject to the written process:** based on a unit cost per appeal of 7k per appeal;
- **£48 for appeals that are subject to the written process:** based on the a unit cost per appeal of £75 by one third of 1.9 appeals.

Benefits

46. In practice an appeals system is an integral and essential part of a system of sanctions and statutory notices have not been introduced without it. While the impacts of the statutory notices are included in the MCAA IA and are not quantified in this IA, they need to be understood so the costs of the appeal system can be seen in context. The nature and scale of these impacts are therefore discussed below.

- **The direct environmental benefits achieved from serving the notices identified in Table B.** It is estimated that there will be 19 notices served each year. Like all regulators the MMO needs to follow the Regulator's Compliance Code⁷ which requires, amongst other things, that regulators should only intervene where there is a clear case for protection, should take risk-based decisions and use proportionate and meaningful sanctions. This would suggest that they are only likely to serve notices where there are relatively high benefits from doing so;
- **The environmental improvements that result from the behaviour change directly brought about by the sanctions.** Using the new sanctions in a pattern described in table B, where currently the norm is warning letters (see table A) is likely to have a deterrent effect, in terms of both specific deterrence (affecting those businesses that have received a sanction) and general deterrence (sending a signal to other businesses that may not be complying). This would mean businesses will improve their environmental management practices to reduce the risk of being subject to future enforcement action⁸;
- **The wider benefits in terms of the level playing field, fairness and competitive advantage;** and
- **The costs incurred by those causing the offences** both of complying with notices and of taking action to avoid being subject to future enforcement

⁷ BERR (2007) *Regulators Compliance Code: Statutory Code of Practice for Regulators*, <http://www.berr.gov.uk/files/file45019.pdf>

⁸ The MMO made some preliminary assumptions to estimate the scale of the equivalent effect for the application of penalties for option 3. If the same assumptions were used for other types of notices, i.e. that only 20% of offences for which notices are appropriate are subject to sanctions, it would mean that 76 offences go undetected. If using notices deters 25% of these from offending that would entail a reduction in offences by 19.

action. Assuming enforcement action is taken proportionately then these costs will be lower than the benefits.

While these benefits were covered by the MCAA IA and are not therefore included in the core analysis in this IA, it should be noted that in practice the statutory notices will not be used until the appeals system is in place.

Option 3: Introduce FMPs and VMPs, as well as a system of appeals for statutory notices

47. This option involves making FMPs and VMPs available for use in response to offences under the FEPA licensing regime, in addition to providing for a system of appeals for statutory notices. It is worth noting that the appeals system would be available for FMPs and VMPs in addition to the statutory notices included in the MCAA so the assessment of the appeals will take that into account. First the impact of introducing FMPs and VMPS is considered, then of the appeals system applied to all the civil sanctions including FMPs and VMPs.

Fixed monetary penalties

48. It is intended that fixed monetary penalties (FMPs) should be used for low level, primarily technical offences. For instance, it is often a condition that the operator informs the licensing authority when works are to commence, so that an officer can inspect them and make sure that the materials used are appropriate. However, often the operator does not do this and the inspector may not be able to check that materials of the correct specification were used. We think that in such cases a FMP would be an appropriate sanction and encourage future compliance.
49. FMP levels are set in the Statutory Instrument introducing the monetary penalties at £100 for an individual and £300 for all others.
50. Since the FMP will be at a fixed amount, they are not likely to equate to the costs to business/operators to remain in compliance since these will vary from case-to-case. Businesses generally do not wish to be seen as non-compliant and the deterrent element will be in the regulator publicising those cases where an FMP is issued.

Variable monetary penalties

51. It is intended that variable monetary penalties (VMPs) should be used for more serious breaches of licence conditions where it is not appropriate to prosecute. Since the level of the penalty for a VMP can be varied, it can be used more effectively and flexibly to remove financial benefit resulting from the offence or to apply an additional deterrent element. There is also potential for VMPs to be used to address repeated offences.

52. The range of operations covered by the marine licensing regime is large and could range from the building of a small private jetty to a large-scale aggregate dredging operation. The impact of individual developments or activities – and the cost of obtaining a marine licence - could vary enormously so the ability to vary the penalty according to the operation and the operator is important to provide enough of a disincentive across a wide range of cases and ensure, for example, that a small business does not suffer disproportionately compared to larger one.
53. The level of a VMP will be determined on the facts of the case. For consistency purposes, we intend to use the model established by the Fairer and Better Environmental Enforcement (FBEE) project that has implemented similar monetary penalties and statutory notices under the Regulatory Enforcement and Sanctions (RES) Act 2008. The level will be calculated to redress any costs the operator has avoided through non-compliance; avoidance and will include a deterrent element which will be calculated on other specific factors of the case. The operator may also offer to carry out undertakings or pay a sum of money to a group or individual that has been affected by the licensing breach if they are issued with a notice of intent for a VMP. The regulator can decide whether or not to accept the undertaking and will take this into account when deciding whether to issue a final variable monetary penalty, and in determining the penalty amount.
54. As is normal practice, any monies received from monetary penalties will go to HM Treasury's consolidated fund, while unpaid penalties will be recovered through the civil courts (usually as a civil debt). In the case of a VMP, any additional costs (e.g. administration, legal and investigation costs) borne by the enforcement authority up to the point of imposing the penalty can also be recovered by that authority and retained by it.

Assessment

55. This assessment started with assessing the numbers of FMPs and VMPs the MMO is likely to serve in the future. They assumed in general that:
- FMPs would be used for the more minor, largely technical offences such as for not notifying commencement of works or not returning forms on time and
 - VMPs would be used for the more serious cases that do not merit prosecution such as exceeding dredging and dumping limits or causing offences where there is moderate damage to the environment.

Taking account of experience from the past, the MMO provided a best estimate that they would on average each year serve:

- 20 FMPs

- 7 VMPs⁹

These estimates have been revised upwards since the MCAA IA now that the scheme for monetary penalties has been developed in more detail and it is clearer which offences will be covered. The MMO has therefore been able to consider the likely numbers of each type of offence in their estimates. There is uncertainty in the estimates of future penalties largely stemming from the fact that it is hard to predict how the nature and scale of offending will relate to that in the past.

56. In general the FMPs would be used either where an advisory letter is currently issued or where no action is taken; and VMPs would be served where a warning letter is used. Table A above shows that there is on average one prosecution per year. In general the MMO expects that it will continue to prosecute for cases similar to those where they currently prosecute but there will occasionally be a case where a VMP will achieve their enforcement objectives without the need to prosecute.
57. The estimated costs and benefits of using the penalties are presented in table D with an explanation of the assessment approach in the ensuing text and detailed workings at Annex 4. These estimates are based on the views of relevant experts (including relevant MMO staff and consultants from Eunomia Ltd who have expertise in developing Impact Assessments) and available data for each of the input parameters. Wage rates used are at Annex 3.
58. The assumptions made in this Impact Assessment will be tested by a review, to be carried out two years after the introduction of new monetary penalties and notices, which will include a review of actual costs and benefits. Monitoring data will be gathered when the system commences in order to inform this review. Defra will work with MMO and stakeholders to develop a proportionate methodology and to ensure that maximum use is made of readily available data. More information on monitoring and review processes is included at **Annex 2**.

⁹ Following consultation VMPs have been made available for information offences. MMO advise that where used they are likely to replace warning letters. However, they expect them to be used rarely – less than once per annum on average. Given the limited impact of this change, the IA estimates have not been amended.

Costs and cost savings to the MMO

Preparation

59. The MMO will incur costs to prepare for monetary penalties. This will include the costs of training and recruitment, procedures, IT systems and developing guidance. These are estimated on the basis of judgement from past experience of the amount of time these activities take and the wage rates of the relevant grade of staff. Wage rates are the actual hourly rates provided by the MMO.

Ongoing costs and cost savings from using civil sanctions

60. **The ongoing costs to MMO of using the sanctions:**

- **The cost of serving FMPs.** This takes account of the estimated amount of time for issuing Notices of Intent, considering any representations made and serving FMPs and the wage rates of the staff needed to perform those tasks. It is assumed that representations are made for 10 of the 20 FMPs per year. This is based on judgement of Eunomia Ltd in discussion with the MMO. All these costs are born by the MMO as the costs of administering FMPs cannot be recovered from operators.
- **The cost of serving VMPs.** This is worked out on the same basis as for FMPs but also takes account of the likelihood that those who receive VMPs will choose to undertake some form of restorative action to offset part of the penalty and that this will involve a meeting with the MMO to discuss this. The costs of administering VMPs is recoverable from those on whom they are served. It is assumed that in practice MMO is able to recover 90% of these costs.
- **Cost savings from not prosecuting.** It is assumed that a VMP is used instead of prosecution once every 3 years. This is based on the fact that there is on average one prosecution per year and the MMO considered that more often than not it would still be appropriate to prosecute but occasionally a VMP would achieve their enforcement objectives without the need to prosecute. The cost to the MMO of prosecution is £10,350 so this cost is avoided every 3 years.
- **The cost of administering appeals.** This includes the estimates for appeals against notices in option 2 and against monetary penalties on a similar basis.
- **The cost of collecting fines.** It is assumed that cost recovery proceedings will need to be instigated for some proportion of penalties; a level of 10% is assumed for FMPs and 15% for VMPs, considering the higher level of penalty. The estimates include elements for administration, going through the bailiff conclusion and using a bailiff.

Costs and cost savings to industry

Preparation

61. The costs to industry when these measures are introduced will include:

- **The costs of responding to the consultation on regulator guidance.** This is estimated on the assumption that 20 businesses will respond to the consultation (guided by past experience) and that it will take on average two days to complete a response.

- **The cost of familiarisation with guidance.** It is assumed that 20% of those holding FEPA license will each spend 40% of a working day familiarising themselves with the guidance.

Ongoing costs of receiving civil sanctions

62. These include:

- **The administrative cost of receiving penalties.** This includes estimates of the time costs of paying penalties and making representations to the MMO. For VMPs it also includes the cost of meeting the MMO to discuss any restorative action that the VMP recipient chooses to take and the recovered MMO administrative costs.
- **Cost savings from not being prosecuted.** It is assumed that industry will face broadly similar costs to the MMO for prosecution as they will need to be doing similar activities during the process as the MMO.
- **The cost of appealing.** This includes the estimates for appeals against notices in option 2 and against monetary penalties on a similar basis.
- **The cost of being subject to cost recovery proceedings.** Where penalties are not paid and the MMO has to instigate cost recovery proceedings, recipients will have some further costs in the time taken to interact with the bailiffs and, for FMPs, of the increased penalty.

It should be noted that the majority of these costs are only incurred by those who cause offences and receive penalties. Those with a good general approach to compliance are unlikely to face costs very often.

Costs of changing behaviour towards compliance

63. It is considered that the existence and use of a more effective sanctioning regime will encourage those who do not currently comply with licence requirements to make more effort to ensure they do what is necessary to comply. For example, as it becomes known that not notifying the MMO of commencement of works attracts a monetary penalty, more operators will make sure they do notify and on time.
64. To provide some idea of how many businesses might take action to become compliant, the MMO considered how many offences there might be that remained undetected. A preliminary view of this was that they might detect about 20% of offences, so for example if they serve 20 FMPs there would be a further 80 offences that they do not detect. Consideration was then given to the number of undetected cases in which operators would take action to comply. MMO took account of the issues that are likely to determine the effect of penalties on compliance. For example, some of the requirements for licences will be activities that a business may only ever do once – like building a small structure in a port – so they may not be influenced by or conscious of what penalties are being received elsewhere. Although other factors, such as contractors who will do works on a repeated basis, will increase awareness of the sanctions for non-compliance. A preliminary view is that action may be taken to reduce non-compliance by 25%. This would mean that the 80 offences per annum would reduce by 20 to 60.
65. There will be cost implication to taking this anticipatory action. It is assumed that the anticipatory action taken for FMPs is relatively low – normally connected with providing information at the right time by notifying or reporting to the MMO: an average estimate of £100 is made of these costs. Action taken to anticipate, or avoid, the types of non-compliance that would lead to VMPs is likely to be more substantial action, normally

consisting of steps that will avoid some form of harm to the environment. If VMPs are set at the level required to deter non-compliance and they are £13k on average, then on the basis that the MMO detects 20% of cases, it means that businesses save £2.6k¹⁰ of costs on average through avoiding compliance with regulations. This is therefore the level of additional cost that businesses would need to incur to avoid non-compliance.

66. On the basis of the two paragraphs above 20 businesses would incur additional costs of £100 on average and 7 businesses would incur additional costs of £2600 on average.

Costs and cost savings to others

The First-tier Tribunal

67. These are as for option 2 except that this includes appeals against monetary penalties included in this option. The costs are associated with:
- **Start-up.** As for option 2, there are costs associated with setting up the Tribunal. These will be the same as option 2 as the fixed costs are the same irrespective of the number of appeals.
 - **Hearing appeals.** As for option 2, the cost estimates have been provided by the FTT based on the actual costs that they will charge for based on the estimated numbers of appeals and the proportions that will go through the written and hearing processes.

Cost saving to the courts service from avoided prosecutions

68. This is calculated on the basis of one prosecution avoided every 3 years and a saving of £231 per case from the FBEE IA.

Responding to consultation on regulator guidance

69. It is expected that some non-industry stakeholders will respond to the consultation on regulator guidance. From previous experience it is assumed that around 20 organisations or individuals may respond and it may take around 2 days.

Penalty cost transfer

From recipients of penalties

70. The value of FMPs is taken to be £300: this is the standard amount proposed in the consultation document. There is also a reduction of 50% for early payment of penalties. In discussion with the MMO, Eunomia Ltd have assumed that in total 13 of the 20 FMPs per annum will be paid at the early payment rate and 7 at the full rate. This includes the 10 that did not make representations and a further 30% who did and then subsequently pay the fine on receipt of the FMP. These proportions are based on judgement taking account factors such as the likelihood that some businesses will want to contest penalties to avoid being on the public register. Actual rates can be examined as part of the Post Implementation Review.
71. The level of VMPs will depend on the individual case. The expected average penalty cost of a VMP over and above existing criminal fines is around £10k for the FBEE proposals. Adjusting for the fact that fines under this regime will rarely replace prosecutions, we take

¹⁰ It should be noted that this figure is the product of two estimates (£13k and 20%) which are both based on informed views rather than empirical evidence.

an initial figure of £13k for the average VMP penalty¹¹. The figure in table D of £91k is £13k multiplied by the 7 VMPs. A better understanding of the typical level of fines will be possible when guidance is developed including case studies covering a range of different circumstances. Penalty income is not retained by the MMO but goes to the government's main bank account which is called the consolidated fund.

To the consolidated fund

72. The revenue from penalties referred to in the paragraph above is paid in full to the consolidated fund¹².

Administrative burden

73. The administrative burden is the cost to business associated with the government's information obligations. These proposals do not lead to any costs that fall in this category. There are some administrative costs to business; associated, for example, with responding to consultation and corresponding with regulators when penalties are served, but these do not result from information obligations and do not therefore fall within the definition of administrative burden.

Benefits

Environmental benefits from increased compliance

74. To the extent that businesses will change their behaviour towards compliance, as discussed above, there should be some benefit in environmental terms. It is not considered that the action taken in response to FMPs will generally lead to significantly improved environmental outcomes given that this will largely be about complying with reporting requirements, although this may reduce investigation costs for the MMO. The action taken in response to VMPs, however, which will largely be to reduce damage to marine ecosystems and will, overall, improve environmental outcomes.
75. Depending on the types of offence that businesses are trying to avoid, there may be different focuses in the action they take. In general terms a fair assumption to make would be that businesses will look for efficient ways of reducing costs and they will only take action which is worthwhile in terms of reducing the scale or likelihood of environmental damage because that will be reflected in the scale or likelihood of receiving VMPs (i.e. VMP penalty levels will broadly reflect the level of damage or risk). In very blunt terms therefore one would expect that the benefits of action taken will be at least equal to the costs and will generally exceed them. However, because there is no firm basis for determining the extent to which benefits might exceed costs. Therefore an "avertive expenditure" approach is taken whereby a cautious figure for benefits is taken at a level equal (rather than in excess of) the costs of actions taken to come into compliance¹³. This could significantly undervalue the true benefits. The MCAA IA, for example, concluded that the nature conservation benefits of Marine Conservation Zones within the Act were between £0.7bn and £1.6bn per annum. However, no direct basis for apportioning benefits

¹¹ On the basis that 80 of the 220 VMPs in FBEE replace prosecutions and that the average fine following prosecution is around £8k, the average total fine would be around £3k higher.

¹² In terms of the Impact Assessment this cost transfer is not a net economic cost as it is a direct economic transfer from one part of the economy to another. It is therefore not included in the summary figures on the front of the IA but is covered in this evidence base

¹³ This is therefore equal to the expenditure in response to VMPs identified at paragraph 1.66 (7 x £2.6k). No benefits figure is included for the action taken in response to FMPs on the basis of the view expressed in paragraph 1.72 above, that action taken in response to FMPs will tend not to lead to significantly improved environmental outcomes.

from this or any other study has been found as a basis for transferring benefits reliably to this context.

More level playing field

76. In general terms a more level playing field is likely to result from more effective deterrents. Improved enforcement is likely to benefit those businesses who typically comply with regulations. This is because companies with a less desirable approach to compliance are more likely to have had reduced costs as a result of not complying with environmental regulations (e.g. reduced monitoring costs, not investing in appropriate equipment or not paying disposal charges) and may have been able to achieve greater market share from being able to charge lower prices. To the extent that costs are increased as a result of these proposals either directly or from moving to greater compliance, the relevant businesses will either have reduced profits or pass costs on and may lose business as a result. This and the fact that, in some cases, offenders may move out of illegal activities will make more market share available for companies that generally comply with regulations.

Competitive advantage from effective environmental regulation

77. There is a growing literature to support the theory that countries can achieve a competitive advantage from implementing environmental regulations. The best known example in the literature is the Porter Hypothesis¹⁴. Companies become good at complying with regulations and can then compete more effectively as other countries implement similar regulations and because the environmental sector develops expertise that it can then sell to other markets. These effects are likely to be undermined to the extent that there is non-compliance with regulations; more effective enforcement may therefore enhance these advantages.

¹⁴ http://en.wikipedia.org/wiki/Porter_hypothesis

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

| Type of testing undertaken | <i>Results in Evidence Base?</i> | <i>Results annexed?</i> |
|----------------------------|----------------------------------|-------------------------|
| Competition Assessment | No | Yes |
| Small Firms Impact Test | No | Yes |
| Legal Aid | No | Yes |
| Sustainable Development | No | Yes |
| Carbon Assessment | No | Yes |
| Other Environment | No | Yes |
| Health Impact Assessment | No | Yes |
| Race Equality | No | Yes |
| Disability Equality | No | Yes |
| Gender Equality | No | Yes |
| Human Rights | No | Yes |
| Rural Proofing | No | Yes |

Annex 1: Specific Impact Tests

Carbon Impact Assessment

1. These proposals are unlikely to have a major effect on any of the determinants of carbon emissions such as the level or energy-intensity of production. Their focus is to make the licensing regime more effective rather than reducing carbon emissions.

Competition assessment

2. This standard competition assessment test concludes that the proposals are unlikely to have significant impacts on competition for firms who comply with existing environmental regulations. This is because the monetary penalties will only affect non-compliant companies.
3. Systematically non-compliant companies, however, are likely to have reduced costs as a result of non-compliance with environmental regulations and may have been able to achieve a higher market share by charging lower prices. Improving the effectiveness of existing enforcement would force non-compliant companies to move to greater compliance or, in some cases, move out of illegal activities (e.g. illegal dumping). Some of these previously non-compliant companies would either need to increase their costs or might choose to exit the industry. This could therefore cause compliant companies to achieve greater market share and increase their prices with reduced competition.
4. Only a small proportion of businesses are systematically non-compliant owing to the existing deterrents from not complying with environmental regulations. We are not aware of data to determine what proportion of businesses are either systematically or occasionally non-compliant.

Small Firms impact test

5. Additional costs would fall disproportionately on small businesses because small businesses generally have significantly less resources available to learn about and adjust to regulatory change. Time invested in finding out about the new monetary penalties may be relatively more costly than for a larger company. By the same token, cost savings from avoided prosecution will be proportionately more significant for smaller companies.
6. The IA of the Regulatory Enforcement and Sanctions Bill (May 2008) which introduced civil sanctions more widely concluded that the negative impact on small business would be minimal and proportionate as the new sanctions would be applied across all business. This was the result of extensive contact with small businesses and small business groups, both national and international. This was conducted in several ways, through submissions, bi-laterals, one-to-ones and focus groups. The responses pointed to a general welcoming of the proposals.

Unintended consequences

7. The following outlines potential negative consequences of the proposals, the likelihood of them arising and what measures can be taken to reduce the likelihood.
 - **The costs of assessing VMPs are disproportionate.** While assessments may potentially be complex, it will be in the common interest of both regulators and offenders not to spend disproportionate sums on assessment. If the experience is that assessment costs are high then there is the risk that regulators may choose not to use them. Government guidance and the development of good practice by regulators will help to reduce the likelihood of high costs.
 - **Monetary penalties are seen as lighter touch than prosecution and the regulated community become less concerned with complying.** The civil sanctions are designed to be available alongside prosecution in a way that recognises and deters the types of behaviour associated with offending. Prosecution will remain the mechanism of choice for the worst offending where the stigma associated with a conviction is required to deter criminal behaviour. The availability of VMPs, which can vary in scale depending on the offence but are not capped at a maximum amount so they can fully offset any financial benefit and reflect other aggravating factors like previous non-compliance, should reduce this risk. There will be guidance on the factors that should be considered when deciding whether prosecution or another type of enforcement action is appropriate.
 - **Monetary penalties affect companies' chances of securing contracts even where civil sanctions are used for relatively minor offences.** Discussions with businesses in the context of the FBEE project suggest that previous convictions are often a factor in the award of contracts and they raise the possibility that civil sanctions may in the future be included as a further factor. It would seem desirable for a distinction to be made between different types of sanction; it should be clear that convictions will indicate the worst cases; and VMPs and FMPs progressively less serious matters. Clear communication of the new monetary penalties would help to encourage such distinctions where appropriate.
 - **Appeals against application of sanctions if not sufficiently clear.** Regulators have made estimates of the frequency with which sanctions may be challenged based on current enforcement experience. These are relatively low as regulators are careful to avoid applying sanctions in a way that is unreasonable. Clear regulations, guidance and rights to make representations to the regulator will minimise the room for unnecessary appeals.

Legal Aid Impact Test

8. The legal aid test is concerned with the impact caused by new criminal sanctions or civil penalties. This is relevant here as the proposals introduce

new civil penalties. An assessment has been carried out by the policy team and agreed with the Ministry of Justice (MoJ) according to the guidance at the following link: <http://www.dca.gov.uk/laid/impact-test.htm>
The MoJ has agreed that there will be a minimal impact on Legal Aid, as the monetary penalties will largely affect defaulting businesses rather than individuals.

Economic

9. Specific economic issues are:

- **The impact on costs, quality or availability of goods and services.** Improved environmental enforcement may encourage some firms to invest in improved environmental management. The costs of this could then be passed on to customers. If non-compliant firms perceive they will need to increase costs then they might reduce quality of service so that they do not pass the costs onto their customers and potentially lose business. Some non-compliant firms may consider that the costs of complying with the law are too high and may choose to exit the industry. If no new firms enter this could reduce the number of suppliers and therefore the availability of goods and services. Equally if previously non-compliant firms are trying to cut costs then they may choose to restrict the goods and services they supply. Overall, it is assumed however that the percentage of non-compliant firms is small due to the already high deterrent so there is unlikely to be a material effect on costs, quality or availability of goods and services.
- **Impact on the public sector, the third sector and consumers.** The consolidated fund will receive more revenue through fixed and variable monetary penalties. The third sector and consumers could be affected if they are receiving goods or services from firms carrying out environmental offences and their costs increase. Consumers and local communities should all benefit from an improved environment.
- **Effect on new technologies.** The proposal should introduce a more level playing field for companies that have previously complied with environmental regulations compared to non-compliant companies. In order to gain greater market share some companies may introduce new technology to improve efficiency and lower costs in the longer term.
- **Internal and external investment.** These proposals are unlikely to have a large impact on investment behaviour. However, regulations and the ability to enforce more flexibly using notices or monetary penalties could stimulate investment in environmental technology and more environmentally sound practices to prevent accidents and the risk of environmental pollution or interference to other sea users.

Other environmental effects

10. The environmental benefits from these proposals are covered in the main body of the IA.

Health Impact Assessment

11. There may be health benefits that result from reduced damage to marine ecosystems for example through reduced contamination of fish stocks.

Sustainable Development Principles

12. These proposals directly supports two of the five principles of sustainable development as set out in the Government's sustainable development strategy i.e. of 'ensuring we are a strong, healthy and just society' and 'promoting good governance'.

Other equality issues

13. The following reports the conclusions made for the other issues that have been considered to test for differential impacts:

- **Race equality.** None identified
- **Gender equality.** None identified
- **Disability equality.** None identified
- **Human rights.** None identified
- **Rural areas and regional.** The proposal will affect companies which do not comply with environmental legislation so any effect would depend on there being more non-compliance in rural than urban areas, or in different regions.
- **Age and income.** It would not have a differential effect on children and young people, older people or income groups. It should facilitate the fair, equitable and consistent treatment of business by regulators; by administering fair and appropriate civil sanctions; and by enhancing consumer confidence and facilitating redress where appropriate in the market in which they participate.
- **Devolved countries.** These proposals will affect any area where the Secretary of State (or a delegated authority) is the licensing authority.

One-in, one-out

14. One-in, one-out does not apply to costs incurred as penalties to non-compliant businesses. Furthermore it only applies to direct costs, minus any direct benefits: the change in behaviour resulting from use of the sanctions is considered an indirect cost and is therefore not included. The only business costs these proposals lead to that are within the one-in, one-out rule are the costs of familiarising with the rules and responding to consultation. The present value of eligible costs to business therefore is £213k and the present value of benefits to business is £26k, therefore the net present value to business is £187k. The annual equivalent cost over 10 years with a 3.5% discount rate – i.e. the 'IN' - is therefore £25.7k.
15. However, the new tools should be considered in the context of wider benefits and costs of bringing in the new marine licensing system, which they will be used to enforce. As a whole, the new licensing system brings overall benefits from regulating and assessing marine projects on a single legislative footing.

That IA estimates that the costs of setting up the new marine licensing system for England are £4.9m over ten years and the benefits to the MMO and industry are £17.7m over the same period.

Annex 2: Monitoring and Review

1. The use of the new enforcement tools will be reviewed two years after their introduction. Monitoring data will be collected when the system commences in order to inform this review.
2. **Table 4** sets out questions the review should address. Defra will work with enforcement authorities and other stakeholders to develop a proportionate methodology for answering these questions and to ensure that maximum use is made of readily available data.
3. Defra and the enforcement authorities will set up a forum with stakeholders where results of the monitoring activity can be reviewed at key stages towards a formal review. This forum will help to assess whether the enforcement tools are being used consistently in line with published enforcement policies and guidance.
4. The aims of the review will be to establish:
 - a) what has happened;
 - b) whether the intended objectives of the new enforcement tools have been achieved (these have been identified within questions 8-14 in the table below);
 - c) what the costs and benefits have been;
 - d) whether improvements could be made;
 - e) what we have learnt about responding proportionately and effectively to environmental non-compliance.
5. **Table 4** below identifies the questions the review will include to achieve these aims.
6. The principle information sources to address these questions are expected to be:
 - data from enforcement authorities on the use of enforcement tools and related issues;
 - questionnaires for enforcement authorities and the regulated community;
 - detailed analysis of a sample of cases;
 - a social research project by external researchers;
 - other available sources.

Table 4: Questions to be covered by the review of the use of enforcement tools

A. *What has happened?*

1. Have the proposals been fully implemented and are the appropriate systems in place?
2. How much have the enforcement tools been used and how does this relate to expectations?
3. What is the enforcement authorities' and other stakeholders' experience of the enforcement tools?
4. What costs have been incurred in using the enforcement tools and how do these compare to expectations?
5. Have recipients of statutory notices and/or monetary penalties complied with them?
6. What have appeal rates been compared to expectations?
7. Have the enforcement tools been applied in a fair and consistent way?

B. *Whether we have achieved the intended objectives of introducing the enforcement tools*

8. Have they brought those not complying back into compliance?
9. Have they removed risks and prevented harm from occurring or continuing?
10. Have they ensured damage is restored, restitution is provided to local communities and that the polluter pays?
11. Have they removed financial benefit, related proportionately to the offence, harm and the facts of the case and, overall, helped to level the playing field?
12. Have they deterred non-compliance and encouraged behaviour change, future compliance and reductions in future risks?
13. Have they secured better results or the same results at lower cost?
14. Have negative 'unintended consequences' been avoided?

C. *What the costs and benefits have been*

15. What are the costs and benefits?

D. *Whether improvements could be made*

16. Are the right tools available for the right offences?
17. Are there ways to improve their design and the way they are used?
18. Are there circumstances in which the enforcement tools should be used more or less than currently?
19. Have the enforcement tools secured better collaboration between the enforcement authority and the regulated community and how can this be improved?

E. *What we have learnt about responding effectively and proportionately to environmental non-compliance*

20. What determines whether a person complies? How does the regulated community perceive the tools as a motivation for compliance compared to other mechanisms?
21. Does using the new enforcement tools provide an effective and fair means of enforcement?

Annex 3: Wage Rates

Rates for the relevant functions have been provided by the modellers in agreement with Defra. The MMO rates are based on observed staff costs and the industry rates are based on typical salaries and have been validated by industry representatives. All rates include a component to cover overheads and are adjusted to take account of the proportion of productive days (i.e. when staff are not on holiday or sick absence).

| Wage rates | |
|--------------------------------|---------------------|
| Function | Daily wage rate, £s |
| External legal advice | 800 |
| MMO district inspector | 367 |
| MMO senior officer | 292 |
| MMO enforcement officer | 225 |
| MMO junior officer | 200 |
| Industry environmental manager | 318 |

Annex 4: Workings for option 3

MMO preparation costs:

| Activity | Quantity | Daily rate | Time (days) | Unit cost pa | On/Off | Total Cost pa |
|--|----------|------------|-------------|--------------|--------|-----------------|
| Enforcement training for staff | 72 | 225 | 1 | -225 | 1 | -16217 |
| Admin costs associated with enforcement staff training | 2 | 294 | 5 | -1472 | 1 | -2944 |
| Training of legal support | 3 | 800 | 1 | -800 | 1 | -2400 |
| | | | | | | -£21,561 |
| Development of templates for notices (legal input) | 1 | 800 | 15 | -12000 | 1 | -12000 |
| Development of templates for notices (MMO/MFA input) | 1 | 292 | 15 | -4378 | 1 | -4378 |
| Establishment of the monetary penalty scheme - internal costs | 1 | 236 | 107.5 | -25343 | 1 | -25343 |
| Establishment of the monetary penalty scheme - external (consultant) costs | 1 | 700 | 40 | -28000 | 1 | -28000 |
| Establishment of the monetary penalty scheme - other costs | 1 | N/A | N/A | -20000 | 1 | -20000 |
| | | | | | | -£89,721 |
| Modification of the current IT system to create templates | 1 | N/A | N/A | -50000 | 1 | -50000 |
| | | | | | | -£50,000 |
| Legal input in to developing new guidance | 1 | 800 | 5 | -4,000 | 1 | -4,000 |
| Senior officer input in to developing new guidance | 1 | 292 | 20 | -5,837 | 1 | -5,837 |
| Officer input in to developing new guidance | 1 | 236 | 60 | -14,145 | 1 | -14,145 |
| | | | | | | -£23,982 |

MMO ongoing costs:

| Activity | Task | Quantity | Daily rate, £ | Time (days) | Unit cost pa | Total cost pa |
|-------------------------------------|---|----------|---------------|-------------|----------------|----------------|
| Guidance | Reviewing the revised guidance | 1 | 225 | 35 | -1065 | -1065 |
| | | | | | | -£1,065 |
| FMPs | Issue notice of intent | 20 | 30 | 1 | -225 | -4505 |
| | Consider representations made | 10 | 50 | 1 | -183 | -1835 |
| | Issue fixed monetary penalty | 10 | 30 | 1 | -113 | -1126 |
| | Total ongoing costs/benefits | | | | | -£7,466 |
| VMPs | Issue notice of intent | 7 | 225 | 3 | -676 | -4730 |
| | Consider representations made | 7 | 367 | 1 | -183 | -1284 |
| | Issue variable monetary penalty | 7 | 225 | 1 | -113 | -788 |
| | Meet with operator to discuss remedial action | 7 | 225 | 2 | -450 | -3153 |
| | Recovery of costs | 7 | N/A | N/A | N/A | 8961 |
| Total ongoing costs/benefits | | | | | -£996 | |
| Appeals | Administration of appeals against notices - hearing - officer time | 1 | 292 | 10 | -2918 | -3697 |
| | Administration of appeals against notices - hearing - legal time | 1 | 800 | 5 | -4000 | -5067 |
| | Administration of appeals against notices - written correspondence - officer time | 1 | 292 | 2 | -584 | -370 |
| | Administration of appeals against notices - written correspondence - legal time | 1 | 800 | 1 | -400 | -253 |
| | Administration of appeals against fixed financial penalties - written correspondence - officer | 2 | 292 | 2 | -584 | -1167 |
| | Administration of appeals against fixed financial penalties - written correspondence - legal | 2 | 800 | 1 | -400 | -800 |
| | Administration of appeals against variable financial penalties - written correspondence - officer | 0 | 292 | 2 | -584 | -204 |
| | Administration of appeals against variable financial penalties -written correspondence - legal | 0 | 800 | 1 | -400 | -140 |
| | Administration of appeals against variable financial penalties hearing - officer | 0 | 292 | 5 | -1459 | -511 |
| | Administration of appeals against variable financial penalties hearing - legal | 0 | 800 | 3 | -2000 | -700 |
| Total ongoing costs/benefits | | | | | £12,909 | |
| Collecting fines | Administrative burden to instigate proceedings for cost recovery | 3.1 | 200.1 | 0.5 | -100.1 | £0 |
| | Administration of going through bailiff conclusion | 3.1 | 200.1 | 1.0 | -200.1 | £13,650 |
| | Cost of using a bailiff | 3.1 | N/A | N/A | -500.0 | £600 |
| | Total ongoing costs/benefits | | | | | £14,250 |
| Prosecutions | Reduction in number of prosecutions | 0.33 | N/A | N/A | -10375 | £3,458 |
| | Total ongoing costs/benefits | | | | | £3,458 |

Industry preparation costs:

| Activity | Task | Quantity | Daily rate, £ | Time (days) | Unit cost pa | Total cost pa |
|-------------|---|----------|---------------|-------------|--------------|-----------------|
| Preparation | Reading and understanding new guidance | 65 | 318 | 0 | -129 | -8436 |
| | Responding to consultation on guidance (industry) | 20 | 318 | 2 | -636 | -12727 |
| | Total ongoing costs/benefits | | | | | -£21,163 |

Industry ongoing costs:

| Activity | Task | Quantity | Daily rate, £ | Time (days) | Unit cost pa | Total cost pa |
|-------------------------------------|---|----------|---------------|-------------|----------------|-----------------|
| FMPs | Administration costs associated with paying the fine upon receipt of notice of intent | 10 | 318 | 1 | -159 | -1591 |
| | Respond to notice of intent by making representation to the MMO | 10 | 318 | 1 | -159 | -1591 |
| | Administration costs associated with paying the fine upon receipt of fixed monetary penalty | 8 | 318 | 1 | -159 | -1273 |
| | Total admin cost | | | | | -£4,455 |
| VMPs | Respond to notice of intent by making representation to the MMO | 6 | 318 | 1 | -159 | -1002 |
| | Meet with the MMO to discuss remedial action | 6 | 318 | 2 | -636 | -4009 |
| | MMO costs recovered | 7 | N/A | N/A | N/A | -8961 |
| | Total admin cost | | | | | -£13,972 |
| Appeals | Prepare for notice appeal - hearing - industry costs | 1 | 318 | 10 | -3182 | -4030 |
| | Prepare for notice appeal - hearing - legal costs | 1 | 800 | 3 | -2400 | -3040 |
| | Prepare for notice appeal - letter to tribunal - industry costs | 1 | 318 | 1 | -318 | -202 |
| | Prepare for notice appeal - letter to tribunal - legal costs | 1 | 800 | 1 | -400 | -253 |
| | Prepare for fixed monetary penalty appeal - letter to tribunal - industry costs | 2 | 318 | 1 | -318 | -636 |
| | Prepare for variable monetary penalty appeal - letter to tribunal - industry costs | 0 | 318 | 2 | -636 | -223 |
| | Prepare for variable monetary penalty appeal - letter to tribunal - legal costs | 0 | 800 | 1 | -400 | -140 |
| | Prepare for variable monetary penalty appeal - hearing - industry costs | 0 | 318 | 5 | -1591 | -557 |
| | Prepare for variable monetary penalty appeal -hearing - legal costs | 0 | 800 | 1 | -800 | -280 |
| Total ongoing costs/benefits | | | | | -£9,361 | |
| Collecting fines | Administration of bailiff recovery process (both fixed and variable) | 3 | 318 | 1 | -318 | -970 |
| | Total ongoing costs/benefits | | | | | -£970 |
| Prosecutions | Costs of prosecution | 0.33 | N/A | N/A | -10375 | £3,458 |
| | Costs of prosecution - legal resources | 0.33 | 800 | 10 | -8000 | £0 |
| | Total ongoing costs/benefits | | | | | £3,458 |

Industry wider costs:

| Activity | Task | Quantity | Daily rate, £ | Time (days) | Unit cost pa | Total cost pa |
|-------------|---|----------|---------------|-------------|--------------|-----------------|
| Wider costs | Non-compliant population (fixed monetary penalties) change to become compliant | 20.00 | N/A | N/A | -100 | -2000 |
| | Non-compliant population (variable monetary penalties) change to become compliant | 7.00 | N/A | N/A | -2600 | -18200 |
| | Total ongoing costs/benefits | | | | | -£20,200 |

Others preparation costs:

| Activity | Task | Quantity | Daily rate, £ | Time (days) | Unit cost pa | Total cost pa |
|--------------|---|----------|---------------|-------------|-----------------|-----------------|
| Preparation | Responding to consultation on guidance (others) | 20 | 318 | 2 | -636 | -12727 |
| | Total | | | | | -£12,727 |
| | Cost of setting up a new chamber for appeals | 1 | N/A | N/A | -45000 | -45000 |
| Total | | | | | -£45,000 | |

Others ongoing:

| Activity | Task | Quantity | Daily rate, £ | Time (days) | Unit cost pa | Total cost pa |
|------------------|--|----------|---------------|-------------|--------------|-----------------|
| Court saving | Costs of prosecution | 0.33 | - | - | -231 | 77 |
| | Total ongoing costs/benefits | | | | | £77 |
| Tribunal appeals | Cost of appeal with written correspondence cases | 3.0 | N/A | N/A | -75 | -224 |
| | Cost of appeal with hearings | 1.6 | N/A | N/A | -7000 | -11317 |
| | Total ongoing costs/benefits | | | | | -£11,540 |

Penalty cost transfer:

| Activity | Task | Quantity | Daily rate, £ | Time (days) | Unit cost pa | Total cost pa |
|---------------------------|--|----------|---------------|-------------|--------------|-----------------|
| FMP | Pay fine upon receipt of the notice of intent | 10 | N/A | N/A | -150 | -1500 |
| | Pay fine early upon receipt of the fixed monetary penalty | 4 | N/A | N/A | -150 | -600 |
| | Pay fine on time upon receipt of the fixed monetary penalty | 2 | N/A | N/A | -300 | -600 |
| | Pay fine late upon receipt of the fixed monetary penalty | 1 | N/A | N/A | -450 | -450 |
| | Pay fine after appeal process and upon receipt of fixed monetary penalty | 1 | N/A | N/A | -300 | -300 |
| | Cost of the bailiff action (recovered fees) for fixed monetary penalties | 2 | N/A | N/A | -300 | -600 |
| Total penalty cost | | | | | | -£4,050 |
| VMP | Pay fine and undertake remedial action | 6 | N/A | N/A | -13000 | -72800 |
| | Pay fine and undertake remedial action after appeal process and upon receipt of fixed monetary penalty | 0 | N/A | N/A | -13000 | -4550 |
| | Cost of the bailiff action (recovered fees) for variable monetary penalties | 1 | N/A | N/A | -13000 | -13650 |
| Total penalty cost | | | | | | -£91,000 |

Wider benefits:

| Activity | Task | Quantity | Daily rate, £ | Time (days) | Unit cost pa | Total cost pa |
|--|---|----------|---------------|-------------|--------------|----------------|
| Environmental benefits from increased compliance | Environmental benefits associated with non-compliant and population (fixed monetary penalties) change to become compliant | 20 | N/A | N/A | 0 | £0 |
| | Environmental benefits associated with non-compliant population (variable monetary penalties) change to become compliant | 7 | N/A | N/A | 2600 | £18,200 |
| Total ongoing costs/benefits | | | | | | £18,200 |