



Response to the Environment Agency's Enforcement and Sanctions Policy Consultation

The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the environmental litigation working party, and climate change party.

UKELA makes the following comments on the proposals:-

PRELIMINARY OBSERVATIONS

The role of the Environment Agency in enforcing laws that protect the environment from illegal activities and in ensuring compliance by industry and individuals with existing environmental law is a vital tool in the safeguarding of the environment.



The Environment Agency must be adequately resourced to continue to carry on its important enforcement functions. The environment is in a distinctive and potentially vulnerable position and this places a special responsibility on Government and regulators to ensure the protection of the environment.

Whilst it appears from the consultation that the provision of informed advice and guidance by the Environment Agency will continue to be the initial and preferable means of securing compliance, the criminal law remains an important sanction for serious or repeated offences. The introduction of the Definitive Guideline for Sentencing of Environmental Offences has resulted in the courts in recent years imposing far higher sentences which are likely to have added weight to the deterrence factor of enforcement by way of prosecution in relation to environmental crimes.

UKELA endorses the use of the wider range of civil sanctioning powers in relation to enforcement undertakings which are now available for offences committed under the Environmental Permitting Regulations which can in appropriate cases be a more effective and efficient sanction than the criminal law. But would welcome that those remaining environmental offences for which civil sanctions are currently unavailable be reviewed to consider whether civil sanctions should be extended

The Environment Agency states that it is proposing changes to its Enforcement Sanctions Guidance as a result of a number of recent changes to government policies and makes reference to the Definitive Guideline for the Sentencing of Environmental Offences, the Code for Crown Prosecutors (reviewed 2013) the Victims Right to Review and



Government Guidance policy on the economic growth duty. UKELA query why there is no reference to the Government's 25 year Environment Plan which advocates greater protection of the environment and envisages a leading role for natural capital accounting. UKELA suggests that the 25 year Environment Plan should also be referred to and considered by the Environment Agency when making any changes to its Enforcement and Sanctions Guidance.

The consultation includes amongst others things, proposed changes to the guidance on when Enforcement Undertakings may be accepted and includes a natural capital assessment methodology for calculating monetary offers by the offender. Taking into account the Government's 25 year Environment Plan, this would seem to be the ideal opportunity for the Environment Agency to also include in the consultation proposals to extend the use of a natural capital calculator approach for not only harm to water but to other media and ecosystems or at the very least state a willingness to consider a natural capital approach to other Enforcement Undertakings beyond those relating to harm to water.

The consultation also contains proposals to update the current guidance on the methodology used to calculate Variable Monetary Penalties (VMP's) together with changes to the existing enforcement policy on climate change and proposed penalties for Fluorinated Greenhouse Gases (Amendment) Regulations 2017 and the draft Control of Mercury (Enforcement) Regulations 2017.

UKELA welcomes the Environment Agency's acceptances that there is a need to change and simplify the current methodology in respect of calculating Variable Monetary

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Penalties (VMP's). VMP's have been rarely used in the past by the Environment Agency and UKELA consider that with a different and simplified methodology VMP's could prove to be a useful enforcement tool.

However, whilst in principle the proposed methodology based on the steps set out in the Definitive Sentencing Guidelines for Environmental Offences is preferable to the current guidance, UKELA has a number of concerns in respect of the current proposals which we have set out in more detail at our response to Q3 below but are briefly summarised here. Firstly, if the Environment Agency proceeds with its proposed changes UKELA consider that the maximum penalty for VMP's should be increased to the maximum level of fine that a court can impose of £3million. This would result in an arguably more proportionate and appropriate outcome. If the current level of £250,000 remains in place it could lead to an unfair imbalance of financial penalties to offenders caught between the fine line of those that are prosecuted and those that are issued with a VMP. This would avoid the slightly confusing "fudge" around reducing the maximum by a factor of 4.

The existing guidance and the proposed changes both affirm that VMP's sit alongside prosecution as an enforcement option in that they will only be considered for the more serious environmental offences and in particular Category 1 or 2 harm.

Some UKELA members have expressed concern that since the Definitive Sentencing Guideline for Environmental Offences was introduced there has been an increase in cases being presented to the court by the Environment Agency alleging higher levels of



culpability and harm to the environment than the facts and evidence support. In addition some of our members are of the view that linking the guidance on VMP's to the Definitive Guideline is a too complicated and convoluted solution to the existing equally complicated guidance. It follows from this if the steps set out in the Definitive Sentencing Guideline for Environmental Offences are to be adopted by the Environment Agency in the use of assessing the value of a VMP there needs to be written clarification of how the level of culpability and environmental harm have been assessed with the disclosure of relevant evidence to support decisions made.

Further concern has been expressed by our members about the ability of the Environment Agency to be an independent and fair adjudicator when carrying out the steps for calculating the amount of the VMP particularly in relation to the level of harm and culpability. The steps set out in the Definitive Sentencing Guideline for Environmental Offences are carried out by the judiciary after hearing submissions from both the prosecution and the defence and therefore an independent calculation is made after hearing all of the facts of the case. There is also the judicial process (a trial issue) available to an offender for the court to then adjudicate upon any dispute that has arisen in relation to the level of environmental harm and or culpability.

CONSULTATION QUESTIONS

Consultation Paper: 3.1 A single and clearer revised ESP

Q1. Do you agree that our established aims and principles in how we approach enforcement and sanctions should remain unchanged?

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Answer

No

Please explain your answer and if you think there are any different principles we should apply please tell us what you think they should be and why?

UKELA agrees that having a single more comprehensive Enforcement Guidance document is preferable to two separate documents that overlap each other.

The Environment Agency's approach to enforcement and sanctions should continue to remain focused on protecting the environment by stopping illegal activities, bringing illegal activity under regulatory control and punishing an offender to deter future offending when appropriate to do so and ensuring that there is restoration or remediation of the environmental harm caused. It is equally important that there is a consistent and transparent approach to regulation.

UKELA notes the proposed added principle to the Enforcement and Sanctions Guidance of taking into account the impact on economic growth. Whilst it is accepted that as a regulator the Environment Agency has a duty under the government's growth and duty guidance to take this into account when carrying out its regulatory functions no detail has been provided regarding how the Environment Agency will meet this principle. In order for the Environment Agency to meet its aims of protecting the environment for people and wildlife this duty should never be to the detriment of the protection of the environment and without sufficient detail being provided on how the Environment



Agency takes into account the impact of economic growth it will be difficult to understand how this proposed new principle will not impact on the Agency's ability to meet its main function which is to protect the environment for people and the environment. In any event it is vital that Environment Officers receive adequate training and are appropriately experienced in their role if this principle is to be added in to the guidance document.

UKELA suggests that there is no need to increase the number of principles and suggests that there are currently too many aims and principles in number. Therefore consideration should be given to in fact reducing the number of aims and principles. Having too many principles can result in conflict. For example the Environment Agency may have to achieve one or two principles but to the detriment of its other principles which can then give rise to concern and dissatisfaction amongst regulated businesses. If the number of principles is to be increased then it would assist businesses/individuals if the Environment Agency were able to provide a simple written pro-forma setting out how the aims and the principles have been considered and taken into account.

3.2 Publication of enforcement responses

Q2. Do you agree with our proposals on publication of our enforcement response?

Answer

Yes



Please explain your answer and if you think we should take a different approach please tell us what you think it should be and why?

UKELA agrees with the proposal to normally publish details of

- criminal convictions for environmental offences including formal cautions
- all Enforcement Undertakings offered including those rejected
- Notices relating to breaches and/or enforcement other than Notices of Intent;

We assume the intention is to publish this information on the Public Register. We suggest that this is expressly written in the Enforcement Sanctions Policy paper so as to give clarity. UKELA suggests that VMP's should also be included on the Public Register. It is not clear to us that this is in the intention (and that it is covered by reference to Notices at bullet point 3 above) if it is we suggest that the policy paper states this in terms for clarity.

The Public Register provides legitimate businesses and members of the public with vital information concerning issues of non-compliance and illegal activities of certain businesses and individuals. In addition it sends out a clear message to non-compliant operators on the likely consequences of their actions.

We note that SEPA's approach in relation to Enforcement Undertakings is much more transparent and that more than just the Enforcement Undertaking form is shared publicly. Consideration should be given to a similar approach in England in order to be more transparent and to ensure a greater level of consistency.



We consider that more could be made of those that self report and cooperate with the agency so that the importance of this approach and the credit given are more easily identified.

3.4 Calculation of variable monetary penalties

Q3. Do you agree that using the Sentencing Guidelines as a reference is a suitable approach to calculating a VMP

If not, what other mechanism do you consider could be used and why?

Yes but strictly subject to the points raised in our preliminary observations. VMP's are too rarely used and there is a need for an easier and more transparent process which linking the guidance on VMP's to the Definitive Guideline could achieve.

Our proposed amendments to the current proposals with brief reasons are as follows:-

1. The maximum penalty for VMP's should be increased to the maximum level of fine that a court can impose of £3million and not as the Environment Agency proposes a starting point of £1million. If an increase to £3million is imposed for the maximum penalty for a VMP this would result in an arguably more proportionate and appropriate outcome.
2. If the current level of £250,000 remains in place it could lead to an unfair imbalance of financial penalties to offenders caught between the fine line of those that are prosecuted and those that are issued with a VMP.
3. An increase to £3million as a maximum penalty would avoid the slightly confusing "fudge" around reducing the maximum by a factor of 4.



4. The existing guidance and the proposed changes both affirm that VMP's sit alongside prosecution as an enforcement option in that they will only be considered for the more serious environmental offences and in particular a Category 1 or 2 harm.
5. To address the serious concern from our members regarding the assessment of category levels of harm and culpability UKELA proposes that the Environment Agency should set out its case in the Notice of Intent to the offender as is provided in the draft Enforcement Sanctions Policy (see procedural safeguards Annex 1). This should include how it has assessed levels of harm and culpability and reasons for this assessment.

3.5 Enforcement undertakings

Q4. Do you agree that a natural capital methodology will help describe the damage to the water environment and so encourage suitable EU offers to be made

Yes

Answer

UKELA agrees in principle that there should be a natural capital methodology to help describe damage to the water environment. This accords with the increased focus on natural capital in the Government's 25 year Environment Plan. It also accords with environmental economics in other jurisdictions and areas of environmental protection.

Thus environmental economics has been used for many years in the United States natural resource damage assessment and for the last decade the ecosystem services



concept has underpinned the Environmental Liability Directive (ELD) approach to damage and compensatory assessment.

Although the consultation document only refers to the use of a natural capital methodology to assess harm to water, changes should be made to the guidance so as to also welcome the use of natural capital accounting principles for other types of environmental harm.

As to other ways that the guidance could be improved upon, UKELA shares the views of Ramboll Environment & Health UK - whose consultants are also members of UKELA – on their consultation response dated 25th January 2018. For ease of reference we have set out the key points in the remainder of this section.

Although the use of an environmental economics concept is agreed, we do not agree with the use of the proposed calculator and guidance. We consider that the current proposed calculator and guidance are overly simplistic and at risk of inaccuracy and the following reasons relate specifically to the overall methodology:-

1. Clarification is needed on the definition of natural capital in the context of the draft policy and the water pollution natural capital calculator (hereinafter referred to as the "calculator"). With focus on fish, invertebrates and plants this would appear to miss the fundamentals of natural capital analysis in terms of the function of a waterbody and its services such as commercial fisheries, landscape value, and its role in flood mitigation (for example, the damage led to a physical change in the waterbody). The Environment Agency's Surface Water Appraisal Guidance



includes a wider range of services than appear in the calculator for example society/cultural services are missing . A damage assessment for enforcement undertakings should take into account all ecosystems services (or natural capital) affected.

2. It is also unclear how the valuation of compensatory actions is to be calculated. An assessment of a broader range of ecosystem services would not only allow for a more accurate valuation of damage, but would also allow an assessor to value a range of compensatory measures to meet some or all of the affected services. These measures may vary in value and timescales for example, high value over short timeframe versus low value over long timeframes, but overall, may demonstrate equivalent or net environmental benefits. How will the assessor or the Environment Agency know whether a compensatory activity will be under – or over – compensatory. Also the policy and calculator leave no room for creative compensatory solutions e.g. where it has not been possible to restore the environment to its original condition other benefits may be valued such as angling facilities , education facilities, research programmes etc. In an accepted enforcement undertaking, a wetland creation was accepted for compensatory action and although not valued at the time, is likely to have created greater environmental benefit than the previous land use and the environmental damage (i.e. a net benefit).
3. The approach appears to be too simplistic and inflexible to be applicable to all environment impacts to waterbodies (examples are provided in the next section). Several aspects of the guidance refer the assessor to the Environment Agency for



advice. Experience of members is that this is unlikely to happen in practice should the Environment Agency be contemplating enforcement action. There is also concern that the advice may not be impartial. It is noted that in a recent enforcement undertaking that Ramboll advised upon, an Environment officer had over-estimated the severity of and scale of the incident. Instead it would be preferable to recognise that damage assessment is complex, science based and should only be undertaken by environmental professionals including biologists, Eco-toxicologists, environmental and analytical chemists and economists. In another example where it was uncertain whether to offer an enforcement undertaking, a site investigation including development of a conceptual site model, soil water and groundwater monitoring and predictive modelling were needed to establish whether damage to surface and/or groundwater had occurred. It should be recognised that the calculator is not a substitute for environmental damage assessment.

4. Enforcement undertakings should be available to all incidents including Category 1 and 2 incidents. The environmental damage assessment methodology is applied to ELD cases which are potentially of the highest severity.
5. It is unclear how the Compliance Classification Scheme (CCS) and Common Incident Classification Scheme (CICS) translates to the proposed approach and calculator. The CICS and CCS have classification systems that do not match the WFD status descriptions in the calculator lookup table.
6. It would be helpful to demonstrate – through guidance – how to undertake a damage assessment, i.e. that it is a step-wise process. Guidance is available, for



example, the Energy Institute has published guidance on establishing ecological baselines for environmental damage and on environmental recovery following major accidents (available from the Energy Institute website).

7. The use of the WFD classification system adds a layer of unnecessary confusion and uncertainty. For example, in a recent enforcement undertaking, the baseline ecological status of the river was understood to be good, but there were no water abstractions and no evidence of recreational fishing since anglers could not access the banks of the river. Angling clubs reported that they always used the nearby 'sister' river that had ready access, similar water quality and migratory salmon. The WFD status lookup in the calculator fails to reflect this situation with the consequence of either under valuing the quality of the river (if a lower status is selected to reflect the lack of other benefits) or over valuing recreational use of the river.
8. The methodology does not account for potential persistent or bio-accumulative substances that may affect higher trophic organisms in the food chain or direct impacts to birds and mammals. The calculator suggests birds and mammals may be accounted for through scaling, but it is not clear how?
9. The draft policy (page 25 of 68) states that an offer relating to an incident that caused an environmental impact should: put right the environmental harm caused; achieve an environmental benefit; and include a financial contribution to a local and/or related environmental cause or charity. UKELA query why should the offer include an additional charity contribution if the environmental benefit offered in compensation is equivalent or greater than the damage caused.



Natural capital calculator tool

The comments below relate more specifically to aspects of the calculator spreadsheet tool:

1. It is not clear how the Environment Agency has calculated the value of watercourse (represented in the calculator as a catchment)? Is there a study underpinning these values that is publicly available? In the example described above, the value of the catchment in the calculator would be the same despite the affected river being used differently to its adjacent namesake by local communities, particularly anglers.
2. It is usual practice in environmental damage valuation to derive a willingness to pay (WTP) value based on the number of households in the vicinity of the affected waterbody (i.e. people that are likely to use and value the waterbody). The calculator guidance recognises value is affected by people's proximity to a watercourse, however, it is not clear how this is accounted for in the calculator. The rural versus urban waterbody is differentiated in the WFD status lookup table, but how does this link to WTP.
3. The metrics for duration are arbitrary and it is unclear how they should change? For example, some species of fish are long lived and may be under-valued if a 7-year default is used (as suggested in the calculator guidance). Conversely, a recently accepted enforcement undertaking for a small tributary that was habitat for juvenile fish used a recovery duration of 3 years for juvenile fish. The recovery duration presumably assumes that there is a healthy ecological community nearby for recolonisation purposes. What if there is no recolonisation potential or if there



are costs for re-stocking.

4. When and how should the scaling factor be used
5. Environmental recovery following an incident is a continuum and may not be linear. How is this accounted for in the calculator.

Comparison of accepted Enforcement Undertakings undertaken by Ramboll versus the draft calculator method

Comparisons have been made of its calculations of the value of environmental damage from some accepted enforcement undertakings (2015 to 2017) with the proposed Environment Agency calculator. Our main findings are summarised below:

1. The environmental damage portion of an accepted enforcement undertaking relating to a small-scale water pollution incident in a tributary was valued by Ramboll at £5,000. A range of damage valuations was initially predicted to be between £2,000 and £5,000 and varied based on the number of households in the WTP estimate (e.g. nearest conurbation, local town, or district). The highest value (£5,000) was used as the basis of the enforcement undertaking and accepted by the Environment Agency. When, as far as practicable, the same input data were used, such as catchment, length of river, conditions before and after incident, default duration (7 years for fish), and no scaling factor, the Environment Agency calculator resulted in a value of £8,000 (central point, £7,000). This may appear to be a relatively small difference, although the Environment Agency calculator value is double the Ramboll-derived value if the mid-point of the valuations are used.
2. In another example of an accepted enforcement undertaking for a water



pollution incident of a watercourse (field drainage network) in a rural location, Ramboll derived an environmental damage value of just below £20,000 (range £13,000 to £18,500). In this scenario Ramboll extended the recovery duration to 10 years as long-lived fish had previously been recorded in the watercourse. When default parameters were used in the Environment Agency calculator for the corresponding catchment a value of £52,000 was derived, and when adjusted to a 10-year recovery for fish, the value is £71,000. Again, the Environment Agency calculator appears to over-estimate the value of environmental damage – using default settings – by at least double or triple those derived using established environmental damage valuation methods and already accepted enforcement undertakings in 2015 to 2017.

In summary, there appears to be some useful metrics behind the calculator spreadsheet, particularly the understanding and metrics behind the catchment values, that could usefully be shared with damage assessors. However, we would strongly recommend the flexibility to use proven environmental economics techniques and to use these in an environmental damage assessment (quantification and valuation) framework to inform enforcement undertaking offers ensuring they are made on a sound scientific and socio-economic basis.



3.9 Climate Change Annex

Q5. Do you agree that our proposed approach to penalty setting is appropriate?

No

If not, what other mechanism do you consider could be used and why?

Answer

We are concerned that there is too much freedom to determine the form and amount of the penalty

3.9 Control of Mercury (Enforcement) Regulations 2017

Q6. Do you agree that our proposed approach is appropriate?

Answer

We have no comments on these proposals.

3.10 The Proposals Generally

Q7. If you have any other comments on the proposed revised policy, please tell us what they are and your reasons for them.

Answer

Generally positive but our members have concerns regarding the following:-

Page 22 of the Guidance states "If we know of material which weakens our case or assists the defence, we will disclose it if it is relevant"



If the material weakens the Environment Agency case or assists the defence, it is relevant

Page 24 of the Guidance states

“We will not normally accept an offer:

- for an incident or breach which has been classified under the Compliance Classification Scheme (CCS) or Common Incident Classification Scheme (CICS) as:
 - category 1, unless there is, at most, low culpability
 - category 2, unless there is, at most, negligence
- where we have started legal proceedings (*)
- where the offence was intentional or of the most severe environmental impact, however we will not rule it out, as we will always apply discretion
- where we have already decided that a prosecution is appropriate in the public interest (*)
- made after issue of a VMP Notice of Intent”

(*) These two bullets duplicate: the Environment Agency cannot prosecute without first having decided it is in the public interest

The line “however we will not rule it out, as we will always apply discretion” duplicates the word “normally” at the start – not fettering discretion applies to each bullet point.

3.11 BIT

Q8. Typically, what is the role of your member of staff responsible for interpreting the Guidance (e.g. external Lawyer, external consultation adding regulated business, Lawyer, Technical Specials, Manager working within regulated business)?

Answer



UKELA members include in-house and external lawyers as well as consultants

Q9. On average, how many hours do you currently spend, per year, interpreting the Environment Agency's Enforcement and Sanctions Statement and Guidance? Please enter a numerical value (hrs)

Answer

As a membership organisation with numerous members involved in interpretation the guidance in various capacities we are not in a position to give an average figure.

Q.10 if the new guidance is introduced, do you think the number of hours you spend on interpreting the Environment Agency's position on enforcement and sanctions will

Answer

We would hope that the additional clarity would reduce the time spent interpreting the guidance.

Q.11. How many hours per year do you think this increase by? Please enter a numerical value (hrs)

Answer

For the reasons given at Q9 above we are not in a position to give an estimate

Q12. How many hours per year do you think this will decrease by? Please enter a numerical value (hrs)

Answer

For the reasons given at Q9 above we are not in a position to give an estimate.



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