



# The Environment Agency publishes its new Enforcement Sanctions Policy

The Environment Agency (EA) has published its new Enforcement Sanctions Policy <https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy> which brings together and clarifies the Enforcement and Sanctions Guidance and Enforcement Sanctions Statement into one document.

It also takes account of a number of changes in the environmental regulatory landscape. This includes the introduction of the Sentencing Council's Definitive Guideline for Environmental Offences on 1 July 2014 and an extension to the EA's powers in the use of civil sanctions for certain offences and their steadily increasing use.

The EA has available to it a number of sanctions, both criminal and civil, in cases where it considers there has been a breach of a legal obligation. The available sanctions are to some extent set out in statute and to some extent subject to the discretion of the EA. The alternative sanctions are set out in the EA's Offence Response Options document [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/705525/Enforcement-and-Sanctions-Offence-Response-Options.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705525/Enforcement-and-Sanctions-Offence-Response-Options.pdf)

So what effect is the new Enforcement Sanctions Policy likely to have?

Our view is that it does not make fundamental changes to the current regime, however, positively it provides duty holders with some clarity around the EA's approach to enforcement and the principles it will apply in taking decisions, specifically around the use of Enforcement Undertakings and Variable Monetary Penalties. It also perhaps signals the EA's willingness and commitment to further utilising civil sanctions as an alternative to a prosecution.

## Enforcement Undertakings

An Enforcement Undertaking (EU) is an agreement between the EA and an alleged offender that it will take certain steps to address a likely breach of environmental law. It is a civil sanction and does not constitute an admission of guilt. If accepted, the EA cannot bring a criminal prosecution for the original offence.

The aim of the EU is to put right the harm caused to the environment or where this is not possible, to achieve equivalent benefit to the environment. This is usually coupled with the payment of compensation, which the EA has indicated can be calculated using the natural capital assessment calculator (in cases of water environment damage). EUs usually also include a commitment by the alleged offender to make a financial contribution to an environmental cause or charity.

At Annex 1 of the Sanctions Policy, the EA has set out specific guidance on the factors it will consider and may cause it to both accept or reject the offer of an EU by a duty holder. For example, acceptance of an EU must be on the basis that the EU is "offered early and proactively". An EU offer will not be accepted when it seeks to deny liability or set up any defence for future breach of the EU.

While to an extent, the guidance offered is high level, it is helpful to duty holders considering whether to propose an EU as well as the terms which might be accepted.



### Variable Monetary Penalties

Variable Monetary Penalties (VMP) are another civil sanction, which can be used by the EA as an alternative to prosecution. As opposed to Fixed Monetary Penalties where the value of the penalty is fixed depending on the type of offence, the value of a VMP will be determined by the EA on a case by case basis depending on the gravity of the offence. It is used for more serious offences, where, for example, there is evidence of neglect or mismanagement, there is an environmental impact and to remove an identifiable financial gain or saving.

Monetary penalties are available for different offences to EU's.

What is interesting is that the new Sanctions Policy sets out that in determining the level of a VMP, which is a civil sanction, the EA will use a similar "stepped approach" as set out in the Environmental Sentencing Guideline, used to sentence cases of a criminal breach of legislation.

The Guideline does this on the basis of an offence category based on culpability to identify a starting point and category range for the penalty. The Policy acknowledges the VMP limit of £250,000 and therefore the starting points in the Guideline will be reduced by a factor of four. For example, the Guideline sets a £1 million starting point for the most serious offence by a large organisation and this would be reduced to £250,000. The other steps in the Guideline would then be applied including considering aggravating and mitigating factors, proportionality, factors which warrant adjustment, reduction for a guilty plea and the totality principle. Like the Guideline, the Policy states that Very Large Organisations may be treated as being in a "class of their own".

In criminal cases where the Guideline is used, this stepped assessment often results in considerable dispute and negotiation between the parties. It will be interesting to see whether for VMP's, such an approach provides clarity and enhances the use of VMP's or simply results in further dispute.

### Comment

Overall the clarification provided by the Policy is helpful and in our view signals a willingness on the part of the EA to utilise alternative sanctions. However, we cannot help but feel that the EA may have missed an opportunity, particularly in relation to EU's, to make the process more collaborative and to encourage constructive dialogue with suspected offenders.

The EA has not adopted suggestions made in response to the consultation on the Policy to establish an impartial forum to manage the EU process. Such a forum would sit outside of the EA's investigation process and review incidents at an early stage with a view to reaching a common view on categorisation, whether an EU offer may be appropriate and the terms of an acceptable EU. This panel would also provide a route of route of appeal.



It will be interesting to see whether the clarification provided by the Policy translates into an increasing use of alternative sanctions and, coupled with that, whether there is any change in approach to those cases that are prosecuted.

If you would like to discuss any of the issues raised in this article, then please contact Amy Sadro at Eversheds Sutherland. The Eversheds Sutherland EHS team works with businesses across all sectors to provide proactive support and advice on environmental, health and safety management as well as enforcement by regulators following incidents.

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