



# Enforcement and Sanctions Policy Consultation document

Proposals to combine and amend our Enforcement and Sanctions Statement and Enforcement and Sanctions Guidance

November 2017

We are the Environment Agency. We protect and improve the environment.

We help people and wildlife adapt to climate change and reduce its impacts, including flooding, drought, sea level rise and coastal erosion.

We improve the quality of our water, land and air by tackling pollution. We work with businesses to help them comply with environmental regulations. A healthy and diverse environment enhances people's lives and contributes to economic growth.

We can't do this alone. We work as part of the Defra group (Department for Environment, Food & Rural Affairs), with the rest of government, local councils, businesses, civil society groups and local communities to create a better place for people and wildlife.

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Environment Agency  
Horizon House, Deanery Road,  
Bristol BS1 5AH  
[Email: enquiries@environment-agency.gov.uk](mailto:enquiries@environment-agency.gov.uk)  
[www.gov.uk/environment-agency](http://www.gov.uk/environment-agency)

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Email: [enquiries@environment-agency.gov.uk](mailto:enquiries@environment-agency.gov.uk).

# Executive summary

The Environment Agency released the latest version of its Enforcement and Sanctions Guidance in March 2015. The Environment Agency now needs to update this guidance on enforcement and sanctions to reflect changes in policy and learning from experience

The Environment Agency is now hosting this consultation which sets out where we are proposing amendments to our current approach and what we propose should remain unchanged.

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# 1. About this consultation

This document explains why we are consulting and what we are consulting you on. Our proposed revised Enforcement and Sanctions Policy, which contains the detailed changes of our proposals, should be read alongside this consultation.

## 1.1. Why are we consulting?

We are consulting on proposed changes to our Enforcement and Sanctions Statement (ESS) and Enforcement and Sanctions Guidance (ESG) documents to seek views on the significant areas of change.

The ESS and ESG documents were first published in January 2011. This followed a substantial review and a full public consultation exercise. The present version of the ESG was published in March 2015 to accommodate, amongst other minor amendments, the change of the Regulators' Compliance Code to the Regulators' Code. Our current ESS and ESG can be found at <https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-statement>

Under the Regulators' Code, we are required to publish, and keep under review, an enforcement policy. Under the Regulatory and Enforcement Act 2008 (RESA), and Regulations made under it, we are also required to consult on, and publish, guidance on our use of RESA civil sanctions.

The main proposed changes in our guidance are due to the following:

- A number of new Government policies have come into force or are likely to come into force soon, since the last review, which we now need to take into account including:
  - the Definitive Guideline for the Sentencing of Environmental Offences (issued July 2014);
  - the Code for Crown Prosecutors (Reviewed 2013);
  - the Victims' Right to Review implemented in November 2015; and
  - Government guidance on the economic growth duty.
- In April 2015 we were given a power to accept enforcement undertakings (EUs) for Environmental Permitting Regulations (EPR) offences. We have stated publicly that we will consult on and update our existing guidance in the light of this extension in our powers. This consultation concerns updating our guidance on when EUs may be accepted and includes a way in which water pollution offenders may quantify their offers using a natural capital assessment methodology. We are also proposing to update our guidance on the methodology we use to calculate Variable Monetary Penalties.
- In 2014 we published our first enforcement policy on climate change penalties. As part of our consultation on the climate change enforcement policy we made a commitment to review our approach to assess the level of commonality achievable across all regimes. We have updated our climate change guidance in the light of experience and made it more accessible by including it in our revised Enforcement and Sanctions Policy (ESP).
- New penalties and offences may be introduced if the draft Fluorinated Greenhouse Gases (Amendment) Regulations 2017 and the draft Control of Mercury (Enforcement) Regulations 2017, which are currently being consulted on, are implemented. We propose our policy on these penalties and offences.
- We propose to combine and shorten our two current documents [ESS and ESG] into a single new ESP.

## 1.2. What the consultation covers

The consultation covers three areas:

- general considerations and the need for the guidance
- a summary of the proposed revised policy, with accompanying consultation questions  
BIT (Business Impact Target)

## 1.3. We want your views

We think that this consultation will be of particular interest to:

Operators, trade associations and business and their legal and professional advisers: this is your opportunity to ensure that the revised ESP can be understood by you and is clear and fair about the action we may take if a legal obligation is breached.

Other regulators, the public, community groups and non-governmental organisations with an interest in environmental issues: this is your opportunity to ensure that the revised ESP sets out a clear and fair approach to enforcement.

## 2. General considerations and the need for the guidance

This section details the background to the guidance and the principles behind the minimum standards.

### 2.1. Need for the guidance

In addition to the statutory requirement to consult on and have a published enforcement policy set out in section 1.1, we consider it is fair and transparent for us to set out how we approach enforcement and sanctions.

There is a particular need for clarity of approach in the case of EUs, where it is the wrongdoer's responsibility to put forward proposals on what might be an acceptable EU.

### 2.2. Who the guidance applies to?

The guidance applies to all individuals and organisations that we regulate and against whom we might take enforcement action or impose a sanction.

It will be of particular interest to the legal and professional advisers of those we regulate.

### 2.3. What is our approach?

Our aim is to provide a cleaner, healthier environment benefiting people and the economy. We will use the full range of enforcement and sanctioning tools that are available to us, in combination if necessary, to achieve the best outcomes for the environment and for people. This may range from providing advice and guidance through to prosecution. In addition to any sanction we may impose, we may require other preventative or remedial action to be taken to protect the environment and people.

We must take account of the provisions of the Regulators' Code when devising and implementing regulatory policies and systems.

The requirements of the Regulators' Code do not apply in certain situations, for example:

- where we can demonstrate that immediate enforcement action is required to prevent or respond to a serious breach;
- where following the provisions would defeat the purpose of the proposed enforcement action.

We believe in firm but fair regulation. Underlying our commitment to firm but fair regulation are the principles of proportionality, consistency, transparency, targeting of action and accountability.

These principles are explained in the proposed ESP. We also believe in outcome focussed enforcement. We want to stop offending, restore or remediate damage or harm that has been done, bring operators under regulatory control and to punish and deter wrongdoing.

In deciding the appropriate action to take we will apply the following principles, we will:

- aim to change the behaviour of the offender;
- aim to eliminate any financial gain or benefit from non-compliance;
- be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
- be proportionate to the nature of the offence and the harm caused;
- aim to restore the harm caused by regulatory non-compliance, where appropriate; and
- aim to deter future non-compliance.

# 3. Summary of the proposed revised policy with accompanying consultation questions

This section summarises the proposed revised ESS and ESG, with the consultation questions

We do not intend to change our firm but fair approach to regulation. The general aims and principles which we currently apply, set out in section 2.3 of this paper will continue to apply and be reflected in our revised ESP.

We will maintain the safeguards provided by RESA when imposing or accepting a sanction provided for by that Act. These ensure that the approach we take will be balanced and fair. We will continue to have high level oversight of these sanctions by Environment Agency Directors.

## 3.1. A single and clearer revised ESP

We currently have two documents, which together set out our approach to enforcement and sanctions. The ESS sets out overarching principles and the ESG provides a more detailed description of approach and process. There is duplication across those documents so we intend to have a single document. We consider this will make our approach easier to understand, more accessible and transparent.

We propose to remove any detailed description of the procedural steps involved in each sanction and focus on the principles in deciding the action we would take.

Our Policy will be published on .Gov.UK consistent with other Government guidance.

### Consultation question 1

Do you agree that our established aims and principles in how we approach enforcement and sanctions should remain unchanged? Please explain your answer and if you think there are different principles we should apply please tell us what you think they should be and why.

## 3.2. Publication of enforcement responses

We are a committed Open Data organisation with the aim of making as much of our data as possible available free of charge. Our aim is for others to use our data to achieve our corporate and environmental outcomes. Incorporating our data into services enables the public and businesses to use it in the way they want to. This could be to understand their local environment, better protect themselves, to make investment decisions based on environmental performance, or to use our data in a way we have not thought of.

Publicising action we have taken and penalties imposed where there has been wrongdoing is part of the deterrent effect of enforcement action. It also enables reputable operators to avoid engaging with operators who have a history of poor performance. We are required by legislation to publish certain information and different requirements apply across different regimes. We propose setting out clearly the enforcement responses we will publish. We intend to adopt a consistent approach across all regimes. When we publish details of enforcement and sanctions we apply the Data Protection Act 1998, and the Rehabilitation of Offenders Act 1974, so far as they apply. The Data Protection Act 1998 provides protection against release of personal data about individuals, though not companies. The Rehabilitation of Offenders Act 1974 treats offences as being spent after prescribed time periods. The proposed ESP sets out the information we intend to publish at page 11.

## **Consultation question 2**

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

### **3.3. Prosecutorial independence in decision making**

We have always operated a process that has ensured decisions to prosecute have been taken independently from the investigating officers.

We have expressly set out our approach at page 17 in the proposed ESP.

### **3.4. Calculation of variable monetary penalties**

The imposition of a Variable Monetary Penalty (VMP) under RESA was dependent on calculating the level of penalty using Government guidance. That guidance has been withdrawn. We propose using, as a starting point, or reference, with modification where needed, the [Definitive Guideline for the Sentencing of Environmental Offences](#) (the Sentencing Guideline). The Sentencing Guideline has been judicially prepared taking account of a range of factors including seriousness and impact of the breach and provides for a stepped approach to the level of penalty based on size and turnover of the operator. We consider that is a proportionate and effective approach to setting a level of penalty in a consistent way. We set out our approach at pages 15 and 22-24 of the proposed ESP.

## **Consultation question 3**

Do you agree that using the Sentencing Guideline as a reference is a suitable approach to calculating a VMP? If not, what other mechanism do you consider could be used and why?

#### **Enforcement undertakings**

Enforcement Undertakings have been available since 2011 but they have only been available for Environmental Permitting Regulations offences since April 2015. In the light of experience using our existing guidance on Enforcement Undertakings (EUs) we consider that further guidance to offenders could be offered in relation to EUs. In relation to those involving water pollution, we propose providing amended guidance which will include a natural capital methodology to assess the long term damage caused to the water environment. A natural capital approach is one way in which the value of services provided by an ecosystem that supports the economy can be identified and valued. If this proves successful we will consider whether to develop a similar methodology for harm to land. We could then consider extending this further to other regimes including transfrontier shipment of waste and producer responsibility.

An EU must specify a number of things:

1. Action to secure that the offence does not continue or recur;
2. Action to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed;
3. Action (including payment of a sum of money) to benefit any person affected by the offence; or
4. Where restoration of the harm arising from the offence is not possible, action that will secure equivalent benefit or improvement to the environment.

In the water environment some form of equivalent benefit or improvement to the environment will often be required because of the transient impact of a polluting event. While fish restocking costs are relatively easy to calculate, for example, calculating the costs of a damaged environment over

several years is a more challenging exercise. Because of this EU offers may not be fully reflecting the harm caused with two consequences:

- If accepted the environmental harm has been undervalued; or
- If refused an offender faces a criminal sanction because it lacked an appropriate method to calculate the costs of damage to the water environment and so to make an offer to secure equivalent benefit or improvement to the environment elsewhere.

This consultation therefore proposes a simplified natural capital methodology to assess the long-term harm to the water environment from a polluting incident. The water industry and regulators already use natural capital methods to calculate the costs of improvements under the Water Framework Directive and that approach can be adopted as follows.

The model contains a number of elements which are used to calculate the costs of harm:

- The catchment affected is identified and valued by average or local value;
- The length of impact from the event;
- The duration of impact by reference to three main factors -
  - Fish – these are suggested to be in 7 year cycles
  - Invertebrates and
  - Plants – these latter two factors are suggested to be in 1 year cycles;
- The condition of each reference factor before the incident should be known from the known existing condition of the water body; and
- The condition of each reference point after the incident can be estimated from the facts of the incident, or from post incident monitoring or analysis.

The difference between the condition of the water body before and after the incident is calculated using the same base data used to calculate the costs of moving up between different water body status categories. A conservative approach is adopted in the model using the lower costs of moving up between “moderate” to “good” or better rather than the alternative higher costs of moving down from “moderate” to “poor”.

A scaling factor is then applied to produce a total sum which brings into account other relevant factors such as tourism/population absence/etc.

That total sum is a surrogate for the loss of natural capital and could be offered as a part of an EU.

We set out our approach to enforcement undertakings, including links to the natural capital model and guidance, at pages 16 and 24-25 of the proposed ESP.

#### **Consultation question 4**

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? If not, what other approach do you consider should be used and why?

### **3.5. Victims Right to Review**

We have developed a Victims’ Right to Review (VRR) scheme to give effect to the requirements of the Victims’ Directive implemented by the CPS in November 2015.

The VRR scheme will allow for a victim to request a review of the following decisions (a qualifying decision):

1. not to prosecute
2. to discontinue (or withdraw in the Magistrates’ Court) all charges involving the victim, thereby entirely ending all proceedings relating to them; or

3. to offer no evidence in all proceedings relating to the victim; or
4. to leave all charges in the proceedings to “lie on file marked not to be proceeded with without the leave of the Court of Appeal”.

For the purpose of engaging with the Environment Agency’s VRR scheme, a victim is, in summary:

- A person, or,
- A close relative of a person, or,
- A representative body such as an angling club or wildlife trust which can give voice to environmental loss or damage and has some standing or relationship, as a victim, with the affected place or community,
- A member of the public who can reasonably claim to represent the interests of the affected place or community as a victim by reason of proximity or by reason of their particular expertise or position in the community.

Victims who are known to us will be notified of the decision not to bring proceedings or to bring proceedings to an end. Where the decision is a qualifying decision, the notification will confirm that the victim is eligible to seek a review under the VRR scheme and will provide sufficient information to enable the victim to decide:

1. whether or not they wish a review to take place; and
2. if they do want a review what steps they need to take.

The only action a victim need take is to notify us of their request for a review. Normally we expect this to be made within 5 working days of receipt of the notification of the decision.

Where a request for a review is made we will advise the victim of the outcome of the review. The review could conclude:

1. a different decision should have been taken. If it is possible and appropriate to do so, action will be taken to (re)commence proceedings and the victim will be notified. If it is not possible or appropriate to (re)commence proceedings we will provide an explanation and if appropriate apologise to the victim.
2. the original decision was correct. We will be provided the victim with additional information/explanation.

We refer to the Victim’s Right to Review at page 13 of the proposed ESP.

### **3.6. Growth duty**

The Deregulation Act 2015 requires us to have regard to the desirability of promoting economic growth. We will take account of that duty and Government guidance when exercising a regulatory function.

We will intervene where it is necessary to protect the environment or people and if we do, we will intervene in a proportionate way.

Our primary role is to protect people and the environment. The growth duty sits alongside our primary role.

Non-compliant activity or behaviour undermines protections for people and the environment and needs to be appropriately dealt with. It also harms the interests of legitimate businesses that are working to comply with regulatory requirements, disrupting competition and acting as a disincentive to invest in compliance.

The growth duty does not legitimise non-compliance and its purpose is not to achieve or pursue economic growth at the expense of protection of people and the environment.

We will apply these approaches when we impose a penalty under the climate change schemes.

The Act excludes consideration of the growth duty where we decide to issue criminal proceedings or decisions we take in the conduct of those or civil proceedings. The duty applies to all of our other regulatory functions.

Our approach to making decisions on RESA and climate change civil penalties (as set out in annexes 1 and 2) takes account of the growth duty.

How the growth duty links to decisions made under the ESP is explained at page 9 of the proposed ESP.

### 3.7. Climate Change Annex

The climate change schemes annex has been reviewed. The maximum penalties for the climate change schemes (the schemes) are set in legislation. We have discretion to waive, reduce or extend the time for payment of the penalties. For the majority of breaches, we propose to amend our approach to applying discretion by using a stepped approach based on the Sentencing Guideline. We've adjusted the steps so that they're appropriate for the schemes. The steps include a 'nature of the breach' assessment and consideration of other enforcement positions. The annex includes our normal assessment for each breach under the schemes.

The annex also includes our proposed approach to new penalties under the draft Fluorinated Greenhouse Gas Regulations 2017. The consultation on the draft Regulations is open and can be found here <https://consult.defra.gov.uk/environmental-quality/fluorinated-greenhouse-gases-f-gas-regulations/>.

We will apply the penalty setting approach for the climate change schemes set out in the draft revised ESP as soon as the consultation starts. However, we will still carefully consider all comments made about the approach during this consultation and will review and revise the approach in light of these comments, if we consider that appropriate.

#### Consultation question 5

Do you agree that our proposed approach to penalty setting is appropriate? If not, what other mechanism do you consider could be used and why?

### 3.8. Control of Mercury (Enforcement) Regulations 2017

A new annex has been added to explain how we propose to enforce the draft Control of Mercury (Enforcement) Regulations 2017. A consultation on the draft Regulations is open and can be found here <https://consult.defra.gov.uk/environmental-quality/control-of-mercury-enforcement-regulations-2017/>.

#### Consultation question 6

Do you agree that our proposed approach is appropriate? If not, what do you consider to be more appropriate and why?

### 3.9. The proposals generally

We have asked specific questions on the significant areas of change we are proposing. We are also interested in any general comments on the proposals.

#### Consultation question 7

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

### 3.10. BIT

The Small Business, Enterprise and Employment Act 2015 commits future Governments to publishing, and then reporting on, their performance against a deregulation target – the Business Impact Target (BIT). The Enterprise Act 2016 extended the BIT to include the activities of national regulators to ensure that they carry out assessments of the economic impacts to business of any qualifying changes to their regulatory policies or practices.

As part of this duty the Environment Agency is carrying out an assessment of the financial impacts on business from proposed changes to its Enforcement and Sanctions Statement and Guidance.

You can help by answering the questions below to provide us with specific estimates from your business of the impacts associated with the proposed move to the revised guidance.

Please provide your best estimates of time described in the questions below. We appreciate these may be estimates only.

### **Consultation question 8**

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

### **Consultation question 9**

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.).

### **Consultation question 10**

If the new guidance is introduced, do you think the number of hours you spend on interpreting the Environment Agency's positions on enforcement and sanctions will:

Increase (go to Q11)

Decrease (go to Q12)

Stay the same

### **Consultation question 11**

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

### **Consultation question 12**

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

# 4. Responding to this consultation

## 4.1. Important dates

This consultation will start on 28 November 2017 and will run until 15 January 2018.

## 4.2. How to respond

You can view the consultation documents and questions online at <https://consult.environment-agency.gov.uk/portal/>. Here you can submit your response using our online tool which will enable you to manage your comments more effectively. It will also help us to gather and summarise responses quickly and accurately as well as reduce the costs of the consultation.

If you would prefer to submit your response by email or letter, or if you would like to ask for a printed version of the document to be posted to you, please contact 03708 506506, or email [ESPConsultation@environment-agency.gov.uk](mailto:ESPConsultation@environment-agency.gov.uk).

However, if you would like to send your response by post, please send your completed response form by 15 January 2018 to:

ESP Consultation - Legal Services  
Environment Agency  
Horizon House  
Deanery Road  
Bristol  
BS1 5AH

## 4.3. What will the responses be used for

We will publish a full response to the consultation. It will include summary comments and queries we received in the responses and will outline our recommendations which will take these into account. We will provide a full summary of the responses on our website by 6 April 2018.

## 4.4. How we will use your information

Throughout the consultation we will look to make all comments (excluding personal information) publicly available on the Environment Agency's online consultation portal. This includes comments received online, by email, post and by fax, unless you have specifically requested that we keep your response confidential. We will not publish names of individuals who respond, but we will publish the name of the organisation for those responses made on behalf of organisations.

If you respond online or provide us with an email address, we will acknowledge your response. After the consultation has closed a summary of the responses will be published on our website. We will contact you to let you know when this is available. We will also notify you of any forthcoming consultations unless you tell us otherwise.

In accordance with the Freedom of Information Act 2000, we may be required to publish your response to this consultation, but will not include any personal information. If you have requested your response to be kept confidential, we may still be required to provide a summary of it.

## 4.5. Consultation Principles

Government is improving the way it consults by adopting a more proportionate and targeted approach. We are running this consultation in accordance with their Consultation Principles.

If you have any queries or complaints about the way this consultation has been carried out, please contact:

Emma Hammonds, Consultation Coordinator  
Environment Agency  
Horizon House  
Deanery Road  
Bristol  
BS1 5AH

Email: [emma.hammonds@environment-agency.gov.uk](mailto:emma.hammonds@environment-agency.gov.uk)

**Would you like to find out more about us  
or about your environment?**

