

# Learning Lessons In Law

Dentons' **Laura Mackett & Annabel Hodge** discuss the changes to environmental law enforcement and civil sanctions and the lessons that may have been learned along the way...

**T**he Environment Agency is currently consulting on proposed changes to its Enforcement and Sanctions Statement and Guidance. The Agency's core enforcement principles are here to stay, but it is proposing some potentially significant updates that could affect many waste industry operators.

Lessons the Environment Agency (EA) has learned from experience – in applying the civil sanctions regime for environmental offences and a number of changes in law and policy – has left its Enforcement and Sanctions Statement and Guidance in need of a refresh. In particular:

- the Sentencing Council's Environmental Offences Definitive Guideline took effect in July 2014, resulting in a dramatic increase in fines for environmental prosecutions. In April 2015 the EA was given the power to accept enforcement undertakings (EUs) for environmental permitting breaches, which has led to more high value and complex EUs being agreed with it. The financial implications of both have undoubtedly made environmental offending a more prominent boardroom issue than ever before.
- the EA has developed a Victims' Right to Review Scheme to give effect to the requirements of the Victims' Directive implemented by the Crown Prosecution Service. The scheme aims to make it easier for victims to seek a review of a decision not to prosecute or a decision to terminate proceedings.

The EA's Enforcement and Sanctions Policy consultation document notes that a victim in environmental cases includes, amongst other persons, members of the public who can reasonably claim to represent the interests of the affected place or community by reason of proximity, expertise or position in the community.

- the Deregulation Act 2015 has required the EA to have regard to the desirability of promoting economic growth when exercising its regulatory functions including when making decisions on civil sanctions (but not when making decisions to prosecute).

"Lessons learned [by the EA] in applying the civil sanctions regime for environmental offences and a number of changes in law and policy has left the its Enforcement and Sanctions Statement and Guidance in need of a refresh."

In response to these and other recent developments, the EA is consulting on – and intends to combine and update – its Enforcement and Sanctions Statement and Guidance into one new "easier to understand, more accessible and transparent" Enforcement and Sanctions Policy (the Policy).

Whilst this Policy does not propose any substantive changes to the current principles underlying the EA's approach to regulatory enforcement (including the application of proportionality, consistency, transparency, targeting of enforcement action and accountability when carrying out enforcement activities),

there are certainly notable changes – we discuss a few of these below.

## Enforcement Undertakings

AN EU is a legally binding agreement under which an alleged offender promises the EA that it will take specified actions within specified time frames to address a likely breach of a certain provisions of environmental laws, including the Environmental Permitting Regulations and the Hazardous Waste Regulations.

Such actions can include taking steps to secure that the (alleged) offence does not continue or recur; action to secure that the position is, so far as

possible, restored to what it would be had the offence not been committed; identifying and consulting with affected parties; actions or payments to benefit affected parties; action that will secure equivalent benefit or improvement to the environment where restoration of the harm caused is not possible; and payment of the EA's costs.

In the right circumstances, EUs can provide a compelling alternative to a potential prosecution – which could be expensive, time-intensive and reputation damaging.

The new proposed Policy aims to clarify when the EA will – and will not – accept EU offers to help encourage the successful use of this civil sanction.

In many respects, the Policy follows existing EA guidance. That said, there are some differences that could create confusion and uncertainty against other EA guidance, which does not appear to be being updated, in particular the EA's guidance on its template EU offer form.

The key development for EUs is the introduction of a natural capital calculator tool. This can be used to inform EU offers relating to water pollution incidents, helping to financially assess longer-term damage caused to the water environment. Consultants have been using similar approaches to assist alleged offenders to appropriately pitch EU offers for some time, so it will be interesting to see how the EA's tool compares.

If this approach and tool proves successful, the EA notes that it will consider whether to develop a similar methodology for harm to land, and consider extending this to other regimes including transfrontier shipment of waste and producer responsibility.

A few other changes seem to have sneaked into the Policy in relation to EUs. For example, current EA guidance notes that the EA will not normally accept an EU offer for a Category 1 (the most harmful/impactful) offence or for an offence involving an element of intent. However, the new Policy indicates that EU offers will normally be accepted by the EA for low culpability Category 1 offences, but EU offers will not normally be accepted for reckless culpability Category 2 offences.

Reckless Category 2 is where, in practice, the EA argues many offences sit, especially those which could be dealt with by either an EU or prosecution. This change, therefore, possibly narrows how often EUs can be offered and accepted.

## Publication of Responses

UNDER THE new Policy, the EA proposes to take a more "consistent" (we would suggest reading more consistent as more thorough) approach to publication of its enforcement responses. This includes publishing details of rejected EUs unless prosecution proceedings are underway and "notices relating to breaches or enforcement other than information notices and notices of intent".

This is potentially a wide range

of information, which would have previously been vulnerable to disclosure via an information request, but not actively published by the EA as a matter of course.

Whilst the EA intends publication to be a deterrent to offending, it could also deter some parties from offering EUs and lead to more complaints/challenges to notices of breaches in an attempt to get these withdrawn and not published.

## Variable Penalties

THE EA proposes to calculate variable monetary penalties (VMPs) using a stepped approach by reference to the Environmental Offences Definitive Guideline. This takes account of company turnover or individual financial circumstances, profit, harm, culpability and aggravating, mitigating and other factors. The maximum penalty the EA can impose under a VMP is £250,000.

To reflect this, the EA proposes to apply the sentencing guideline fine starting points reduced by a factor of four. The EA is familiar with, and has had a lot of prosecution success, applying the sentencing guideline. This familiarity and improved clarity in how to calculate a VMP could lead to a much increased use of VMPs by the EA. The consideration of company turnover could also result in more VMPs hitting the £250,000 statutory cap level.

VMPs remain unavailable for environmental permitting offences (although can be used in relation to water pollution incidents that breach certain provisions of the Salmon and Freshwater Fisheries Act, which can often also constitute a breach the permitting regulations). They can be used for most offences under the Hazardous Waste Regulations and Transfrontier Shipment of Waste Regulations, as well as offences under some other environmental laws.

## Next Steps

THE EA consultation is open for responses until 15 January 2018, so the time to engage with this is now. We anticipate that the new Policy will be published in April 2018 and we will definitely be keeping a close eye on the consultation outcome and how the EA implements the new Policy. ■

**A Maidstone-based recycling company has been fined £666,700 and ordered to pay costs of £8,424 after a 34-year old worker suffered life-threatening head injuries.** Folkestone Magistrates' Court heard how, on 30 September 2015, the 34-year old employee of Countrystyle Recycling Ltd instructed another colleague to use a telehandler to move paper at the company's site in Maidstone. The telehandler was left running while the employee left the cab unattended, the boom of the telehandler was elevated and was lowered by another employee who entered the cab of this vehicle. The boom struck the head of the injured person as he was standing below. The injured person suffered serious brain injuries.

**Three relatives who dumped tree cuttings in a ditch have each been hit with fines by South Holland District Council.** Edward Church, Scott Church, Jamie Church and a 17-year-old boy who cannot be named for legal reasons, dumped the waste near Spalding on March 27 2017. When interviewed they admitted dumping the cuttings in Martins Road, Shepeau Stow. A fourth relative, Steven Church, who was not present during the offence but was questioned regarding the incident, admitted not having a waste carriers licence. All five offenders appeared at Boston Magistrates' Court.

**LIFE SMART Waste has partnered with Crimestoppers and a range of organisations to launch a campaign to help tackle the issue of illegal dumping of waste in warehouses and farm buildings in Scotland.** The Scottish Environment Protection agency (SEPA) highlights that the UK is seeing an increase in incidents of criminals using warehouses and farm buildings to illegally dispose of massive quantities of waste materials. The Crimestoppers campaign will raise awareness of the issue in Scotland via social and traditional media, calling upon industry and the public to be vigilant and report any suspicious or unusual behaviour. As a result of the collaboration, three interventions to reduce the incidence of warehousing in waste crime are planned, commencing with this communications intervention. Land and property owners have a responsibility to ensure anyone leasing their land or property complies with existing regulations.