



# To Plead Or Not To Plead?

**Helen Bowdren**, senior associate; and **Jennifer Travers**, associate, of Dentons explain what is set out in the new guidelines for sentencing for environmental offences, and what impact an early "guilty" plea could have on proceedings

The financial consequences of breaching environmental or safety law have changed dramatically over the last three years. The Sentencing Council issued new guidelines for sentencing environmental offences (in use from July 2014) and health and safety offences (in use from February 2016). Both sets of guidelines have changed the approach to sentencing in the courts – and led to much higher fines for large companies. It is now common to see fines over £1m and, in 2016, we have seen a fine as high as £5m in one safety case. A further change will come into force in June 2017, making it harder for offenders to get the one-third reduction to their sentence for entering a guilty plea. So what does this mean for the waste industry?

It will see a change in sentencing policy; not a change in law. In most safety and environmental prosecutions involving a company, the punishment is a fine. In some rare cases, directors may be sentenced to time in prison.

The Crown Court judges and magistrates use the new guidelines to calculate what the fine should be. They take into account factors such as the harm caused (or risk of harm), the culpability of the company, any aggravating or mitigating features and any past offences. They then calculate a fine using a sliding scale linked to turnover.

As an initial point, we would highlight that environmental and safety law has not changed – the duties that companies have to safeguard their employees and

protect the environment remain. However, the consequences of breaking the law have changed. The new guidelines provide consistency and certainty, meaning that companies will hopefully be treated in a consistent way. However, the numbers involved are much higher.

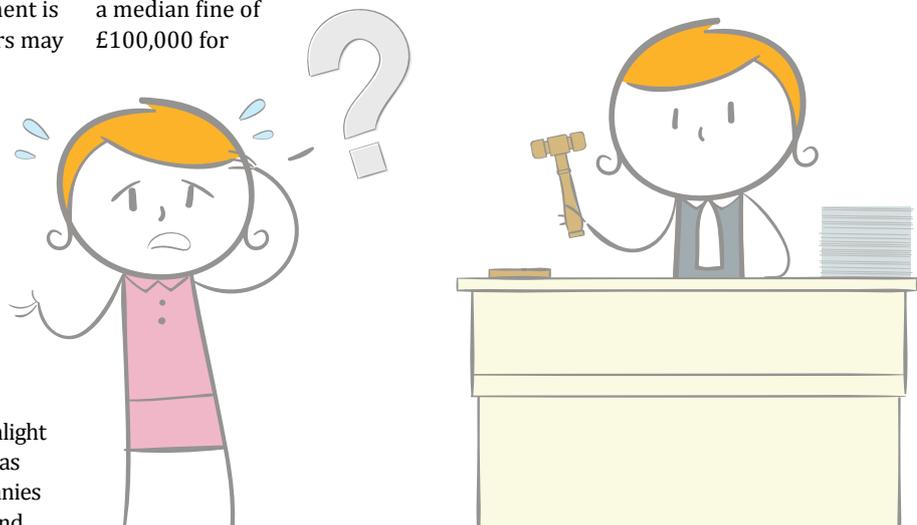
## Environmental Sentencing

THE SENTENCING Council has published figures showing the impact of the guidelines for environmental offences during their first year in force. The median fine for organisations sentenced in the Crown Court almost doubled from £12,500 (January 2013 to June 2014) to £21,500 (July 2014 to December 2015). The mean fine increased from £39,200 to £70,6000 in the same period. Those companies which are classed as "very large", with a turnover of £50m or more, had a mean fine of £166,200 and a median fine of £100,000 for

environmental offences.

In January 2016 Thames Water received a much-publicised £1m fine for a sewage pollution offence, at the time the largest fine given in an EA prosecution. However, by December 2016, that record had not only been broken, but the fine involved had doubled. In December 2016, Southern Water was fined £2m for pumping station failures, leading to pollution of the Kent coastline. It is clear that the courts have become comfortable with figures at the top end of the ranges in the guidelines.

In February 2017, Suez Recycling and Recovery UK Limited was ordered to pay a fine of £180,000 and costs of £325,000 for a series of offences relating to management of leachate at landfill site in Cornwall. The high level of costs reflected the complexity of the investigation carried out by the Environment Agency.



## Enforcement Undertakings

WE ARE also seeing increased use of civil sanctions as an alternative to prosecution. Since April 2015 the Environment Agency has the power to accept voluntary enforcement undertakings in relation to breaches of some environmental law (including environmental permitting breaches and packaging offences). Enforcement undertakings are a civil sanction, and they can provide a direct way of restoring the environment harmed by the offending, improve internal practices in non-compliant company and avoid the time and cost of bringing cases to court.

For example, Northumbria Water recently agreed an enforcement undertaking as a result of having pumped raw sewage into the River Tyne. This included a payment of £375,000 to a charity, as well as spending £15,000 on a project manager to oversee the implementation of the measures promised in the EU, which including site improvement works and varying the environmental permit.

The EA has accepted many enforcement undertakings for offences under the Producer Responsibility Obligations (Packaging Waste) Regulations 2007, including a sum of £414,960 paid by HiPP UK Ltd for failure to recover and recycle packaging waste between 2004 and 2011. The money was split between the Bumblebee Conservation Trust, the Woodland trust and the Yorkshire Dales Millennium Trust.

In 2016 the EA also published details of the first enforcement undertakings which had been accepted for environmental permitting offences.

## Early Guilty Plea Guidelines

WITH FINES increasing to record levels, the importance of getting credit for a guilty plea is more important than ever. The Sentencing Council has also released a new definitive guideline (Guilty Plea Guideline) for how an early guilty plea is treated, which will be in force from 1 June 2017.

The current position is that a sentence will be reduced by a third where a defendant has entered a guilty plea at the "first reasonable opportunity". After

this "first reasonable opportunity" the credit for a guilty plea reduces as the case progresses.

The new position is that the maximum one-third reduction is available when a guilty plea is indicated at the "first stage of proceedings". This has removed the "reasonableness" element, potentially impacting corporate defendants who are not in a position to enter a plea at the first stage. After the first stage of proceedings the maximum level of reduction is one quarter, which reduces to a maximum of one-tenth if a guilty plea is entered on the first day of the trial.

For complex environmental cases, it is often not easy to have a full picture of the facts, or enough information to seek advice on the strengths of a case. In addition, large organisations have authorisation structures that may need to be expedited in order to get board approval of a guilty plea in time for the first stage of proceedings.

The Guilty Plea Guideline offers some guidance on such cases. There is an exception where further information, assistance or advice is necessary prior to indicating a plea. In order for the sentencing court to be satisfied that the full reduction is still appropriate, there must be particular circumstances which "significantly reduced the defendant's ability to understand what was alleged or otherwise made it unreasonable to expect the defendant to indicate a guilty plea sooner than was done".

However, the court should distinguish between cases where advice or evidence was required in order to understand whether the defendant is guilty of the offence, and cases where the plea is delayed to assess the strength of the prosecution evidence.

Whilst the Guilty Plea Guideline explicitly states that nothing in the guideline should be used to put pressure on a defendant to plead guilty, it will be weighing over decision-makers and their legal advisors when potential fines are in the millions.

An increase in fines and a potential loss of the third reduction may mean the number and value of the enforcement undertakings accepted by the Environment Agency increases further, as companies seek to quickly resolve matters before a prosecution is brought. ■

**Associated Waste Management Ltd has been fined £125,000 for causing odour pollution at its sites in Leeds and Bradford.** The company was sentenced at Leeds Crown Court on 6 March after previously admitting two environmental offences relating to its waste transfer facilities in Gelderd Road, Leeds and Canal Road, Bradford. The Environment Agency prosecuted the company following repeated odour problems that had a detrimental effect on local residents. In mitigation, the company told the court that it had relied upon an external company that had approached it regarding odour suppression equipment, which had not worked. AWM was fined £75,000 for the Leeds offence, and £50,000 for the Bradford offence. It was also ordered to pay £75,000 in legal costs.

**Natural Resources Wales (NRW) has taken action against waste storage firm, SiteServ Recycling Ltd, in the Vale of Glamorgan following a major fire.** NRW issued a suspension notice to prevent more waste adding to the volume on site until the current wastes have been managed, to "ensure all residual risks to the environment and human health are reduced as far as practicable". Nadia De Longhi, operations manager for NRW, said: "While our main focus at the moment is working closely with South Wales Fire and Rescue Service, Public Health Wales and Vale of Glamorgan Council to manage the effects of the blaze, we have taken this emergency measure to minimise further risks of serious pollution."

**The operator and the landowner of an illegal waste site in a north Colchester village have been ordered to pay a total of £66,493.** Chelmsford Magistrates' Court heard that 14,700 tonnes of inert waste was stored on land behind a residential address known as Gean Tree in Great Horkesley, north of Colchester, "grossly" breaching a waste exemption and planning rules. George Nicholas James Dench pleaded guilty to running the illegal site and failing to comply with an enforcement notice to remove the waste. He was ordered to pay a total of £32,895 in fines and costs by Chelmsford Magistrates' Court. Annette Ismay Williams, who owned the land, pleaded guilty to allowing the illegal waste site to operate and to failing to clear the land under an enforcement notice; she must pay a total of £33,598 in fines and costs.