**Annex 1: RES Act - the Environment Agency's approach to applying civil sanctions and accepting enforcement undertakings**

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**Applies to England**

Contents

1. [1.The Environment Agency’s procedural safeguards](https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/annex-1-res-act-the-environment-agencys-approach-to-applying-civil-sanctions-and-accepting-enforcement-undertakings#the-environment-agencys-procedural-safeguards)
2. [2.Variable monetary penalties (VMPs)](https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/annex-1-res-act-the-environment-agencys-approach-to-applying-civil-sanctions-and-accepting-enforcement-undertakings#variable-monetary-penalties-vmps)
3. [3.Enforcement undertakings](https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/annex-1-res-act-the-environment-agencys-approach-to-applying-civil-sanctions-and-accepting-enforcement-undertakings#enforcement-undertakings)
4. [4.Third party undertakings (TPU)](https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/annex-1-res-act-the-environment-agencys-approach-to-applying-civil-sanctions-and-accepting-enforcement-undertakings#third-party-undertaking-tpu)
5. [5.Limitations on imposing RES Act civil sanctions](https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/annex-1-res-act-the-environment-agencys-approach-to-applying-civil-sanctions-and-accepting-enforcement-undertakings#limitations-on-imposing-res-act-civil-sanctions)
6. [6.Appeals against RES Act civil sanctions](https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/annex-1-res-act-the-environment-agencys-approach-to-applying-civil-sanctions-and-accepting-enforcement-undertakings#appeals-against-res-act-civil-sanctions)

We must follow the strict requirements and procedures set out in the legislation. However, the law does not include all that we need to consider when we assess whether to apply a sanction or accept an undertaking.

We must be satisfied beyond reasonable doubt that an offence has been committed before we impose a RES Act civil sanction. When we do decide to impose such a sanction we will apply the same safeguards as we would when we decide to prosecute.

**1. The Environment Agency’s procedural safeguards**

When we investigate whether an offence has been committed, or is likely to have been committed, we will apply the safeguards as set out in the [Police and Criminal Evidence Act 1984](http://www.legislation.gov.uk/ukpga/1984/60/contents).

We will follow the evidential and public interest tests laid down in the [Code for Crown Prosecutors](https://www.cps.gov.uk/publication/code-crown-prosecutors) when we assess whether our evidence is sufficient and whether our enforcement response is in the public interest having regard to our own Enforcement & Sanctions Policy. This includes consideration of the evidential strength and if it is clear, logical and convincing. If any of the evidence is ambiguous we will search for the truth. Where there is a direct conflict of evidence we will give the benefit of any uncertainty in favour of the accused.

We will make sure that the recipient of a notice of intent understands the case against them. We will set out the alleged offence and the reasons for the proposed sanction.

If we know of material which weakens our case or assists the defence, we will disclose it if it is relevant. If material is so sensitive a judge should rule on its disclosure or admissibility, then we will consider whether we should prosecute instead.

We will review our evidence based on our evaluation of any representations we receive.

We will have regard to victims and third parties (where they are known to us) whose interests have been adversely impacted by an environmental incident. We will try to:

* ensure that affected third parties are appropriately compensated
* encourage offenders to engage with the local community, assess and fully remediate the impacts of the environmental incident

Where we are advised that an offender is to compensate a third party, we will normally seek written confirmation that the offender has made reasonable attempts to compensate the third party as part of the arrangement. We will only proceed with applying a RES Act civil sanction or accepting an enforcement undertaking, if:

* it is appropriate in all other circumstances
* the offender has attempted to agree reasonable compensation with the affected third party

If we accept an enforcement undertaking we will make it clear that this does not prevent or prejudice the rights of a third party to bring their own civil claim about the incident to which it relates.

**2. Variable monetary penalties (VMPs)**

Please consider with this section the [Sentencing Council’s Definitive Guideline for the Sentencing of Environmental Offences](https://www.sentencingcouncil.org.uk/publications/item/environmental-offences-definitive-guideline/) (referred to as the ‘Guideline’) with this section. The Guideline explains how a court should assess a suitable penalty for an environmental offence. It follows a stepped approach. It applies to individual offenders (aged 18 and over) and organisations.

We use a similar stepped approach to calculate a VMP and follow the approach in the Guideline. To illustrate our approach we have set out the steps we would apply to an organisation. We would use the steps in the Guideline for Individuals when calculating a VMP for an individual.

We will follow the stepped approach, the guidance and the ranges set out in the Guideline. We will follow the definitions and terms used there.

The starting point for the most serious, deliberate offence by a large organisation is £1 million (within a range of between £450,000 to £3,000,000) - that is the top of the tariff scale.

Prior to the new legislation the maximum penalty we could impose using a VMP was £250,000 which was the statutory cap. So accordingly, we reduced the starting points in the table by a factor of 4 to reflect the statutory maximum. This adjustment will continue to be applied to offences which pre-date the new legislation. From the date of implementation of the new legislation this adjustment will no longer be required and there will therefore be a direct read-across from the Guideline tariff tables to our VMPs.

From the 1 December 2023 a VMP may be imposed for up to the same level of sanction as the maximum fine for a Crown Court case, namely an unlimited fine. The Guideline remains appropriate as a guide as it covers situations where unlimited fines may be handed down. We believe that we should have regard to the levels of penalties and guidance issued by the Courts when they sentence environmental offences when we impose penalties.

We will choose our starting point by reference to the factors laid down in the Guideline and the size of the defendant company in financial terms [or individuals, as appropriate]. We will follow a stepped approach in calculating the appropriate VMP.

Where the maximum fine that can be imposed for a particular offence in the Crown Court is anything other than unlimited, we will reduce the starting point for calculating the penalty to reflect the lower maximum fine.

Very Large Organisations (VLOs). We may treat very large organisations (VLOs) in a class of their own. This is in line with the Guideline and how the courts deal with fines for VLOs. An example of this is the judgment in the case: [R v Thames Water Utilities Limited (2015) EWCA Crim 960](http://www.bailii.org/ew/cases/EWCA/Crim/2015/960.html) where the court held that applying a mechanistic increase or reduction is not considered helpful.

Some helpful guidance has been provided by the Court of Appeal in the landmark case of R -v – Southern Water Services Limited in July 2021. We will have regard to the approach and guidance set out in these and other cases, in particular any decisions of the Court of Appeal and the Supreme Court on sentencing VLOs.

Discretionary requirements – we may consider imposing a Compliance Notice or Restoration Notice alongside the imposition of a VMP.

**Step 1: compensation**

We will take account of compensation paid to third parties and victims for:

* personal injury
* loss or damage resulting from an offence

We will use our discretion to reduce the amount of a VMP if compensation has been paid.

**Step 2: confiscation**

This is not relevant to VMPs. The proceeds of a crime can only be confiscated following a conviction.

**Step 3: determining the offence category**

We will use culpability (blame) and harm factors when we work out the offence category.

We will use the definitions in the Guideline to assess culpability.

We will use the categories of harm in the Guideline to assess harm. But, as part of our assessment we will use our Common Incident Classification Scheme (CICS) and Compliance Classification Scheme (CCS) classifications as evidence of harm.

Together the culpability and harm factors indicate how serious the offence is. We will use the result to identify our starting point and category range when we assess the appropriate penalty.

**Step 4: starting point and category range**

When we calculate a VMP we will assess the:

* size of the organisation, by turnover or equivalent
* financial circumstances of an individual

The Guideline includes a summary of aggravating and mitigating factors. We will identify if any combination of these or other relevant factors should result in adjusting the starting point penalty up or down. For example, relevant recent convictions and/or a history of non-compliance are likely to result in us applying a substantial upward adjustment.

After step 4 we will ‘step back’ and apply the factors set out in steps 5 – 7. This is to review whether the penalty as a whole is fair and proportionate and we will adjust as necessary .

**Step 5: step back - removal of any economic benefit derived from the offending**

The penalty can include an amount to cover any obvious financial benefit unlawfully gained by the offender. We will only add this if the amount of the financial benefit can be ascertained with some degree of certainty.

**Step 6: step back – proportionality**

We will check whether the proposed penalty based on turnover is proportionate to the means of the offender. We will balance the need for the penalty to have a real economic impact with the organisation’s ability to pay.

We will remove the automatic division of the penalty by 4 for offences committed after the implementation date of the legislation, but we will use our discretion to ensure the proportionality of the proposed penalty.

We may, where we receive evidence, allow time for payment or allow payment by instalments.

**Step 7: step back – consider other factors that may warrant adjustment**

Our calculation will take any other factors into account. For example, matters which came up in the investigation or as a result of representations received, such as the involvement of third parties.

**Step 8: consider any factors that might indicate a reduction, such as assistance to the prosecution**

This factor does not apply to calculating a VMP as there is no prosecution, however, though it may have been a factor which influenced the choice of sanction. We may , however, take into account assistance and co-operation in the investigation and imposition of a sanction.

**Step 9: reduction for guilty pleas**

This does not apply for calculating a VMP as a plea is not required, but we will take into account an offender’s co-operation. We may reduce a penalty where there have been early admissions and prompt assistance with our investigation.

**Step 10: ancillary orders**

We may adjust the VMP if the offender will face financial expenditure as a result of following compliance with any other notice related to the offence, [where expenditure directly benefits the environment] however, we will ensure that this does not reward poor operational performance and cost-avoidance.

This adjustment is not appropriate if the recipient benefits from the work, such as site improvements.

**Step 11: totality principle**

We will take account of whether the total VMP is proportionate to the offending behaviour. In particular, we will consider any recovery of costs we have sought and any other discretionary requirements which might impose obligations upon a recipient.

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**Step 12: reasons**

We will explain how we calculated the VMP and give our reasons.

**3. Enforcement undertakings**

**3.1 When the Environment Agency will accept an offer**

We are more likely to accept offers when they are offered early and proactively.

Generally, we will only consider accepting an enforcement undertaking offer when:

* we are confident the terms of the enforcement undertaking will be complied with
* we believe a breach of relevant legislation has occurred
* we consider the enforcement undertaking to be the correct regulatory outcome taking into account:
	+ the nature of the offence and its impact
	+ other forms of enforcement available, to remedy the issues concerned, to the environment and the community

however we will retain our discretion to accept offers which may be exceptional or otherwise desirable in the public interest

* the offer is above what the company would normally need to do to comply
* the offer is given in good faith
* the offeror makes a positive commitment, at the right company level to stop the offending conduct or alleged breach and to maintain compliance
* the offeror rectifies the consequences of the conduct, including interacting with any third party affected by the offence
* the offer does not contain restrictions on how we may publish its acceptance in cases involving pollution of the environment or harm to human health and it is demonstrated that any necessary remediation or restoration work commenced or will commence at the earliest opportunity

**3.2 When the Environment Agency will not accept an offer**

We will not normally accept an offer:

* for an incident or breach which has been classified under the CCS or 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

We will not normally accept an enforcement undertaking offer if it contains:

* a clause denying liability
* any clause that sets up defences for possible breach of an enforcement undertaking

**3.3 How the Environment Agency secures consistency when assessing offers**

We will establish that:

* the offer includes reasonable payment to cover our costs for the time spent on the offence and assessing the offer, this meets the ‘polluter pays’ principle
* a payment made to a project the Environment Agency is involved with does not contribute to funding its core activity
* the offer of payment to a third party is an unrestricted offer with no benefit to the offeror
* the offer of payment to a third party protects, restores and enhances the natural capital of England and where possible meets the objectives the breached legislation was trying to achieve
* the action in the offer secures environmental improvement and relates to the objectives of the breached legislation, for example, it is for a relevant charity or to address the actual impact
* where the offer relates to an incident that caused adverse environmental impact, it should:
	+ put right the environmental harm it caused
	+ achieve equivalent benefit to the environment plus compensation where the environmental harm cannot be restored - one method to calculate this is to do a natural capital assessment with the [Environment Agency’s natural capital assessment calculator](https://www.gov.uk/government/publications/water-pollution-natural-capital-calculator) for water environment damage
	+ include a financial contribution to a local and/or related environmental cause or charity
* an offer proposing to contribute to a project to improve the ecological status of water bodies which would be unaffordable without this contribution is carefully considered
* where the breach does not have a direct impact on the environment, such as the packaging waste producer responsibility regime, the offer will protect, restore or enhance England’s natural capital
* an offer to a local authority contains no financial contribution to their core activities

An offeror may pay the offer in installments. We will consider the request if the offeror can give evidence of their inability to pay it outright - such as certified accounts or records.

**3.4 When the offer is accepted**

Once an offer has been accepted, it becomes a legally binding written agreement between the offeror and the Environment Agency.

**3.5 Failure to comply with an enforcement undertaking**

If an offeror fails to comply, either fully or in part, with an enforcement undertaking, we are likely to do one of the following:

* serve a VMP, compliance notice or restoration notice on the offeror
* prosecute for the original offence
* vary or extend the time for complying with an enforcement undertaking

**4.Third party undertaking (TPU)**

A TPU is similar to an enforcement undertaking but can only be offered where an offender has already received a notice of intent to serve one of the following:

* VMP
* compliance notice
* restoration notice

A TPU can only be used to make an offer to compensate someone who has been affected by the offence.

**5. Limitations on imposing RES Act civil sanctions**

The Environment Agency cannot impose a RES Act civil sanction where:

* that offence is not specified as having a civil sanction available
* that offence does not have that particular civil sanction available
* no offence has been committed
* it is not possible for the offence to be proved beyond reasonable doubt (except enforcement undertakings)
* representations indicate that a defence is available which should be heard before a court such as a statutory defence

**6. Appeals against RES Act civil sanctions**

Where we can impose a RES Act civil sanction our notices will set out rights of appeal. Find guidance on [how to appeal to a tribunal against a fine or notice for an environmental offence](https://www.gov.uk/guidance/environmental-fines-or-notices-appeal-against-a-regulator).

The grounds of appeal against the imposition of a civil sanction will be one of the following:

* decision was based on an error of fact
* decision was wrong in law
* decision was unreasonable
* amount is unreasonable
* any other reason