Response to Environment Agency’s consultation on Enforcement and Sanctions Policy
29 January 2018

About Energy UK

Energy UK is the trade association for the GB energy industry with a membership of over 100 suppliers, generators, and stakeholders with a business interest in the production and supply of electricity and gas for domestic and business consumers. Our membership covers over 90% of both UK power generation and the energy supply market for UK homes. We represent the diverse nature of the UK’s energy industry – from established FTSE 100 companies right through to new, growing suppliers and generators, which now make up over half of our membership.

Our members turn renewable energy sources as well as nuclear, gas and coal into electricity for over 27 million homes and every business in Britain. Over 730,000 people in every corner of the country rely on the sector for their jobs, with many of our members providing long-term employment as well as quality apprenticeships and training for those starting their careers. The energy industry invests £12bn annually, delivers £88bn in economic activity through its supply chain and interaction with other sectors, and pays £6bn in tax to HM Treasury.

We welcome the opportunity to contribute to the Environment Agency’s (EA) consultation on proposed changes to its Enforcement and Sanctions Statement (ESS) and Enforcement and Sanctions Guidance (ESG) documents. Our responses to selected questions are set out below.

Consultation questions:

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.

On the whole, most of the established aims and principles of the EA’s approach to enforcement and sanctions, as set out in section 2.3 of the paper, appear reasonable. In terms of the approach taken by the EA, the paper states “this may range from providing advice and guidance through to prosecution”. In our view, advice and guidance is key to securing compliance for the majority of operators and we would therefore urge the EA to adopt this as the first step in any enforcement proceedings before progressing to more stringent measures. Such an approach is key to maintaining a good and effective working relationship with generally compliant operators.

Furthermore, we have particular concerns with the EA’s enforcement and sanctions penalty principles which state that the EA, when carrying out enforcement activity, aims to be “responsive and consider what is appropriate for the particular offender and regulatory issue, including punishment and the public stigma that should be associated with a criminal conviction”. Whilst it is perfectly legitimate for the EA to say that it aims to change the
behaviour of an offender and punish wrongdoing, the punishment must be clearly related to, and proportionate to the offence committed. It is important that there is complete transparency in how regulators approach their regulatory activities and using something as nebulous as the effect of a public statement does not seem appropriate. Whilst public stigma is something that operators consider, it should not be central to the enforcement principles of the regulator.

Nonetheless, we welcome the intention to continue to have high level oversight of sanctions by EA Directors. In our view, this level of oversight is necessary to ensure that only proportionate and consistent actions are taken. We also support the intention to have a single policy document.

**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.**

We recognise that publicising enforcement action taken and penalties imposed is part of the deterrent effect of enforcement action and we support this approach where there has been a wilful, negligent or significant breach or incident. However, the publication of all notices relating to breaches or enforcement (other than information notices or notices of intent) will include notices for very minor offences, such as a fixed penalty for failing to submit a data return on time. The publication of such a penalty could have a disproportionately negative impact on some companies, for example where there is a reputational impact.

To give a specific example, we do not agree with the EA's proposal to publish rejected Enforcement Undertakings (EUs) on the basis that:

(i) it is prejudicial to the alleged offender who may still be required to defend prosecution if an EU cannot be agreed even if prosecution proceedings are not underway at the time of publication;

(ii) it would represent a breach of confidentiality implied by the EU negotiation process (i.e. communities may feel entitled to benefits that were not agreed in a concluded EU), and;

(iii) it will act as a deterrent against engaging with the EA on an EU, if rejected proposals are made public.

Considering that the Scottish Environment Protection Agency’s (SEPA) enforcement policy makes clear that rejected EUs are not published, we would suggest that the EA has a clear obligation not to publish any notices which are the subject of appeal or challenge while such a process is ongoing or where such an appeal or challenge has been upheld.

Moreover, we would urge the use of discretion by the EA where available in determining when to publish such details and, in particular, when to name individual companies. The decision whether or not to publish needs to take into account the potential reputational impact that could result and whether such impact is proportionate to both the nature of the offence and the harm caused (if any) to the environment. In our view, the publication of such details should only be undertaken in cases of significant enforcement action and not for fixed penalties which are, by their very definition, for minor offences.

Given the above, we would welcome clarification that all enforcement measures that are to be published, including any fixed penalties, will go through the same internal governance process and be subject to the same level of oversight by EA Directors. While fixed penalties may have
a smaller financial impact, there is potential for a significant (and disproportionate) reputational impact and we therefore consider that fixed penalties should be subject to the same degree of scrutiny within the EA as larger financial penalties.

**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?

We are concerned that, under the Sentencing Guideline, the level of penalty is to be based on the size and turnover of the operator and, in particular, whether this could result in a significant penalty being imposed on a large operator while a considerably lower penalty could be imposed on a smaller operator for essentially the same offence. In our view, the level of a Variable Monetary Penalty (VMP) should be set to reflect the harm caused to the environment and any financial benefit arising from the offence, rather than how much the offender can pay. Indeed, a key principle of the policy is to adopt a consistent approach across regimes and operators, and we would therefore welcome clarification on this point of concern.

**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?

The introduction of a pragmatic basis for agreeing the size of an Enforcement Undertaking (EU) where complete restoration is not possible is welcomed. However, using natural capital tools to calculate the value of an EU is a new approach and the introduction of this methodology sets a major precedent. As such, the introduction of this calculator for water should be delayed to allow the EA to properly consult upon it, and the regulator’s broader vision for the application of natural capital.

We also welcome the statement that the use of the natural capital assessment calculator for the water environment is not mandatory, as it is important that new tools and approaches are trialled and assessed before being fully adopted. The EA has not, as far as we are aware, tabled this concept for discussion before and, given that it is a significant change to the enforcement policy, we would have expected a greater level of prior engagement.

We anticipate that natural capital tools and methodologies will be used increasingly in the future and this is borne out in the consultation. The consultation document (page 6) shows a clear intention for the EA to develop a similar methodology for assessing harm to land, transfrontier shipment of waste and producer responsibility, if the water pollution natural capital calculator proves successful. Application of this approach to these diverse topics requires a clear strategy and vision from the EA on natural capital. Therefore, we recommend that the EA publishes its vision for the future use of natural capital tools and methodologies (perhaps as part of the forthcoming review of its Regulatory Strategy) and consults upon it before producing tools, methodologies and guidance on natural capital to ensure that its approach is consistent and coherent. We therefore reiterate the point that the introduction of this calculator for water should be delayed to allow the EA to properly consult upon it, and its broader vision for the application of natural capital.

With regard to the calculator tool, the guidance and spreadsheet that support the methodology are somewhat limited in detail. The approach taken for natural capital for water offences appears incomplete when compared with the method for calculating a VMP. The VMP proposed method is based upon the Sentencing Guidelines, which is a well-established
process that considers a range of factors and provides a proportionate, effective and consistent approach to setting the level of penalty.

Further guidance on the EA’s natural capital assessment calculator for water in the form of worked examples of its implementation would be helpful to operators who wish to use this tool to calculate an EU. We suggest that these examples should cover a range of aquatic scenarios including freshwater uni-directional flow, freshwater bi-directional flow and coastal regimes. Such examples should be provided for practitioners so that the process of using the calculator at a site-specific level can be followed, and the application of scaling factors and the way in which impact is assessed can be demonstrated. These examples should help operators assess the following situations:

1. Where data characterising the impact (spatial extent and severity) of the incident on the three key ecological receptors (fish, invertebrates and plants) is unavailable. The approach currently assumes that this data is available, and this may not always be the case. Whilst the Water Framework Directive status table may allow a negotiated agreement to be reached in some cases, we would welcome further detail on approaches to impact characterisation, noting that the cost of survey work at the level of resolution required to capture the spatial scale and severity may have a similar magnitude to the final EU sum.

2. Where information for water bodies regarding the current status in terms of the three key ecological receptors (fish, invertebrates and plants) does not exist. We are not sure that such information exists for all water bodies. Therefore, further information on the mechanism to establish the status of a water body where such data does not exist would be useful.

3. Where scaling of the starting spreadsheet result is required to allow for individual circumstances and local conditions. It would also be helpful to provide more detailed examples on the circumstances and conditions which could play within this scaling. This would be helpful to both the EA and the offender.

Given the pragmatic nature of the approach followed when using the natural capital calculator, we suggest that a limit on the scaling factors for individual circumstances and local conditions should be applied (e.g. of the form +/- x% of the spreadsheet starting figure).

Additionally, we would welcome further information on what Water Framework Classification item is used to describe the “plant” receptor covered by the calculator.

**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?**

Energy UK agrees with the EA’s commitment to have regard to the desirability of promoting economic growth when exercising its regulatory function. It is important that the EA deals with non-compliant activities, as these can undermine legitimate businesses, but it is also important that action taken is proportionate, and as far as possible, is used to bring non-compliant operators into compliance to allow them to improve their performance and grow in a sustainable manner.

In terms of the victim’s right to review, the consultation document states that a victim can be a person without providing any further details as to what characteristics must be in place for a person to be considered a victim. Without qualification being made as to how a person is correctly categorised as a victim in relation to a specific offence, the victim’s right to review
could be claimed by almost anyone. We would suggest that a victim should be a person who has been impacted to a material extent by the offending behaviour.

**Question 7. If you have any other comments on the proposed revised policy, please tell us what they are and your reasons for them.**

We note in the policy document in the section on EUs that generally the EA will only consider accepting an EU offer when “the offer is above what the company would normally need to do to comply”. It seems excessive and unreasonable to require an operator to incur costs above and beyond the cost of compliance when compliance is the standard set for other operators. In our view, it would be more appropriate and proportionate to state that the scope and cost of the EU should not be less than the scope and cost of compliance. We do not consider that it is within the remit of the EA to require operators to go beyond their regulatory requirements i.e. beyond compliance.

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