Consultation on Enforcement and Sanctions Policy (ESP)

Summary of responses

11 April 2018

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

Acting to reduce the impacts of a changing climate on people and wildlife is at the heart of everything we do.

We reduce the risks to people, properties and businesses from flooding and coastal erosion.

We protect and improve the quality of water, making sure there is enough for people, businesses, agriculture and the environment. Our work helps to ensure people can enjoy the water environment through angling and navigation.

We look after land quality, promote sustainable land management and help protect and enhance wildlife habitats. And we work closely with businesses to help them comply with environmental regulations.

We cannot do this alone. We work with government, local councils, businesses, civil society groups and communities to make our environment a better place for people and wildlife.

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Background

The purpose of the consultation was to seek views on the proposal to introduce the Enforcement and Sanctions Policy (ESP), to replace both the Enforcement and Sanctions Guidance (ESG) and Enforcement and Sanctions Statement (ESS). The Environment Agency carried out the consultation from 28 November 2017 to 29 January 2018.

We asked respondents whether they agreed with:

- combining the ESG and ESS into the new ESP
- some amendments to our approach

We asked respondents to give reasons for their answers and invited them to suggest any changes to the proposals.

Summary of responses

The Environment Agency received 50 responses from a combination of businesses, trade associations and public sector bodies. Half responded through citizen space and the remaining 25 by email or post.

Several respondents did not give a yes or no answer to all the questions but still provided comments which we took into consideration. We have categorised responses that did not indicate a yes or no answer as ‘not answered’.

Q1: Do you agree that our established aims and principles in how we approach enforcement and sanctions should remain unchanged?

Answer	Yes	No	Not answered
Number of responses	31	3	16

Response

The majority of respondents gave overwhelming support for our aims and principles and that our approach should remain unchanged. Respondents felt that our approach to enforcement is key to protecting the environment and people. There was general agreement for the decision to combine the ESG and ESS into one document.

Respondents commented that they would appreciate ‘early engagement’ at the start of the enforcement process. Advice and guidance allows both parties the opportunity to engage in a dialogue which may prevent the need for enforcement action.

Respondents felt that the aims and principles need to be more clearly and consistently applied, specifically with regard to providing defined timescales for outcomes. Every case is different and the timescales involved in carrying out investigations and preparing for

legal action vary in every instance. Therefore it would be incorrect to set expectations for timescale of outcomes within the ESP.

A number of respondents reminded us that the Environment Agency's penalty principles need to be applied consistently and transparently. Any punishment needs to be "clearly related to, and proportionate to the offence committed", with one respondent claiming that we often pick "on issues that have no environmental risk where there is the potential to put a company out of business with no benefit to society and a risk of a loss of a key part of the waste infrastructure". As set out in the draft ESP, we are committed to a transparent approach by publicising enforcement actions. Before proceeding with enforcement action it must be considered that the approach is proportionate and appropriate to achieving the outcome that is sought.

Respondents felt that the increased use of Enforcement Undertakings was a positive move, especially with the oversight provided by the National Civil Sanctions and Penalties Panel (NCS&PP). This approach ensures that consistent and proportionate actions are taken. More guidance in this area would be welcome. We have already provided additional guidance in ESP Annex 1.

One respondent wanted to emphasise that Enforcement Undertakings should not "be seen by offenders as a proxy for private claims in the civil courts". The revised ESP makes it clear that an offer does not prevent or prejudice the rights of a third party to bring their own civil claim about the incident to which it relates.

One respondent felt that whilst we aim to "put right environmental harm or damage", this is not always achieved, most commonly due to the costs involved (borne by the offender). Without further explanation, this can lead to a view that the Environment Agency have failed to meet that objective.

Whilst the Environment Agency aims to ensure environmental harm or damage is put right by an offender this is not always possible. It is intrinsic to any aim that sometimes it will not be achieved. There is no overall responsibility on the Environment Agency to remedy the effects of pollution or harm. However, where appropriate we can consider using our remediation powers. Whether we do so will depend on the circumstances, including the seriousness of the pollution or harm. There is no duty or obligation on us to use these powers. However, we make it clear in our policy that where we undertake remedial work we will always seek to recover these costs.

Some respondents made a number of comments on the actions taken by the Environment Agency. They considered more and speedier action was needed against illegal or non-compliant operators. And also a change on the focus away from end-of-pipe operators to others in the waste supply chain. We share the view that there should be targeted action. However, the purpose of the ESP is to set a consistent framework within which regulatory decisions are made. We expect it to be in place for many years. The ESP is for setting out where the Environment Agency will direct its enforcement activities – this will vary from year to year depending on priorities and resources.

Some respondents raised concerns that the removal of the procedural steps from guidance is likely to lead to a loss of clarity for operators. We removed these because many of the procedural steps are set out in specific guidance, for example how offers of enforcement undertakings are to be proposed and considered.

A respondent expressed disappointment that the ESP does not build on previous documents with regards to "meeting the principles of regulation for the vast majority of regulated facilities, non-site-based operations and illegal operations". This ESP review is light touch to update recent changes to legislation. The Environment Agency remains committed to dealing with all offenders in accordance with the principles it has reaffirmed in the ESP document.

Q2: Do you agree with our proposals on publication of our enforcement response?

Answer	Yes	No	Not answered
Number of responses	29	4	17

One respondent commented as previously "The way that the question is framed allows only a binary (yes/no) answer, with the inference that comments will only be considered if they accompany a 'no' answer. To ensure that our comments are considered, we therefore have indicated 'no' whereas it is, in reality, a 'conditional yes'."

Response

There was a large amount of support for our proposal to publish enforcement responses. Generally the proposals were seen as a positive step to act as a deterrent against wrongdoing. Several respondents were happy with the proposals subject to withholding any commercially confidential information.

A number of respondents were keen on us disclosing the value of the Enforcement Undertaking financial contributions as well as the outcome. We publicise the detail of Enforcement Undertakings, including the value of any financial contribution on GOV.UK on a quarterly basis.

A number of respondents were keen on a more transparent approach, with more information being published than proposed, specifically the categorisation and harm classification. One respondent suggested adopting a model used by the Scottish Environment Protection Agency (SEPA), where more than just the EU form is published. We publicise the Enforcement Undertaking including a factual summary of the event in respect of which the Enforcement Undertaking is offered. We consider that to be adequate.

One respondent requested clarification “about which enforcement undertakings for prior offences would be subject to publication and which specific details would be made available”. We publicise details of cases on an individual basis. We do not publicise an offender’s history as part of our justification for accepting the EU.

One respondent asked if more details about EUs could be made available, including rejected proposals, and information about the reasons behind any decision. Another respondent felt it was incorrect to publish rejected EUs on the basis that:

1) “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”

2) “it would represent a breach of confidentiality implied by the EU negotiation process (that is communities may feel entitled to benefits that were not agreed in a concluded EU)”

3) “it will act as a deterrent against engaging with the Environment Agency on an EU, if rejected proposals are made public”

Our position is that we are obliged to withhold details of rejected EU offers for the reasons given above.

One respondent felt that, to be transparent, we should publish outcomes of enforcement action where the Environment Agency has not been successful, including publication of costs for cases where the Environment Agency has lost. The purpose of publishing successful outcomes is to deter potential wrongdoers. Publishing details of unsuccessful outcomes would potentially promote methods which the Environment Agency consider to be bad practice.

One respondent commented that the Environment Agency should also publish Variable Monetary Penalties (VMPs) on their public register. We are required to publish details of civil sanctions. This will include VMPs – we will advise how we will publish in due course.

One respondent requested that “information about enforcement against individuals should be available in the same way as it is for companies”. As mentioned in the response, data protection legislation is a limiting factor. It is not normally possible to publish details of an offence where the offender is an individual. To do so, would in most cases require personal information (or information that may easily link the incident to an individual) to be published. In some cases public register requirements dictate that we must publish these incidents.

One respondent remarked that it was difficult to “obtain meaningful published data” on the number and type of enforcement action taken. We are not required to publish this information. In this policy, we aim to improve the level of data made available.

One respondent requested clarification about the wording on page 12 of the revised ESP, which states that “Taking all of this into account, and except where we think ongoing

enforcement action may be compromised, we will normally publish details of all criminal convictions, enforcement undertakings, including those rejected, except where prosecution proceedings are underway and notices relating to breaches or enforcement other than information notices and notices of intent". The respondent remarked that "including the word 'normally' in fact makes it unclear in what circumstances certain details will be published and certain details will not." We are not always able to publish the details of enforcement actions. Generally we will always aim to publish details of enforcement actions, but as we state in the policy, it is not always possible to do so due to a variety of reasons, for example it may interfere with the course of justice.

Two respondents commented that the publication of some outcomes for minor offences could have a "disproportionate negative impact on some companies" and that proper consideration should be given to the "potential reputational impact" that may occur. We consider that where an outcome has been gained against a minor offence, the penalty and consequent publicity will reflect this.

One respondent felt that the decision on which enforcement actions to publish, should "go through the same internal governance process and be subject to the same level of oversight by Environment Agency Directors". We cannot implement this level of governance for a publishing decision because of the volume of actions we deal with. However, high profile or significant outcomes are approved for publication at the correct level.

One respondent felt that it was "imperative that a clear distinction can be made between operators with a history of poor performance and those where poor performance results from unusual and unexpected circumstances." We will provide adequate information in the factual summary and reflect it in the level of VMP.

One respondent felt that we could do more to educate businesses on good environmental management practices by publicising incidents that have a negative effect on the environment. In our draft ESP, we detail how we will use publication of enforcement action to act as a deterrent to potential wrongdoers. We will also provide a 'lessons learnt' resource for businesses if needed.

Q3: Do you agree that using the Sentencing Guideline as a reference is a suitable approach to calculating a VMP?

Answer	Yes	No	Do not know	Not answered
Number of responses	25	6	2	17

One respondent commented as previously "The way that the question is framed allows only a binary (yes/no) answer, with the inference that comments will only be considered if they accompany a 'no' answer. To ensure that our comments are considered, we therefore have indicated 'no' whereas it is, in reality, a 'conditional yes'."

Response

We received a generally favourable response to this question. A comment which encapsulates the responses, is that this provides a “coherent method”. Another response stated that “VMPs are too rarely used and there is a need for an easier and more transparent process which linking the guidance on VMPs to the Definitive Guideline on the Sentencing of Environmental offences (the Guideline), would achieve”.

We were asked why we feel it necessary to depart from the original guidance and calculation formula for VMPs. We found the original model difficult to apply, and believe a different model will allow us to make better use of civil sanctions and divert matters away from prosecution. We hope this will be a cost effective mechanism for securing deterrence and reparation.

Methodology and procedural safeguards

We received a helpful comment about the form and content of the Notice of Intent saying that there should be more information made available.

We were also told that there needs to be more consistent application of culpability assessments and that sharing the reasons behind these early in the process would be welcomed. We agree, there is benefit in the logic being explained early in the process. We feel the best way to act on this suggestion is to include the culpability assessment and a summary of the reasons for it in our Notice of Intent to impose a VMP.

Similarly, there needs to be an assessment of environmental harm, usually carried out by using our established Common Incident Classification Scheme (CICS) and Compliance Classification Scheme (CCS) methodology. We believe there is value in being transparent and should explain the facts which have led to the assessment. We think that including a summary of the harm caused (or risk) and of the facts behind it, within the Notice of Intent will be appropriate.

We will continue to assess culpability and harm as we are doing currently. We are keen to explore further with stakeholders how we can get to the fairest and most accurate assessment of culpability and harm.

Past performance

Some respondents asked us to detail if we would consider past performance appropriate and how we would take this into account. We believe that the appropriate mechanism for this is to detail our assessment of relevant past performance as an aggravating or mitigating feature as part of the assessment.

We agree with another respondents, this must not be a mechanistic calculation but must take account of all relevant factors including past performance. One respondent indicated that as this is not a strict sentencing exercise, we should retain discretion to take into account the previous history of both the company and its directors. We feel this is a valid point – we will have regard to all relevant offences when we assess the fitness of an individual or a company as a fit and proper person. For the purposes of a VMP, we would

consider any previous convictions of a company or its directors that could be relevant in an assessment of aggravating or mitigating features.

Quantum

One respondent queried whether the current cap level of £250,000 was appropriate, as it could lead to an unfair imbalance of financial penalties between those offenders who are prosecuted and those that are issued with a VMP. We agree, there could be an argument for raising the level of the cap to expand the middle ground for dealing with offending behaviour. However, the cap of £250,000 is a statutory cap imposed by the Environmental Civil Sanctions (England) Order 2010 and it is not possible to raise that cap.

We were advised by a respondent that increasing the maximum penalty to £3 million would avoid having to scale down penalties by a factor of 4 to get to the starting point for a VMP. We agree that over time, this proposal is sensible. However, we recognise that Parliament's will to cap the figures which may be imposed by way of administrative penalty stands until greater experience of their use is available to us.

It should be noted that there are separate tables within the Guideline for individuals and corporate offenders. We propose to follow the part of the Guideline which relates to individuals when dealing with natural persons.

Larger penalties for larger companies

One respondent who answered 'no' to this question expressed concern that this would lead to larger penalties for larger companies.

We can confirm, that in line with the principles behind the Guideline, whereby the size of the company is a relevant factor in considering the appropriate sentence, we propose the same approach to administrative sanctions. This will have the effect of larger penalties for larger companies but also smaller penalties for those less able to afford them.

Need for a decision making panel

We received a long and helpful response from Water UK. They anticipated that a panel is involved in decision making for VMPs. This would be an unnecessary and disproportionate process as prosecution proceedings are authorised by a reviewing lawyer on the recommendation of an operational manager. We will also apply this to the imposition of VMPs, and like EUs these will be overseen by a high level director led panel. Therefore there will not be a VMP panel.

We do not intend the VMP process to be identical to a criminal prosecution – it will be conducted outside of the courts. We intend VMPs to provide for easier, swifter resolution of cases where an offence is clear but not necessarily in the public interest to prosecute. We will include a summary of facts within the notice of intent - this will replace the disclosure of witness statements in most cases.

If necessary, we will use expert evidence when deciding on VMPs. We will also, if necessary accept expert evidence from those who are subject to VMPs as part of their representations. We will attempt to resolve any differences of opinions between experts. If

there is real uncertainty on an expert evidence matter, we may consider it inappropriate to impose a VMP and instead seek the adjudication of the criminal courts over a critical matter.

There is a high legal threshold for the imposition of a VMP. The views of the investigating officer and the lawyer who reviewed the case will contribute to the decision on whether a VMP is an appropriate disposal. This will be subject to the general oversight of the civil sanctions regime by directors.

Time for representations

In the draft ESP document, we have stated that we will give 28 days in which to make any representations. Section 43(3)(d) of the Regulatory, Enforcement and Sanctions Act 2008 provides that the period within which representations and objections may be made may not be less than the period of 28 days beginning with the day on which the notice of intent is received.

In the Environmental Civil Sanctions (England) Order there is a requirement to provide a right to make representations within 28 days, beginning with the day on which the notice of intent was received. Whilst a person or organisation has 28 days in which to make representations, this period may be extended if necessary. This would allow for scenarios where, for example, expert evidence is required to properly assess classification of culpability and harm.

Appeal route

Appeal against the imposition of a VMP is to the First-tier Tribunal in line with section 10 Environmental Civil sanctions (England) Order 2010.

Starting point

One respondent suggested that the starting point within the Guideline should not be £1 million but £3 million to reflect the bracketed figure in which the starting point may be set. They suggested that a larger reduction would be appropriate to reflect the relationship between this “notional maximum” and the £250,000 cap for VMPs. They suggested that reduction by a factor of 12 would be appropriate, rather than 4 as suggested by us.

It is important to remember that the Guideline is being used as a guideline to inform the model for calculating the appropriate penalty and that an unlimited fine is ultimately possible. Therefore we consider the starting point of £1 million within the Guideline to be the best indicator of a starting point for a VMP.

Very Large Organisations (VLOs)

We received a helpful observation that our policy says that VLOs **will** be treated in a class of their own. In fact the Guideline states that in the case of a VLO it **may** be necessary to move outside the suggested range to achieve a proportionate sentence. We accept that the use of the word **may** is preferable here and will change the wording of our policy and ensure that our approach to VMPs for VLOs reflects this.

Concerns from those who objected to the proposed new methodology

We received comments from organisations who did not support the proposed model because of the scope for improper or overzealous use by the Environment Agency.

We will not use VMPs where we are in doubt that an offence has been committed or where there is a need to test the evidence. We will not apply the Guideline itself but the spirit of the Guideline in how we calculate the appropriate penalty. We will keep the calculation of penalty as simple as possible and share our assessments with the recipient of our Notice of Intent who has an opportunity to make representations and ultimately to challenge our views before an independent tribunal.

We accept that the Guideline is a guideline for the courts. We have used it only as a model and only for those lesser offences where prosecution is not necessary in the public interest. We will adopt a transparent process which we will apply objectively and fairly where there is a right of appeal to an independent tribunal. We hope that this will allay such concerns as to how we will use VMPs.

Informal discussions

One respondent stated that there should be an opportunity for companies to informally discuss the proposed VMP and the basis of calculation with the Environment Agency.

They went on to suggest a possible arbitration route. However RES Act 2008 and the Environmental Civil Sanctions (England) Order 2010 set out the statutory procedures for appeals. Whilst some limited informal discussion to clarify the VMP is permissible, we want to ensure we follow the statutory procedure for service of a notice of intent and allow formal representations. This process will be transparent and be clear to all concerned and third parties that due process has been followed.

Q4: 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?

Answer	Yes	No	Do not know	Not answered
Number of responses	18	6	24	2

The question specifically relates to the adoption of a new Natural Capital model calculation which was introduced in the consultation and has given rise to the most mixed set of responses in the consultation.

The overall message from respondents was positive. We would like to make it clear that the Natural Capital Model is only one choice for performing the calculation and we would like to work with partners to refine the model.

A number of respondents raised some technical questions concerning the detailed operation of the model. We propose hosting a workshop for all interested parties to work through the assumptions and choices in the model so that we can adapt and refine it. We will take the opportunity to work through some of the technical detail with any respondents who chose to participate. Our plan will be to publish the model and then improve it in the light of our experience and feedback.

Response

The proposal is supported by 37.5% of the respondents, with the following remark fairly typical; “The Natural Capital methodology will certainly help to assess the long-term harm to the water environment from a pollution incident, and should help to encourage suitable EU offers to be made”.

Some respondents commented as previously “The way that the question is framed allows only a binary (yes/no) answer, with the inference that comments will only be considered if they accompany a ‘no’ answer. To ensure that our comments are considered, we therefore have indicated ‘no’ whereas it is, in reality, a ‘conditional yes’”.

It was interesting to see the range of views from respondents on certain points. One example was the use of the Sentencing Guideline to benchmark financial contributions - this was thought by one consultee to be “undervaluing the environmental harm associated with a water pollution event”. Among both the ‘no’s’ and the ‘do not knows’ there was a lot of support for the idea of the natural capital model, but with particular concerns raised about the headline issues covered individually below.

Mandatory use of the model

We do not propose that use of the model it is mandatory.

The purpose of the Natural capital model is to help those making enforcement undertaking offers to ‘monetise’ the value of the impacts of their offending. They can then support a project of an equivalent value to achieve relevant alternative environmental benefit.

In summary, an EU offer needs to put right what has gone wrong and make sure it cannot happen again. Where all of the impacts cannot be put right directly, then the offer should make provision for some alternative environmental benefit. This is where the calculator will be of the most practical benefit. The amount specified via the natural capital assessment calculator needs to be understood in the context of the full requirement for an EU offer. In our experience, some companies offer the absolute minimum. The use of a methodology such as the Natural Capital Calculator presents one way of objectively assessing the value of their offer.

The offeror will not be able to use the Natural Capital Model to develop their proposal on how they will ensure the offending will not happen again; this will require a proper analysis of the causes of the offending.

We accept that putting a financial value to the harm caused in an incident is difficult. The model provides one method an offeror can use to estimate this difficult calculation.

Ultimately, we need to work out whether the proposals offered in an EU are sufficient in the circumstances of the case.

We accept the facts of each case will be different and we do not want the model to be too prescriptive. We recognise the need for an accurate assessment, where it can be achieved and welcome any reasonable efforts to understand the overall cost of putting an incident right.

It is clear from the comments that the availability of some methodology or mechanism to assist in performing this calculation is welcome.

Circumstances where the use of the model is suitable.

Clearly in its current form the natural capital model is only suitable for water pollution situations. In due course we aim to extend the availability of the model to other media but for now it will only be applicable to the water environment.

Q5: Do you agree that our proposed approach to penalty setting is appropriate?

Answer	Yes	No	Do not know	Not answered
Number of responses	22	2	6	20

The majority of respondents were in favour of the proposals. They felt the clear stepped approach provides a transparent method of determining if a penalty should be set, and if so, how it should be calculated. Only 2 respondents disagreed.

One said there is too much freedom to determine the form and amount of the penalty. However, the majority of respondents felt that the new stepped approach would be fair.

Another was concerned that the maximum penalty for breaches of the F Gas Regulations was too low. The levels of penalties are set within legislation and cannot be changed by this consultation.

Two respondents raised concerns about the proposal to apply the new approach from the start of the consultation. In the event, we did not apply any penalties during the consultation. Neither did we before we reviewed the responses to determine the proposals were supported.

One respondent raised some detailed points about the proposals for EU ETS. They suggested that it is incorrect to refer to the ‘EU Emissions Trading Scheme’. The legislation still refers to the regime in this way. It is likely that the formal title of the scheme will change to ‘EU Emissions Trading System’ in the next scheme phase.

They also suggested that it would be appropriate to list ‘case-specific mitigating or aggravating factors’ in the examples in Annex 2, Section A. However, the examples are to

illustrate the ‘steps’ in our penalty setting approach, rather than to set out in detail all factors considered following a breach.

We are grateful that the error in the EU Emissions Trading Scheme example in Section A was pointed out. We have corrected the error.

Q6: Do you agree that our proposed approach to the control of mercury is appropriate? If not, what do you consider to be more appropriate and why?

Answer	Yes	No	Do not know	Not answered
Number of responses	10	0	15	25

No respondents disagreed with the proposed approach, and there were no comments of note to report.

Q7: If you have any other comments on the proposed revised policy, please tell us what they are and your reasons for them.

Most points raised in this section have been dealt with above. However there are some areas we have not been able to group with other questions.

Enforcement Undertakings (EUs)

An EU is a voluntary offer by an offender to put right the effects of their offending, its impact on third parties and to make sure it cannot happen again.

Where it is not possible to fully restore any environmental damage, the offer needs to include financial contribution to achieve some alternative environmental benefit. This includes compensation for damage to the natural capital, for example money for appropriate projects to improve river quality following a water pollution incident.

It is important to understand that EUs are a formal enforcement response. In many cases they are a direct alternative to prosecution for offences that have been committed. The availability of an EU is not an indication of a general decriminalisation of the offences themselves.

A number of respondents were concerned that before an EU can be accepted, a formal interview is normally held. We do this because we can only accept an EU offer when we have reasonable grounds to suspect that an offence has been committed. However, that is only part of the picture. We also need to be confident in our understanding of the extent of the offending. This is to satisfy our obligations to the general public and third parties. We may also need to take action when an EU offer has not been complied with. Collectively these are public confidence issues. This means we need to have evidence of the nature

and extent of the offending, obtained to the criminal standard of proof before being able to accept an EU offer.

The best evidence we have tends to come from witnesses and affected third parties. This testimony will be the main basis against which we assess any EU offer.

Some respondents expressed concern that the views of the offeror do not feature more prominently in the EU process. Our view is that the whole EU process is dependent on the offeror's representations. These are initially with the EU offer and in subsequent correspondence - there are ample opportunities for the offeror to make representations. However, where there is a conflict between these representations and the case's overall evidence we reserve the right to 'prefer' the evidence over the representations.

We tend to assess EU offers differently depending on whether they are proactive or reactive. If they are proactive, the offending is acknowledged in the EU offer and is self-reported. For all EU offers, we will give credit to those who tell us about their offending and give us a proposal to put matters right. We give less credit to those who wait until we start prosecution proceedings before they make an EU offer. This does not mean any investigations need less formality. We must have absolute confidence that we operate the EU scheme effectively and fairly.

A number of comments were made about the use of EUs for more serious offences. One respondent commented that there could be a "…risk of creeping use of the EU enforcement tool for the most serious offences and a growing perception amongst the general public that offenders are able to buy their way out of prosecution". We believe that the principles we have published in the ESP contain this risk effectively and make EUs more suitable for less serious offences.

One comment stated that the use of EUs for water pollution events are only suitable for "minor incidents only". Our view is that each case will be considered on its own merits, consistent with our general guidelines. The comment went on to say "where there is continued / long-term pollution it should be taken into consideration whether an enforcement undertaking alone is proportionate to the offence". This is correct; where there is a pattern of offending our likelihood of accepting an EU offer is much reduced.

One response referred to the requirement in the ESP for an EU offer to include a financial contribution to a local and/or related environmental cause or charity. And asked whether the offer should "include an additional charity contribution if the environmental benefit offered in compensation is equivalent or greater than the damage caused". Our position is that the natural capital calculator is one way to estimate the overall monetised cost of an incident but the offeror is still able to determine the overall amount and content of their offer.

One comment referred to "restoration and environmental impact as required by the Environmental Permitting Regulations". The legal requirements for an EU offer do not relate to rules in the EPR regime.

It was also suggested that the Environment Agency needs to provide clearer guidance on which types of charities they deem acceptable as recipients of EU donations. We do not see it as the regulator's role to go beyond describing the requirement. It is a matter for the offeror to develop an appropriate proposal that meets the requirements as published in the ESP. We may assess the recipient of the EU to determine if it is appropriate.

We received a number of comments which highlighted the benefit to the environment that can be delivered when EUs are accepted. It is important to remember that we can only accept an EU offer in appropriate circumstances. Prosecution will still be reserved for the most serious offences.

The revised ESP explains that where possible any financial contribution made in an EU offer should directly benefit the affected area. We do not propose to get involved with the selection of appropriate projects. We think that the offeror should identify preferred projects.

Future financial contributions are not a funding resource. Every EU offer is made in response to specific circumstances. We do not want to create any incentives which might weight our thinking in favour of accepting EU offers.

We do not think it is the Environment Agency's place to provide detailed guidance on how offenders should create EU offers with charitable and other organisations. We have improved the EU information available to offenders in the ESP. This includes the circumstances where we think making an EU offer is appropriate. However, the decision on whether to offer an EU is ultimately for the offender.

We agree that the polluter should pay for, and make restoration of any damage a priority. However, there will be cases where prosecution remains the most appropriate response. This is due to the seriousness of the impact and/or the offender's level of culpability.

The new ESP makes it clear that we are open to EU offers in appropriate cases and that we make decisions on a case by case basis. The guidance in the ESP will assist those seeking to make offers. Our investigation into the facts of the case, including the interview under caution, will provide us with sufficient evidence about the level of impact and the level of culpability.

The offeror develops the EU offer but Environment Agency staff can provide limited assistance on some specific issues. We already provide for a review of a decision to reject an EU offer, as we do for other regulatory decisions. We have a wide discretion to accept or reject EU offers so we cannot enter into discussions which might influence our discretion.

We agree that EU offers should be determined as quickly as possible. The key time component in this is the completion of the investigation into the offending. The more complex the incident or breach, the longer the investigation is likely to take. However, the more quickly the investigation is completed, the sooner the decision as to whether an EU is appropriate in the circumstances can be made. The time taken to get to that point can greatly depend upon the level of co-operation with our investigation.

We will take note of any challenge to our assessment of harm (CICS/CCS) and keep this

under review.

Growth duty

Of those consultees that commented on the growth duty, there was general support for us considering the growth duty as part of our enforcement and sanction regulatory principles.

One respondent commented that there was no mention of the growth duty in the procedural safeguards section of the draft ESP. Also that our proposed explanation of the impact of the growth duty on our enforcement and sanction decisions did not adequately reflect the intent of the duty. That is, that regulatory action is taken only when it is needed. We will take account of the growth duty as part of our overall enforcement and sanction regulatory principles. Consideration of the growth duty is built into our regulatory decision making process. We consider that our explanation "This means we will only take enforcement action or impose a sanction when we need to and in a proportionate way" does properly reflect the intent of the duty to take action when needed. It is clear from the government's guidance on the growth duty that the pursuit of economic growth cannot be used as an excuse for failing to comply with legal obligations or as a means of giving one operator a competitive edge over other compliant businesses.

Concerns were raised on whether the growth duty would prevent us from achieving environmental protection. One respondent commented that the growth duty should be seen as a secondary duty subservient to other obligations, such as the duty to maintain, improve and develop certain fisheries. The government's guidance, which we have to consider, makes it clear that the pursuit of economic growth cannot be used as an excuse for failing to comply with legal obligations. We do not consider the growth duty will lead to a reduction in environmental protection and we clearly set out in the proposed policy that "We will not allow operators to pursue economic growth at the expense of protecting people and the environment". Similarly it should not prevent us from promoting other duties. However, the growth duty and guidance are relevant and should be considered in deciding how that level of protection can be achieved, for example the duty could be relevant in setting steps to be complied with under an enforcement notice, or how other duties can be promoted.

One respondent commented that the decision to start a prosecution is not subject to economic growth duty, but that deciding whether to accept and offer an EU is, seemed to be inconsistent. We have a general obligation to have regard to the desirability of promoting economic growth when making regulatory decisions. The exclusion from the duty of the decision to start criminal proceedings is set out in the Deregulation Act 2015.

Other issues raised

A point was made that there is no appeal mechanism against warning letters nor that the appeal mechanism against Common Assessment Report (CAR) forms is adequate. The Environment Agency has an appeal mechanism where our regulatory decisions can be challenged.

We received a number of comments that were not directly related to the proposed policy, such as how subsistence charges could be used for enforcement activity, reviewing old permits and using powers to secure premises. We note those comments. Specific powers on securing sites are now made in the Waste Enforcement (England and Wales) Regulations 2018.

One respondent commented that they were unsure if the Offence Response Options document (ORO) would be discontinued. We have no plans to remove the ORO from use and is accessible via GOV.UK.

One respondent requested that a “track change” version of the ESP be published, to clarify the changes from the ESG/ESS. The changes we have made to our policy were all detailed within the consultation document.

A number of respondents referred to the role of the National Civil Sanctions & Penalties Panel (NCS&PP), our director-led panel which provides governance and oversight of our handling of EU offers. Some expressed a preference for this model to be expanded to include non-RES Act 2008 work and possibly to include non-EA participants. We believe that the NCS&PP has allowed our approach to EUs to develop without being ‘overly influenced by the views of an individual Environment Agency officer or lawyer’. The NCS&PP will continue to provide governance for RES Act 2008 work but will not expand their remit into traditional enforcement aspects such as prosecution. Neither will this forum be open to external members; these are sensitive enforcement matters in respect of which we have statutory duties. The RES Act 2008 completely envisages decisions about the acceptance or rejection of an EU offer being made by the appropriate regulator without external influence.

Q8 to Q12: Business Impact Target (BIT) analysis

24 consultees responded to this question, with 20 providing a quantifiable response.

The average time currently spent analysing the guidance is 24.9 hours per year (minimum 0 hours, maximum 150 hours).

25% (5) of respondents expect that the time spent will increase, at an average of 20.6 hours per year (minimum 1 hour, maximum 50 hours).

5% (1) of respondents expect the time spent will decrease by 10 hours.

70% (14) of respondents expect the time analysing the guidance will remain the same.

Overall we consider the revision of the policy will have no negative impact on the overall time businesses spend considering the policy.

Next steps

1. The Environment Agency are grateful to all respondents who provided their views. We are pleased the majority supported the key changes to the ESP and we will continue with that approach.

2. The new ESP will be finalised in the coming weeks and published shortly on the Environment Agency website.

Annex: List of respondents

360 Environmental Ltd	Air Conditioning and Refrigeration Industry Board ACRIB
BESA Refrigeration Air Conditioning & Heat Pump Group	British Ceramic Confederation (BCC)
British Plastics Federation (BPF)	CIWM, Professional Membership Organisation
Comply Direct	Dairy UK / Dairy Energy Savings Ltd (Trade Association)
Ecosurety Ltd	EDF Energy
Energy UK	European Recycling Platform (ERP)
Fire Industry Association (FIA)	Fish Legal
Food and Drink Federation	Food Storage and Distribution Federation
Kite Environmental Solutions	London Undergound
Mineral Products Association	Nipak and Scotpak Ltd
Norfolk County Council	Northumbrian Water
Packcare	Paperpak Ltd
Pennine-Pack Ltd	Properpak, Packaging Compliance Scheme operated by Veolia
REFCOM	REPIC Ltd
Smart Comply (Formally Papco)	South West Water
SSE – business	Surface Engineering Association
Synergy Compliance	Thames Water Utilities Ltd
The Law Society of England and Wales	The Rivers Trust
UKELA	Uniper UK Limited
Unitied Utilities	Valpak Limited
Wastepack	Water and Waste Water Company - Anglian Water Services Ltd
Water UK	Wessex Water
Yorwaste/Toddpack	Carbon Credentials Energy Services Ltd.

We received 3 responses from individuals.