



BURGESS
SALMON

Environment and energy briefing from Burgess Salmon published in
the July/August 2013 issue of The In-House Lawyer:

Paying for environmental incidents

THE 
IN-HOUSE
LAWYER

Paying for environmental incidents



BY ROSS FAIRLEY
partner,
Burges
Salmon LLP

THE SENTENCING COUNCIL (THE COUNCIL), an independent body that develops sentencing guidelines for the English courts, has just closed a consultation on proposals for new guidelines (the Guidelines) for the sentencing of environmental offences. There is no doubt that the Guidelines set out in the consultation, even if only partially implemented, will materially increase the level of fines for companies, businesses and individuals who breach environmental laws. This article examines the Guidelines and focuses on corporate penalties rather than individual offenders, although directors and officers of companies should be mindful that they can be liable for the same penalties as a company if it can be shown that the offence was committed with their consent, connivance or neglect.

Anyone involved in representing clients in environmental enforcement proceedings will recognise that there is limited sentencing guidance for the English courts. Magistrates, in particular, tend to struggle when it comes to sentencing environmental offences, since it is not the usual offence they face in their court. The result is an inconsistent level of fines and a nervousness on the part of many magistrates about the right level of fine and whether the Magistrates' Court is the right place to decide the case. Before the consultation was published, the Council conducted its own review of the current sentencing practice for environmental offences to assess the consistency and level of fines being handed out. It concluded that the levels of some fines were too low and did not reflect the seriousness of the offences being committed. Through this consultation, the Council sought views on, among other things:

- the factors which should make an environmental offence more or less serious;
- additional factors that should influence a sentence; and
- the levels of fines that should be given for environmental offences.

WHAT OFFENCES ARE THESE GUIDELINES COVERING?

The Guidelines focus only on those environmental offences which come before

the courts most often and centre around offences arising from:

- the unauthorised or harmful deposit, treatment or disposal etc of waste; and/or
- illegal discharges to air, land and/or water.¹

All of these offences are triable 'either way' (in other words, they can be tried either in the Magistrates Court or, for the more serious offences, in the Crown Court) and were also chosen because of the range of penalties that can be applied. One can also envisage that, once the Guidelines are in place, the courts will be tempted to cross refer to them for other environmental offences outside the Guidelines' strict scope.

In addition to the above offences, the Council also decided that three other offences where lower sentencing powers are held by the courts, should have the Guidelines apply to them but with appropriate statutory limits. These offences are the transport of controlled waste without registering², breach of duty of care³ and breach of an abatement notice⁴.

While the principal offences to which the Guidelines relate have a maximum punishment in the Crown Court of an unlimited fine, within the Magistrates' Courts there are still limits on the amount of a fine which can be awarded for each environmental offence. So, for example, the illegal deposit of waste carries a maximum fine in the Magistrates Court of £50,000. Magistrates will still have to observe these limits on the level of fines, but the Guidelines will provide clearer guidance on the levels on the amount of the fine within those parameters, which should be applied.

HOW WILL THE GUIDELINES WORK?

The Guidelines propose a step-by-step decision-making process to follow when sentencing with a clear steer on the actual amount of fine. So, what are these steps?

Step one: the offence categories

This first step involves the court considering the principal factors of the offence and, in particular, the harm that has been caused and the culpability of the offender in committing the offence. In other

words, what damage or loss has the offence caused to the environment and others, and how blameworthy is the offender?

The Guidelines propose four categories of harm (category one being the most harmful, four being the least) and provide descriptions as to what the effects of each level of harm would be. The idea of categorising the harm caused by a pollution incident is very familiar to those in the environmental law sphere. For many years the National Rivers Authority and, subsequent to that, the Environment Agency (EA), have categorised environmental offences and, depending on those categorisations, determined whether enforcement action is merited and the level of enforcement action that should be applied. The Guidelines, however, go into more detail. It is recognised that there can be actual harm and damage caused by the commission of an offence, but that harm should not be assessed solely by reference to the physical damage. So, for example, if an incident requires a high level of costs to clean up or restore the environment or the accident causes interference with other lawful activities, that may be viewed as a category one issue. There is also the issue of whether the risk of harm from an incident should be treated the same way as actual harm. This was one of the questions which was raised in the consultation.

In terms of culpability, many environmental offences impose strict liability and many companies, however environmentally responsible they are, can get caught by this. Where strict liability applies, there is no need to prove any negligence or fault on the part of the offender. A company operating a facility could have an oil leak on the site without negligence or fault and still face prosecution. All that needs to be shown is that the act or omission has been committed by the offender. The Council describe the categories of culpability as (i) deliberate ie where the offender intentionally breaches the law, (ii) reckless, (iii) negligent and, (iv) low or no culpability ie where the offence occurred as a result of a genuine accident, rather than the absence of preventative measures etc. In practice, we often find that the EA rarely accept an incident as a pure accident.

The idea of step one is then to marry together the culpability of the offender with the category of the harm which has arisen

‘The Guidelines propose a step-by-step decision-making process to follow when sentencing with a clear steer on the actual amount of fine.’

in order to decide the ‘offence category’ and starting point for the level of fine (see later) and then move to step two.

Step two: starting point and fine category range

Step two sets out the principles which the court should follow in setting a fine. The fine should reflect the seriousness of the offence, how far below the required standard the offender fell, be fair and proportionate and take into account the financial circumstances of the offender. Ultimately, the fine should act as both a punishment and a deterrent and remove any gain derived through the commission of the offence. The Guidelines make it clear that it should not be cheaper to offend than take the appropriate precautions to prevent the commission of an offence.

The financial means of the offender is a very important area for businesses in terms of focusing on the financial consequences of committing an offence.

For companies and bodies delivering public or charitable services, the Guidelines indicate that the offender should provide accounts for the last three years so that the court can make an appropriate assessment of means. In the absence of this information, the court can make reasonable inferences and it is likely to lead to the conclusion that the company can pay any appropriate fine.

Once the offender’s means have been established, the court must then consider aggravating and mitigating factors as it has historically done. The Guidelines provide the court with a starting point for a fine or sentence applicable to the relevant category of the offence identified in step one. The court then has to consider additional factors, which may indicate an upward or downward movement from this point. A list of aggravating and mitigating factors is included in the Guidelines. Of course, the offender, prior to sentencing, is entitled to raise other issues with the court which it believes may

point to mitigation. It is important for any company or business looking to assess the level of fine and punishment it is likely to receive when it appears before a court to consider what, if any, of these aggravating or mitigating factors will apply. Aggravating factors include; a history of offending, obstruction of justice, previous warnings being issued by the EA, the offence being committed near a sensitive area, such as housing or schools, and deliberate concealment by the offender of the illegal nature of the activity.

Mitigating factors include; a previous good record, evidence of steps taken to remedy the problem and how quickly they were taken, little or no financial gain resulting from the commission of the offence, self-reporting, good character, general compliance with environmental issues and/or good environmental management systems.

Step three: further factors that warrant adjustment of the fine

Step three effectively gives the court the ability to be flexible to ensure the sentence is fair and proportionate within the stated objectives of punishing, deterring and removing gain. This step contains a non-exhaustive list of factors which the court should consider, such as the means of the offender and the impact of the fine

NOTES

- 1) The relevant statutory references being s33 of the Environmental Protection Act 1990 and Regulations 12 and 38(1), (2) and (3) Environmental Permitting (England & Wales) Regulations 2010.
- 2) Section 1 Control of Pollution Amendment Act 1989.
- 3) Section 80 Environmental Protection Act 1990.
- 4) Section 80 Environmental Protection Act 1990.

on employees and customers. Where the fine will fall on public or charitable services, the fine should normally be substantially reduced. Nevertheless, the offending charitable organisation must demonstrate the fine will have a negative impact on the provision of the charitable services before the court can make a reduction.

Interestingly, for corporates, one of the factors under step three is 'whether the fine will have the effect of putting the offender out of business'. However, the Guidelines go on to say that, in some cases, this actually may be an acceptable consequence so there is scant comfort on the fine level here for businesses.

The full amount of any economic benefit derived by an offender from the commissioning of an offence must be included within the level of fine. For these purposes, the Guidelines make it clear that economic benefits include avoided costs, operating savings and any gain made as a direct result of the offence. There is a very strong crossover here with the EA's increased enthusiasm to use powers of confiscation under the Proceeds of Crime Act 2002. The last few years have seen a marked increase in the use of these confiscation powers to deprive offenders of any economic benefits they have received as a result of environmental offences. There have been some very high-profile confiscation orders issued and companies and businesses need to be very wary of these powers which are now regularly considered by the EA.

Further steps

There are a further five steps (four to nine) set out in the Guidelines, such as reduction for guilty pleas, giving reasons for the fine, consideration of time spent on bail, assisting the prosecution and multiple sentencing.

TARIFFS: HOW MUCH WILL IT COST?

As mentioned above, the Guidelines actually set out tables for starting points for fines and the range of fine that should be applied, dependent on the turnover of the particular offending organisation or individual and the step one categorisation of the offence. The greater the organisation's turnover, the higher the starting point and ranges of fine. The Guidelines divide organisations into:

- i) large organisations, those organisations having a turnover or equivalent of over £25.9m;
- ii) medium organisations, having a turnover or equivalent of between £6.5m and £25.9m; and
- iii) small organisations, with a turnover of not more than £6.5m.

Set out below in Table One is the range of fine and starting points for the most serious offences with the highest culpability, for large, medium and small organisations, to give you an indication of how, in future, these penalties could really hurt businesses.

What should focus a corporate's mind is Table Two below, which gives a range of fine for those offences which may not necessarily be the most serious, nor where the offender has been particularly culpable. Many environmental offences are not committed deliberately, but are likely to be committed negligently or without too much fault. If these guidelines are followed through, we can see that, even for the negligent or lesser fault offences, the fines can be material.

WHAT NEXT?

The consultation closed on 6 June 2013. The next step will be the issuance of final Guidelines, which we should expect later this year. The move to higher penalties for

environmental offences is clear. Companies and businesses do need to be aware of their environmental responsibilities and compliance. They also need proper advice in the event that an environmental offence is committed. Due to the nature and the way in which many of these environmental offences are constructed, even well-run companies and businesses can and do find themselves in court.

The fine, of course, is not everything, there are the remediation costs and the hearing costs but in many cases, it is reputational risk that will most concern businesses and the other consequences which go with having a criminal record. Nonetheless, these increased fines are likely to concentrate the minds of many companies in an increasingly financially constrained world. Aside from fines for environmental offences, companies and businesses should also be reminded that there are alternatives to criminal prosecution in the form of civil sanctions which the EA has been adopting and pioneering over the course of the last two years. There is, as mentioned above, also the prospect of confiscation proceedings for proceeds from a criminal offence, a system originally designed to target lifestyle criminals, such as drug barons, but which is now being increasingly used for those who commit environmental offences.

*By Ross Fairley, partner,
Burges Salmon LLP.
E-mail: Ross.Fairley@burges-salmon.com.*

TABLE ONE: RANGE OF FINES AND STARTING POINTS FOR THE MOST SERIOUS OFFENCES		
Organisation size	Most serious offence and highest culpability range	Starting point
Large	£270,000-£2m	£750,000
Medium	£90,000-£690,000	£250,000
Small	£9,000-£70,000	£25,000

TABLE TWO: RANGE OF FINES AND STARTING POINTS FOR LESS SERIOUS OFFENCES		
Organisation size	Range for negligent and medium category offence	Starting point
Large	£20,000-£150,000	£60,000
Medium	£7,000-£50,000	£20,000
Small	£700-£5,000	£2,000