

**WildFish.**

**Buying a way out?**

**The use of enforcement undertakings to deal with water pollution offences.**

**March 2024**

## **Executive summary**

It is twelve years since Enforcement Undertakings (EUs) were first used by the Environment Agency in England as a novel way of dealing with environmental offences in a way that did not involve proceeding to full prosecution of offenders.

The law on EUs is examined as to what EUs are supposed to achieve, and how EUs have been and are employed by the Agency in practice, particularly in relation to water pollution offences, with particular focus on EUs given by water companies, together the relevance of repeat offending by water companies, involving highly similar offences at multiple sites.

Published and FOI data from the Agency is examined including on how many EUs have been accepted and from whom, and the rate of criminal prosecution by the Agency since EUs became available.

Payments made to environmental NGOs under EUs, how those NGOs are selected and what scrutiny those NGOs are subject to, is examined in relation to the requirement that equivalent benefit under the EU is delivered. The report also considers the effect of EUs in respect of private prosecutions that may be brought by other NGOs.

Recommendations are made for the Government and the Environment Agency to ensure improved transparency, accountability and that EUs are only used where appropriate.

## 1. What are EUs?

- 1.1 Enforcement undertakings (EUs) are one of a number of civil sanctions available to the Agency in England and are used as an alternative to full-blown prosecution when taking enforcement action, for example, in relation to water pollution offences under the Environmental Permitting Regulations 2016 or Salmon and Freshwater Fisheries Act 1975.
- 1.2 Rooted in theories of restorative justice, EUs have been described as representing “a middle way – neither letting a company off with a slap on the wrist, nor committing the time and expense involved in mounting a prosecution”<sup>1</sup>.
- 1.3 Technically, EUs are legally-binding voluntary agreements, proposed by an offender to the Agency, offered at any time before legal proceedings commence, as a way of disposing of an offence while avoiding prosecution.
- 1.4 EUs can be offered either proactively - before an offender has been told that the Agency has reasonable grounds to suspect that a pollution or other offence has been committed - or reactively, after that information has been made known. The overwhelming majority of EUs<sup>2</sup> are offered reactively.
- 1.5 Importantly for offenders, once an EU has been accepted, the regulator can no longer prosecute for the breach in question. Nor can any other person or body bring a private prosecution.
- 1.6 In his 2006 report - *Regulatory Justice: Making Sanctions Effective* - Professor Richard Macrory, the architect of EUs, suggested that, when selecting to use EUs rather than prosecution, regulators should have regard to the following ‘six penalties principles’, so that an EU should:
1. Aim to change the behaviour of the offender;
  2. Aim to eliminate any financial gain or benefit from non-compliance;

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<sup>1</sup> ENDS (2020) Enforcement undertakings: Is the system being exploited by companies with deep pockets? 27<sup>th</sup> July 2020

<sup>2</sup> EUs offered routinely for packaging offences are excluded from this analysis.

3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma<sup>3</sup> that should be associated with a criminal conviction;
4. Be proportionate to the nature of the offence and the harm caused;
5. Aim to restore the harm caused by regulatory non-compliance, where appropriate; and
6. Aim to deter future non-compliance”.<sup>4</sup>

1.7 In the mid-2000s, the Government accepted much of what Professor Macrory recommended. Section 50 of the Regulatory Enforcement and Sanctions Act 2008 set the legal basis for EUs.

1.8 Section 50(3) of the 2008 Act set out four alternative requirements for an EU, that “the action specified in an enforcement undertaking must be—

- (a) action to secure that the offence does not continue or recur,
- (b) action to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed,
- (c) action (including the payment of a sum of money) to benefit any person affected by the offence, or
- (d) action of a prescribed description”.

1.9 The 2008 Act gave the Secretary of State to the power to decide at a later date what “action of a prescribed description” might involve.

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<sup>3</sup> Note that in 2015, Lord de Mauley, for the Government, expressly saw the sigma of prosecution in negative terms:

“Where enforcement undertakings are offered and accepted... they will also benefit persons affected by the offending. Enforcement undertakings will streamline the enforcement process, which is no small matter. They will avoid the stigma of a criminal conviction, with its knock-on impacts, which may be higher business insurance and a negative impact on being able to bid for business contracts”.

In Hansard - Environmental Permitting (England and Wales) (Amendment) (England) Regulations 2015 Volume 759: debated on Wednesday 4 February 2015 Lord de Mauley

[https://hansard.parliament.uk/Lords/2015-02-04/debates/15020479000223/EnvironmentalPermitting\(EnglandAndWales\)\(Amendment\)\(England\)Regulations2015](https://hansard.parliament.uk/Lords/2015-02-04/debates/15020479000223/EnvironmentalPermitting(EnglandAndWales)(Amendment)(England)Regulations2015)

<sup>4</sup> Regulatory Justice: Making Sanctions Effective Final Report November 2006 [https://www.regulation.org.uk/library/2006\\_macrory\\_report.pdf](https://www.regulation.org.uk/library/2006_macrory_report.pdf) at Box E1

1.10 Two years later, the Environmental Civil Sanctions (England) Order 2010 then required, at Schedule 4, para 2, that:

- (1) An enforcement undertaking must specify—
  - (a) action to secure that the offence does not continue or recur,
  - (b) action to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed,
  - (c) action (including the payment of a sum of money) to benefit any person affected by the offence, or
  - (d) where restoration of the harm arising from the offence is not possible, action that will secure equivalent benefit or improvement to the environment<sup>5</sup>.

1.11 It is important to note the particular effect of paragraph 1(d) of the 2010 Order - where restoration of the harm arising from the offence is not possible, action that will secure equivalent benefit or improvement to the environment – which is the ‘prescribed description referred to in section 50(3)(d) of the 2008 Act.

1.12 What this means is that, where direct restoration of damage is not possible, payments - often wrongly characterised as ‘donations’ - are made to environmental NGOs (eNGOs) to address the environmental impact of an offence by providing those NGOs with resources for work or projects which are supposed to meet the legal requirement of securing “equivalent benefit or improvement to the environment”.

1.13 That legal wording is important and will be returned to regularly in this report.

1.14 Later still, Schedule 26 of the Environmental Permitting Regulations 2016 - Enforcement undertakings – echoed the 2010 Order, but for permitting offences.

1.15 Therefore, although they need not do so, in practice, most EUs typically require the payment of funds to an eNGO pursuant to paragraph 1(d) of the 2010 Order and/or Schedule 26(2) of the EPR 2016, as above.

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<sup>5</sup> Schedule 4 para 2 of the 2010 Order is echoed verbatim for environmental permitting offences in Schedule 26 - Contents of an enforcement undertaking – of the Environmental Permitting Regulations 2016.

## **2. How are EUs employed by the Environment Agency in water pollution offences?**

- 2.1 Since their introduction, the Agency has made very extensive use of EUs in its enforcement activities.
- 2.2 The first EUs were accepted by the EA in 2012 with those early EUs being mainly related to technical offences under the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (as amended).
- 2.3 The first ‘water-related’ EU was accepted for a breach of the Control of Pollution (Oil Storage) (England) Regulations 2001 and involved a small £100 donation to a local conservation charity.
- 2.4 EUs became available for more water offences committed on or after 6 April 2015 pursuant to the Environmental Permitting (England and Wales) (Amendment) (England) Regulations 2015. Since then, many more EUs have been accepted.
- 2.5 To the end of October 2023, a total of 633 EUs have been accepted by the Environment Agency. Just over 1/3 of those EUs are non-packaging<sup>6</sup> EUs. The total value of EUs accepted to October 2023 is £28,143,206<sup>7</sup>.
- 2.6 So, when will the Agency accept an EU, as opposed to employing other enforcement mechanisms such prosecuting an offender? The Agency’s formal policy is that it “will only consider accepting an EU for cases where it is not in the public interest to prosecute (and) the offer itself addresses the cause and effect of the offending”<sup>8</sup>.

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<sup>6</sup> Most EUs have been accepted for offences under Producer Responsibility Obligations (Packaging Waste) Regulations 2007 and are for relatively small sums.

<sup>7</sup> ENDS EU database as at 01/03/24

<sup>8</sup> <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>

2.7 Specifically, the Agency says it will not accept an EU offer “for an incident or breach which has been classified under the Compliance Classification Scheme or Common Incident Classification Scheme 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”<sup>9</sup>

2.8 Sir James Bevan, then Chief Executive of the Agency said in 2022 of the Agency’s use of EUs that “we are only prepared to consider those undertakings, **let me stress, in minor cases**. Where an operator causes major or deliberate harm, we will normally always prosecute and seek the highest available penalties”<sup>10</sup>.

2.9 However, given there is currently almost no Agency response at all to Category 3 or 4 water pollution incidents when they arise<sup>11</sup>, it is surprising perhaps that any water pollution offences at all are disposed of by way of EU. If Sir James is to be taken at his word, no Category 1 and 2 cases - which are clearly not Sir James’ ‘minor’ cases - should be disposed of by way of EUs.

2.10 However, ENDS has reported<sup>12</sup> Professor Macrory, the architect of EUs, as saying “particularly for those cases involving very large sums of money – and therefore presumably a pretty serious pollution incident – I would like to see a brief rationale for accepting the EU rather than prosecuting”. Professor Macrory

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<sup>9</sup> <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> at 3.2

<sup>10</sup> Sir James Bevan, Speech “Water: Myths, Facts and Inconvenient Truths” 22<sup>nd</sup> February 2022

<sup>11</sup> See ENDS (2022) Hundreds of low-impact pollution events were serious, EA data reveals, 28<sup>th</sup> February 2022 “The most serious and damaging pollution incidents are deemed to be category 1 and 2, with lower and no impact events described as category 3 and 4. It is these latter events that the agency has chosen to ignore”.

<sup>12</sup> ENDS (2020) Enforcement undertakings: Is the system being exploited by companies with deep pockets? 27<sup>th</sup> July 2020

appears to believe that serious pollution offences are being settled by way of EUs.

2.11 One example of the use of EUs for dealing with more serious pollution offences came in 2018, when Yorkshire Water has paid Yorkshire Wildlife Trust £300,000 following a breach of its environmental permit that “saw sewage discharged without authorisation from its Garforth Storm Tanks in Leeds in 2018. The resulting impact of the pollution was reported as “widespread, affecting the beck and its wildlife for 3.3km”<sup>13</sup>.

2.12 There have been many other significant payments made by water companies, under EUs.

2.13 It is not always easy to discover the details of what an EU requires. ENDS has reported that the details [of EUs] published by the EA are “slight”<sup>14</sup>, and that the detail of offending is not specified by the regulator - “its notices of enforcement undertakings are always terse”<sup>15</sup>. This makes it problematic to assess the categories of pollution involved, but there has been many EUs paid in sums of over £100,000 (see Appendices 1 and 2). It would odd, to say the least, for an offender to consider paying in excess of £100,000 for what was in truth just a Cat 3 or 4 offence.

2.14 Whatever the actual policy, the Agency is increasingly using EUs as opposed to prosecution, to deal with water-related offences and it is clear that cost savings for the regulator are at least one of the drivers pushing the Agency to use EUs more frequently.

2.15 Nehme and Pederson (2022) suggest that one of the reasons the Agency likes to use EUs is “the fact that an enforcement undertaking allows the Environment Agency to recover costs of its investigation (considering that most of these costs would not be recovered as part of a criminal prosecution)”, describing this as “a significant advantage from the regulator’s perspective”<sup>16</sup>.

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<sup>13</sup> <https://www.switchwatersupplier.com/yorkshire-water-pays-300k-to-wildlife-trust-for-pollution-incident/>

<sup>14</sup> <https://www.endsreport.com/article/1686529/yorkshire-water-pays-450000-enforcement-undertakings>

<sup>15</sup> <https://www.endsreport.com/article/1738863/severn-trent-water-hit-two-civil-sanctions>

<sup>16</sup> M Nehme and O W Pedersen (2022) Accountability and Offsetting in Environmental Law Enforcement



2.16 Indeed, the costs to the Agency of bringing prosecutions, and the availability of staff to investigate and provide the evidence required, does appear to be a very significant factor in the Agency choosing to use EUs, although the Agency has stated that “any alleged significant offences are investigated to reach the best understanding of the circumstances of the incident including cause, culpability and public interest” and that “it’s only after this point that we determine the best enforcement and/or regulatory response in line with our E&S [Enforcement and Sanctions] Policy”<sup>17</sup>.

### **3. Why are EUs popular with offenders?**

3.1 As well as being popular with the Agency, it is worth considering why EUs are popular with offenders.

3.2 Browne Jacobson, a firm of solicitors often acting for potential offenders, has noted “Enforcement undertakings are... attractive to companies as they avoid the expense that is associated with a lengthy trial and criminal prosecution, as well as the steep fines and associated legal fees that companies can receive as a result of being found guilty of an environmental crime” noting that while “payments under an Enforcement Undertaking can be as large as those under a prosecution, however the key difference is that the company does not have to pay for the significant legal costs associated with taking a case to court”<sup>18</sup>.

3.3 The Agency too acknowledges “an Enforcement Undertaking enables an offender to ...avoid the stigma and reputational damage of criminal conviction and the legal costs”<sup>19</sup>.

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Final version will appear in Journal of Law & Society (2022)

<sup>17</sup> EA letter to Evenlode Catchment Partnership, 23rd February 2022, on subject of EUs, Colin Chiverton, Area Environment Manager

<sup>18</sup> The rise of the Enforcement Undertaking for environmental crime – a force for good? Browne Jacobson 17<sup>th</sup> December 2018

<sup>19</sup> Environment Agency (undated) Enforcement Undertaking Offer Form - Regulatory Enforcement and Sanctions Act 2008, Section 50 Environmental Civil Sanctions (England) Order 2010, Article 3 & Schedule 4

3.4 Browne Jacobson gives further advantages for the regulated persons guilty of an environment offence as being that “directors of companies may also prefer an Enforcement Undertaking because it avoids them of being held criminally responsible. Accordingly, it avoids the risk of imprisonment and orders such as disqualification orders”.

3.5 Another major legal firm, Eversheds, makes similar points to their clients<sup>20</sup>.

“There are a number of advantages for a business when making an offer to the Environment Agency pursuant to an Enforcement Undertaking. An Enforcement Undertaking can avoid a potential criminal prosecution and the associated negative impact (reputational damage, loss of management time, legal costs, uncertainty, loss of control). There are also commercial implications arising from a criminal record including increased insurance premiums or difficulties in procurement tendering”.

3.6 Another firm, Bryan Cave Leighton Paisner also notes that “regulated companies like them [EUs] because they provide an opportunity to actively manage the ramifications of a potential environmental offence quickly, finally and with minimum disruption and adverse publicity”<sup>21</sup>.

3.7 Browne Jacobson also argues that enforcement undertakings “may not dissuade companies from damaging the environment in the future as the payments required under an Enforcement Undertaking may be relatively small compared to their available funds.”

3.8 That contrasts rather markedly with Professor Macrory’s initial plans, at para 4.23 of his 2006 report, where Macrory suggested that “EUs could be more effective in cases where a financial penalty or criminal conviction is likely to be

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<sup>20</sup> [https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Diversified-industrials/Chemicals\\_enforcement\\_undertakings](https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Diversified-industrials/Chemicals_enforcement_undertakings)

<sup>21</sup> Bryan Cave Leighton Paisner LLP at <https://www.bclplaw.com/images/content/1/8/v2/186743/Enforcement-Undertakings-Briefing-12-May-2020.pdf>

absorbed by the business with a limited impact on the culture or management of the firm”.<sup>22</sup>

3.9 Browne Jacobson sounds a further note of caution that “regulators need to be mindful of individuals or companies that may seek to agree Enforcement Undertakings as a way of escaping the potentially more damaging effects of a prosecution. Those that have the financial strength to pay the large payments associated with an Enforcement Undertaking may not be incentivised to comply with their environmental obligations in the future. The purpose of environmental legislation, such as the Environmental Protection Act 1990, is to protect the environment by stopping businesses allowing damaging activities such as unauthorised discharges to take place. It is not to simply place a cost on doing environmental harm”.

3.10 There is a very real danger that the increasing use of EUs acts to downplay the significance of water pollution offending, by removing the very helpful stigma of prosecution.

3.11 As Browne Jacobson also notes “by prosecuting environmental offences courts can in certain situations impose custodial sentences on individuals such as directors responsible for causing the environmental harm. They can also disqualify responsible individuals from being directors. These actions are more likely to encourage businesses to take steps to avoid environmental harm, even when financially it would be more cost efficient to pay the fine than resolve underlying issues which result in the environmental damage. Sometimes a successful prosecution is the only way to force a business or encourage other businesses to invest sufficiently to stop environmentally damaging events occurring.”<sup>23</sup>

3.12 Indeed, Government appeared to accept the useful ‘stigma’ of prosecution. In 2015, the Parliamentary Under-Secretary of State, Department for Environment, Food and Rural Affairs, Lord De Mauley said that while “the

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<sup>22</sup> Regulatory Justice: Making Sanctions Effective Final Report November 2006  
[https://www.regulation.org.uk/library/2006\\_macrory\\_report.pdf](https://www.regulation.org.uk/library/2006_macrory_report.pdf)

<sup>23</sup> The rise of the Enforcement Undertaking for environmental crime – a force for good? Browne Jacobson 17<sup>th</sup> December 2018

regulations we are considering today will enable the Environment Agency to accept enforcement undertakings for certain offences at facilities where an environment permit is required....it is important to confirm that the worst offenders will continue to be prosecuted”<sup>24</sup>.

3.13 However, as the data shows (see later), this has not been the case in recent years.

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<sup>24</sup> Environmental Permitting (England and Wales) (Amendment) (England) Regulations 2015  
Volume 759: debated on Wednesday 4 February 2015 Lord de Mauley  
[https://hansard.parliament.uk/Lords/2015-02-04/debates/15020479000223/EnvironmentalPermitting\(EnglandAndWales\)\(Amendment\)\(England\)Regulations2015](https://hansard.parliament.uk/Lords/2015-02-04/debates/15020479000223/EnvironmentalPermitting(EnglandAndWales)(Amendment)(England)Regulations2015)

#### 4. What does the data show about EUs and water company offences?

4.1 In May 2014, the first EU was accepted from a water company, Wessex Water, following a serious water pollution incident in July 2013 during which a main sewer discharged large quantities of raw sewage into the River Trym, causing large numbers of dead and dying fish on the surface of the river<sup>25</sup>.

4.2 In that case, the EU required improvements to be made to the sewer by installing telemetry systems, although one might consider telemetry to be a necessary requirement for a reasonable water company to operate its infrastructure properly in such circumstances. As the Agency's undertaking offer guidance suggests, an EU should "not include actions that you would normally need to do to comply with your permit or the law"<sup>26</sup>. However, that does not always appear to be the case.

4.3 Additionally, a payment of £15,000 was made to the Sustainable Eels Group to restock the eel population in the river, a payment of £10,000 to the Bristol Avon Rivers Trust and a small payment of £500 to Henbury Golf Club as compensation for the impact of the incident on its business. Finally, a payment of all of the EA's costs incurred in connection with the incident was made.

4.4 However, while payments to eNGOs, such as those here, may be considered generally beneficial, there is nevertheless a legal requirement to be fulfilled, that this must provide for "action that will secure equivalent benefit or improvement to the environment".

4.5 However, it is not at all clear how EUs are assessed against that legal requirement.

4.6 Further, with particular reference to water companies, it might be considered to be fairly obvious, given the stated aim of EUs is to prevent repeat offending,

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<sup>25</sup> <https://app.croneri.co.uk/feature-articles/case-report-first-enforcement-undertaking-water-company?product=139%27>

<sup>26</sup> Environment Agency (undated) Enforcement Undertaking Offer Form - Regulatory Enforcement and Sanctions Act 2008, Section 50 Environmental Civil Sanctions (England) Order 2010, Article 3 & Schedule 4

that repeat offences or repeat offenders should not be allowed to benefit from offering EUs, instead of facing prosecution.

4.7 ENDS quotes Simon Colvin, environmental solicitor at law firm Weightmans, as saying that: “a slight concern might be, did people envisage that what you’re going to end up with is lots of these from large utility companies for ongoing repeat incidents?” Says ENDS, “while Colvin believes, in the round, the use of EU’s for permitting offences is a good thing, he is concerned that if too many EUs are used for repeat offenders then public trust in the system could be undermined”.

4.8 Indeed, as to the history of the offender, the Agency has stated that<sup>27</sup> “we will check if the offender has a history of non-compliance and/or offending, including the degree, number and nature of the breaches and/or offences time elapsed since the previous breach and/or offence. This includes site specific offences and general failures by the offender. We will normally escalate our enforcement response if previous sanctions have failed to achieve the desired outcome. For example, if we have previously issued a formal caution to encourage a change in behaviour to prevent future offending, and the person commits the same offence again, then we are likely to prosecute or serve a VMP where available”.

4.9 On repeat offending, the Agency says “continued repeat offending will normally result in us increasing the level of our enforcement response and imposing or seeking a more severe sanction. We will not normally accept an enforcement undertaking for an offence where one has been previously accepted”.

4.10 When it comes to ‘multiple operations’, the Agency says that “we will always have regard to the compliance history of an offender, such as repeated breaches of a similar type or demonstration of overall management failure”.

4.11 Patently, the issues of being a repeat offender, repeat offending and multiple operations all have specific relevance to water companies – where the same or

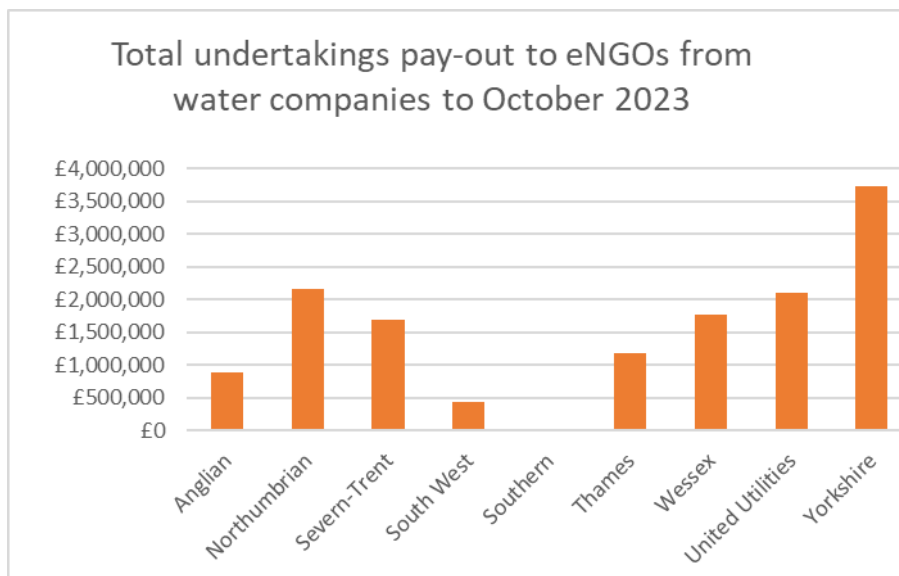
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<sup>27</sup> <https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy>

highly similar offences occur with regularity at many different sewage treatment works or other sewerage infrastructure across the country.

4.12 So, one might expect that water companies would not therefore be permitted by the Agency to benefit from being able to dispose of their offending by way of EUs. However, the data shows that, water company offences, contrary to the Agency’s assurances, are routinely disposed of by way of EUs.

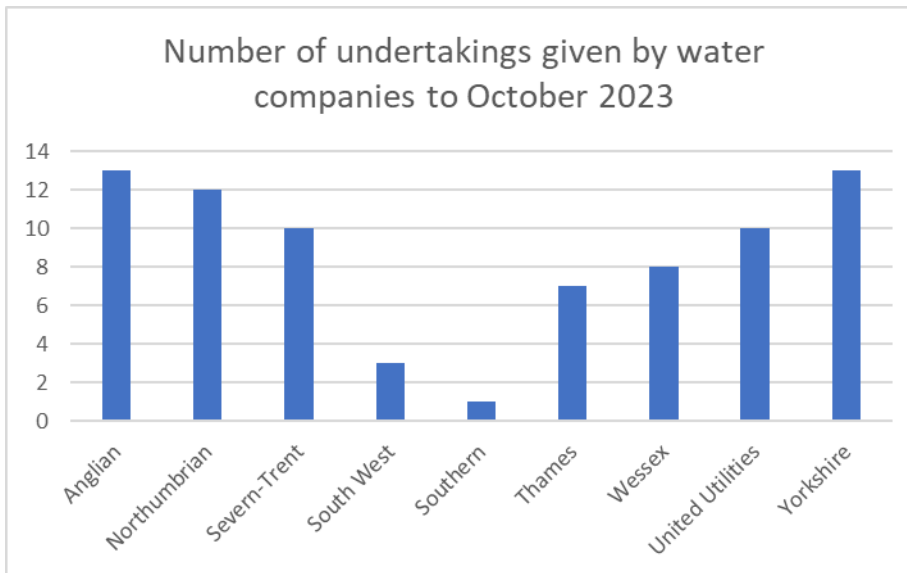
4.13 Since that initial water company EU, of the 221 non-packaging EUs to October 2023, no fewer than 79 EUs have been accepted from the ten large, privatised water companies, totalling £14,054,483, well over 70% of the value of all non-packaging EUs accepted. The spread of this total across the water companies is illustrated in Figures 1 and 2, with more details given in the Annexes to this report:



4.14 Peter Kellet, at the time Director of Legal Services at the Environment Agency has said, of EUs, that “where EUs have been accepted (and we don’t accept those that are too serious or will not prevent a recurrence for example) then there has been almost no reoffending” but he qualifies that by adding “save only for large water companies who appear to continue to offend”<sup>28</sup>.

<sup>28</sup>[https://www.castledebates.org.uk/storage/events/1581938558a\\_Peter%20Kellet%20UKELA%20Law%20Society%20Slides%20%20Final](https://www.castledebates.org.uk/storage/events/1581938558a_Peter%20Kellet%20UKELA%20Law%20Society%20Slides%20%20Final)

4.15 Yet the Agency persists in accepting EUs offered by those water companies, with Anglian Water and Yorkshire Water leading the way on 13 each.



4.16 Typically, sewage pollution offences follow a spillage due to operational failures at a sewage works, or blockages to sewers not cleared due to inadequate maintenance, or pump or pipe failures, again due to inadequate maintenance, or generally providing insufficient treatment capacity at its sewage works, so that a permit is breached. These scenarios make all-too-frequent appearances across the water companies' infrastructure.

4.17 Given that there is a fairly limited range of breaches that a water companies sewerage operations can commit - both in terms of the regulation or statute breached, and the factual basis of the breach - it would seem completely at odds with the Agency's stated policy that offer of EUs should be so readily accepted by the Agency from water companies. There is little that is 'new' in sewage pollution.



4.18 ENDS reported<sup>29</sup> that Professor Macrory, the architect of EUs “would like to see a brief rationale for accepting the EU rather than prosecuting” and that “unless this is explained transparently there is a danger that the public may lose public confidence in EUs and suspect that those with deep pockets can exploit the system to avoid a criminal prosecution”.

4.19 The Agency needs to explain why water companies are still allowed to benefit so often from EUs, instead of feeling the more chastening effect of full-blown prosecutions, as against its own stated policy and indeed, as against the law.

4.20 In that vein, in 2022, Wildlife and Countryside Link<sup>30</sup> issued a statement, supported by Buglife, the Freshwater Habitats Trust, the Marine Conservation Society, Friends of the Earth, Surfers Against Sewage and WildFish in relation to the current Agency investigations of more than 2000 sewage works for persistent breaches of permits, that:

*“we do not feel that EUs should be considered an appropriate outcome of any of the current investigations into potential offences at Sewage Treatment Works. The scale of the investigation, affecting all water and sewerage companies across England and Wales, suggests that the practices being investigated are widespread and either deliberate or, at best, the result of total disregard of permit conditions; this is day to day failure to comply with permit conditions, to the detriment of the environment and customers”.*

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<sup>29</sup> ENDS (2020) Enforcement undertakings: Is the system being exploited by companies with deep pockets? 27th July 2020

<sup>30</sup> WCL statement on EUs May 2022 at

[https://www.wcl.org.uk/docs/WCL\\_Statement\\_on\\_Voluntary\\_Enforcement\\_Undertakings\\_and\\_the\\_Sewage\\_Investigation\\_31\\_05\\_2022.pdf](https://www.wcl.org.uk/docs/WCL_Statement_on_Voluntary_Enforcement_Undertakings_and_the_Sewage_Investigation_31_05_2022.pdf)

## **5. Examples of water companies undertakings**

5.1 To illustrate the finer details of the issues surrounding EUs, in February 2022, WildFish (then Salmon and Trout Conservation) requested copies of a random sample of EU offer documents relating to pollution offences committed between 2016 and 2019.

5.2 Although, regrettably, it was necessary to refer follow-up requests made to the Agency to the Information Commissioner, two of these EUs related to typical water company sewage pollution events.

5.3 For each one of those, the EU is assessed as against the legal requirements under the 2008 Act and 2010 Order / 2016 EPRs etc:

### **Case study: Thames Water**

Thames Water Utilities Limited paid a total of £122,350 under an EU when it breached permit conditions on the effluent discharge from its Maple Lodge Sewage Treatment Works in June 2016, which were detected by the EA. 2.5km of the Grand Union Canal were impacted, with low dissolved oxygen levels, high ammonia and solids visible in the water.

Under the EU, Thames Water promised to carry out repairs and improvements to the site and contribute £122,520 to the Groundwork South Trust.

The offence was failure to comply with a permit condition for a water discharge activity – Regulation 38(2).

#### **Did the EU provide for “(a) action to secure that the offence does not continue or recur”?**

The Thames Water undertaking listed 12 actions under this heading that could more properly be described as actions any reasonable operator should be taking in any event to avoid pollution being caused. These included replacement of defective pipework, cleaning of sludge deposits, installation of guard rails, replacement of heavily corroded pipework, inspection of pumps and refurbishment of the same.

So, while it appears that the undertaking required Thames Water to take some action to avoid re-offending, arguably these were actions that it was obliged to take in any event. Here, the EU added little. As the Agency’s proforma undertaking offer form guidance suggests, an EU should “not include actions that you would normally need to do to comply with your permit or the law”<sup>31</sup>. It is also interesting to note that some of the actions were not completed until January 2018, a year and half after the pollution incident occurred.

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<sup>31</sup> Environment Agency (undated) Enforcement Undertaking Offer Form - Regulatory Enforcement and Sanctions Act 2008, Section 50 Environmental Civil Sanctions (England) Order 2010, Article 3 & Schedule 4

On offences recurring, both before and after the event for which Thames Water offered the undertaking, it is clear that the Maple Lodge sewer catchment has caused other pollution.

In early March 2013, a pumping station failure at Maple Lodge STW caused severe sewage pollution in the vicinity of the works which saw the pumping station overflow, spreading untreated sewage onto nearby fields and into part of West Hyde.<sup>32</sup>

Consultants noted a year after the event in 2016 at Maple Lodge STW<sup>33</sup>, that “the evaluated current treatment capacity is 427,000 PE (population equivalent) against a catchment PE estimate of 553,000, based on information provided by Thames Water in 2016”, suggesting that Thames Water has allowed an under-capacity issue to develop at this works. The consultants note that “Maple Lodge STW is predicted to require at least focused planning from 2021 onwards to ensure it can accommodate expected growth”.

The problems at the Maple Lodge STW were clearly not resolved, as a recent report on the Angling Trust website shows.<sup>34</sup>

“14th Aug 2020: A ‘storm’ pollution event reported from Thames Water Maple Lodge...What was found: Storm discharge which mainly went into the spill weir. The river downstream was an awful grey colour and stank of sewage. Significant numbers of dead and distressed fish were evident for an estimated mile downstream of the discharge point. It could have been further but as the incident was reported in the evening the failing light prevented the full extent of the event to be established...”

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<sup>32</sup> <https://www.watfordobserver.co.uk/news/10296532.thames-water-issues-apology-after-maple-lodge-sewage-leak/>

<sup>33</sup> Arcadis (2017) Hertfordshire Water Study 2017  
Hertfordshire County Council Infrastructure & Resources, Sub-catchment Solutions  
(2021 – 2051) <https://www.hertsmere.gov.uk/Documents/09-Planning--Building-Control/Planning-Policy/Local-Plan/Hertfordshire-Water-Study-2017-.pdf>

<sup>34</sup> <https://anglingtrust.net/pollution-watch-south-east/>

16th Aug 2020: Two Riverfly samples at different locations downstream of the incident recorded very low compared to average scores.

21st Aug 2020 (one week after incident): Thames Water sent over their response, which stated they had listed the incident as a 'no pollution' incident".

Further, Professor Peter Hammond for Windrush Against Sewage Pollution has calculated that there were 17 "early" spilling days – unlawful discharges contrary to permit conditions - from Maple Lodge STW in 2020<sup>35</sup>.

The Colne Valley Regional Park, by way of a letter in October 2020<sup>36</sup>, sent to MPs in support in Sewage (Inland Waters) Bill 2021, confirms that, despite the EU, the Maple Lodge sewerage infrastructure is still causing pollution, noting that "the catchment is increasingly suffering from the repeated release of raw sewage under licence from the Environment Agency, and to an extent you may find both surprising and alarming...Recently, water companies have been directed to self-regulate the monitoring of discharges from sewage treatment works – effectively leaving them to mark their own homework. We have already observed the disturbing consequences of this: numerous pollution incidents recorded across the catchment, with few, if any, repercussions".

**Did the EU ensure "(b) action to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed"?**

Under this heading, Thames' undertaking described the use of temporary pumps and piping to maintain sewage treatment during the incident. Again, this is the minimum that a responsible operator would do in any event. The actions listed clearly did not fall into the category of actions "to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed", but are, more properly, actions taken under (a) above.

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<sup>35</sup> Part 2 of WASP's Review of Unpermitted Spills from Sewage Treatment Works  
Peter Hammond, Windrush Against Sewage Pollution (WASP), January 2022

<sup>36</sup> Colne Valley Regional Park, letter October 2020, in support in Sewage (Inland Waters) Bill 2021 to Rt Hon Boris Johnson MP, David Simmonds MP, Rt. Hon John McDonnell MP and others

Further, Thames described a macroinvertebrate survey conducted in June 2016, but again it is not clear how this falls into the category of actions “to secure that the position is, so far as possible, restored to what it would have been if the offence had not been committed”. Such a survey would merely describe the damage caused, but does nothing to restore it.

**Was there “(c) action (including the payment of a sum of money) to benefit any person affected by the offence”?**

No information was provided by Thames Water in its EU offer form and it appears that no affected person was identified by Thames.

**Do we know that the EU ensured “(d) where restoration of the harm arising from the offence is not possible, action that will secure equivalent benefit or improvement to the environment”?**

As no person who suffered damage could be identified, Thames made a contribution of £122,520 to the Groundwork South Trust Limited for three projects listed in the undertaking document, involving improvement in fish passage on the River Colne corridor and de-silting of backwater channels associated with the Grand Union Canal<sup>37 38</sup>.

When asked in March 2022 for “confirmation of the current status of the three projects to be managed by the Groundworks South Trust Limited, as listed in the Undertaking”, the Agency responded that “we do not hold this information”<sup>39</sup>. Nevertheless, on 14<sup>th</sup> September 2021, the Agency confirmed to Thames Water that it was “satisfied that the actions detailed in your Enforcement Undertaking... in

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<sup>37</sup> Thames Water funded an earlier project on backwaters to the Grand Union canal which ended in 2014 <http://www.colnecan.org.uk/index.php/the-action-plans/rivers-misbourne-and-alderbourne/rivers-misbourne-and-alderbourne-projects/19-colne-valley-park-north-projects/169-grand-union-canal-backwater-old>

<sup>38</sup> Groundwork South is paid by Thames Water to deliver Smarter Home Visits for the company in the Thames Valley.

<sup>39</sup> EA FOI response 15<sup>th</sup> June 2021

relation to the Maple Lodge Sewage Treatment Works and the offence that took place on 1 June 2016, have been complied with in full and the undertaking has been discharged”.

The total costs paid to the Agency, including for compliance monitoring / EU completion, were £15,670.95.

**In conclusion, while the projects funded by this EU on the River Colne were clearly designed to benefit or improve the environment, it was unclear whether they had provided equivalent benefit or improvement to the environment, equivalent to the damage caused, as the law requires. There were questions as to whether the Agency had ensured the actions envisaged under the EU had actually been delivered. However, it is clear that the EU failed to prevent further pollution from the Maple Lodge sewerage network.**

### **Case study: Severn-Trent Water**

Severn Trent Water Limited (reference 800)

The offence was operating without an environmental permit for a water discharge activity – Regulation 38(1). It relates to a sewage pollution to Blackminster Brook, Badsey in June 2017. It subsequently removed the offending sewer blockage, carried out improvement work, and paid £368,752 to the Severn Rivers Trust.

**Did the EU provide for “(a) action to secure that the offence does not continue or recur”?**

The Severn-Trent Water undertaking, like its Thames counterpart above, described 6 actions under this heading that can more properly be described as actions a reasonable operator would be taking in any event to avoid pollution being caused. These include using CCTV to check and then clean a sewer of blockages, upgrading or installing telemetry and adding the relevant section of sewer to its proactive cleaning schedule and relining and replacing pipework.

So, while it appears that the undertaking requires Severn-Trent Water to take some action, arguably these are actions that it was obliged to take in any event. The undertaking has added little.

However, following the 2017 incident, Severn-Trent Water was prosecuted for another offence at Blackminster. Counsel for the Environment Agency told the court that in February 2018, Severn-Trent Water failed to respond promptly to alarms at its sewage treatment works at Blackminster, near Evesham. A blockage to the works resulted in approximately 360,000 litres of sewage being illegally discharged to the nearby Broadway Brook. It was hours before Severn Trent Water operatives attended to take remedial action. Severn-Trent was convicted of discharging sewage



into the Broadway Brook at Blackminster, Worcestershire contrary to Regulation 38 (2) of the Environmental Permitting (England and Wales) Regulations 2016<sup>40</sup>.

**Do we know that the EU ensured “(d) where restoration of the harm arising from the offence is not possible, action that will secure equivalent benefit or improvement to the environment”?**

The EU described a scheme “developed specifically to benefit the area affected by this pollution. It consists of four elements:

- Riparian planting and fencing – reducing sediment runoff into the watercourse thereby increasing habitat availability and improving water quality conditions for spawning fish.
- River restoration – creating a series of backwater areas to enable fish to escape high flows and to act as a nursery area for fry.
- Fish passage improvements reconnecting habitat and allowing fish populations optimal use of brooks, specifically addressing at least 30 manmade barriers to fish migration and sediment transport located within the Broadway-Badsey Brook catchment.
- Wetlands and wet woodlands – wetland restoration, including floodplain meadows and restoration of calcareous flushes”.

Further detail was included as to these four elements, although in 2021 the Agency refused to provide the appendices referenced in the undertaking documentation, stating that the EU was “an active offer”<sup>41</sup>.

However, three elements are described, inter alia, as “helping to meet WFD targets”, which is arguably a legal requirement in any event (indeed, in most English water bodies the WFD 2015 deadline for achieving good ecological status has been missed), but the projects when delivered will be beneficial to the catchment. As the Agency’s proforma undertaking offer form guidance suggests, an EU should “not include actions that you would normally need to do to comply with your permit or the

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<sup>40</sup> <https://www.gov.uk/government/news/severn-trent-water-fined-1-5-million-for-sewage-discharges>

<sup>41</sup> EA FOI response 15<sup>th</sup> June 2021

law”<sup>42</sup>. Water companies, as statutory undertakers, have obligations under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 that should not be duplicated in EUs. As Nehme and Pedersen (2022) also warn “where the gains arising from the community benefits are used to meet policy objectives in other areas, there is a risk that the gains displace other initiatives that might not go ahead, resulting in no real net benefit”<sup>43</sup>.

**In summary, while the projects funded by this EU were very clearly designed to improve the environment, it is unclear whether they have provided equivalent improvement to the environment, equivalent to the damage caused, as the law requires. However, it is clear that the EU failed to prevent further similar pollution events in the same location only a matter of a year after the first incident.**

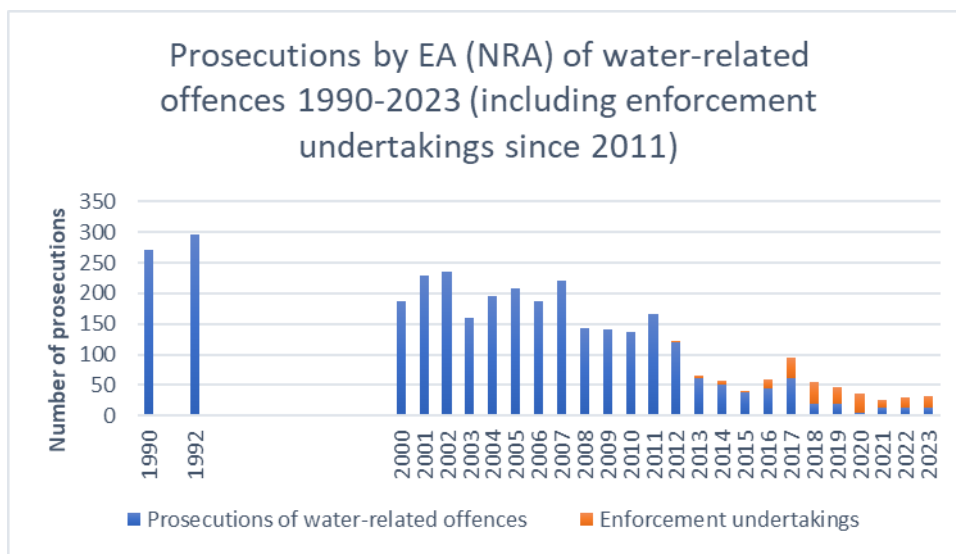
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<sup>42</sup> Environment Agency (undated) Enforcement Undertaking Offer Form - Regulatory Enforcement and Sanctions Act 2008, Section 50 Environmental Civil Sanctions (England) Order 2010, Article 3 & Schedule 4

<sup>43</sup> Nehme and Pedersen (2022) at page 17.

## 6. Reduction in Agency prosecutions and minimal use of other sanctions

6.1 As ENDS reported in 2020<sup>44</sup> there are concerns that the increasing use of EUs for permitting offences and other water pollution offences is to the detriment of prosecutions for appropriate cases. That the number of prosecutions has already fallen away - and that the useful stigma of prosecution is being lost - is very clear from analysis of EA data by WildFish:



6.2 The Agency says<sup>45</sup> that the purpose of an EU is to secure that the offender will:

- put right the effects of their offending
- put right the impact on third parties
- make sure the offence cannot happen again.

6.3 However, these three aims can equally be achieved by a combination of prosecutions, cautions, compliance notices, restoration notices and stop notices, all of which are available to the Agency.

<sup>44</sup> ENDS (2020) Enforcement undertakings: Is the system being exploited by companies with deep pockets? 27th July 2020

<sup>45</sup> <https://www.gov.uk/government/publications/environment-agencys-use-of-civil-sanctions/enforcement-undertakings-accepted-by-the-environment-agency-1-april-2021-to-9-september-2021>

6.4 Additionally, the Environmental Permitting Regulations 2016, under which most water pollution offences now fall, provide that, upon prosecution, a Court has power to order cause of offence to be remedied. Regulation 44 provides that “where a person is convicted of an offence under regulation 38(1), (2) or (3) in respect of a matter which appears to the court to be a matter which it is in the person's power to remedy...in addition to or instead of a punishment imposed under regulation 39, the court may order the person to take such steps for remedying the matter within such period as may be specified in the order...”. Offers of restoration are also used by offenders to mitigate sentencing, post-conviction.

6.5 Worryingly, the Agency appears to be unaware of this, stating in a recent letter defending EUs to members of a catchment partnership that there are no legal powers “for a court to compel an offender to make payments similar to those specified”, although it did recognise that EUs are not necessarily required, stating that “successful prosecutions can result in charitable donations,” adding that this is “something that we have achieved on numerous occasions in recent years”<sup>46</sup>.

6.6 However, as ENDS reported in 2022 “the regulator has all but abandoned issuing cautions. Only two were made last year [2021], in stark contrast to the 205 recorded in 2013” and “the data provided by the EA indicates that these other [civil sanction] powers are barely being used at all”<sup>47</sup>.

6.7 Of the other civil sanctions available, ENDS reported in 2022 that “other civil sanction powers have hardly been touched. Only one compliance notice – intended to ensure that an offence does not continue – has been issued since 2013. Stop notices are also a rarity, a total of nine being issued since 2013, one of them last year. These prohibit a person from conducting specified activity until certain steps have been taken. Failure to comply is an offence punishable through a potentially unlimited fine at Crown Court. The civil sanction regime

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<sup>46</sup> EA letter to Evenlode Catchment Partnership, 23<sup>rd</sup> February 2022, on subject of EUs, Colin Chiverton, Area Environment Manager

<sup>47</sup> ENDS (2022) Why is the EA's enforcement activity locked in decline? 3<sup>rd</sup> March 2022

also provides for restoration notices, allowing the EA to require the restoration of harm. This power has never been exercised”.

6.8 On restoring the environment or providing for ‘equivalent benefit’, slightly paraphrasing the requirements for EUs as set out in the 2010 Order and the EPR 2016, the Agency says it requires that 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”.<sup>48</sup>

6.9 However, the availability of funds under an EU ‘for the environment’ could also be provided for in a number of other ways, by way of statutory and common law remedies available against offenders, such as are already available to the Agency (for example, by way of restoration notices or under the Environmental Damage (Prevention and Remediation) (England) Regulations 2015), to others such as Fish Legal (by way of common law claims) and, where that is not possible, by way of central funding of public bodies, such as Natural England and the Environment Agency to commission relevant restorative conservation work, which is already required if the legal obligations of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 are to be met.

6.10 While it is true that currently fines levied after prosecution pass to the Treasury, that does not in any way preclude Government from providing funds for restoration after pollution offences by way of its central funding of the Agency and it is a poor argument to suggest that, without EUs, funds for the environment would not or could not otherwise be made available.

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<sup>48</sup> <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>

## **7. Payments made to eNGOs to secure equivalent benefit or improvement to the environment .**

7.1 As the Agency's proforma EU offer form states, "in cases where there has been damage to the environment the offer must include actions to restore the environment and repair damage as far as is reasonably possible. This action should relate directly to the impact of the offence"<sup>49</sup>.

7.2 Therefore restoration, if possible, must be secured before any donation to an eNGO is considered to secure equivalent benefit or improvement to the environment.

7.3 When payments are made under EUs by offenders to eNGOs, it is important to remember that the law requires that the EU must then provide for "action that will secure equivalent benefit or improvement to the environment".

7.4 Looking at this requirement, Nehme and Pedersen (2022) examined four undertakings, from which donations of £1.3 million were passed to 12 different charities in the north-east, predominantly Wildlife Trusts and Rivers Trusts, by Northumbrian Water, all in relation to offences committed under Regulation 38 of the (then) EPR 2010. They concluded that "not all the projects funded by the community benefits were directly related to the harm caused by the offence" and that "the projects are not necessarily aimed at reinstating environments harmed directly by the offender's actions"<sup>50</sup>. They also reported that "the fact the providers have no connections to the harm caused (either as victims or as guardians of that locality) raises the question of how the providers were chosen in the first place".

7.5 They continued: "The enforcement process ought to be more transparent on this and clear simple criteria should be in place as currently there may be a

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<sup>49</sup> Environment Agency (undated) Enforcement Undertaking Offer Form - Regulatory Enforcement and Sanctions Act 2008, Section 50 Environmental Civil Sanctions (England) Order 2010, Article 3 & Schedule 4 [Enforcement undertaking offer form - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/364222/enforcement_undertaking_offer_form_-_gov.uk.pdf)

<sup>50</sup> Nehme and Pedersen (2022) page 14

perception that the choice of potential providers of community benefits is random or favour particular organisations”.

7.6 They concluded that, in fact, most often “enforcement undertakings in reality operate as an offset mechanism instead of a restorative enforcement tool”. In other words, restoration is rarely possible and paying NGOs for action to secure equivalent benefit or improvement to the environment is the norm – the concept of ‘equivalence’.

7.7 Nehme and Pederson also add that “it is questionable whether the function of offsetting rather than restoring was what Parliament intended when enacting the Regulatory Enforcement and Sanctions Act in 2008”<sup>51</sup>.

7.8 The 2006 Macrory Report makes no mention of ‘offsetting’. The 2008 Act was silent on the potential use EUs for offsetting, leaving that to be prescribed later by the Minister in the 2010 Order.

7.9 In 2015, when piloting the draft Environmental Permitting Regulations through Parliament, that introduced EUs for permitting offences, the Parliamentary Under-Secretary of State, Department for Environment, Food and Rural Affairs, Lord De Mauley, made no mention of ‘offsetting’, only referring to restoration: “The regulations we are considering today will enable the Environment Agency to accept enforcement undertakings for certain offences at facilities where an environment permit is required... Enforcement undertakings are voluntary offers made by offenders to restore and remediate damage and, importantly, to ensure compliance both now and in the future... Where they are used, they will streamline enforcement, put compliance and restoration first, and encourage dialogue between the Environment Agency and business... Where enforcement undertakings are offered and accepted, they will give priority to the restoration of what has been harmed and a return to compliance...”<sup>52</sup>

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<sup>51</sup> Nehme and Pedersen (2022) at page 16

<sup>52</sup> Environmental Permitting (England and Wales) (Amendment) (England) Regulations 2015 Volume 759: debated on Wednesday 4 February 2015 Lord de Mauley [https://hansard.parliament.uk/Lords/2015-02-04/debates/15020479000223/EnvironmentalPermitting\(EnglandAndWales\)\(Amendment\)\(England\)Regulations2015](https://hansard.parliament.uk/Lords/2015-02-04/debates/15020479000223/EnvironmentalPermitting(EnglandAndWales)(Amendment)(England)Regulations2015)

7.10 Nehme and Pedersen continue, that “the application of offsetting functions in the context of environmental harm raises a range of challenges in respect to exchangeability/equivalence, additionality and coherence... where environmental harm is allowed in one location but offset by improvements in another location. In these situations, it is often necessary to scrutinise in depth whether the benefits generated in one location are comparable to the harm caused elsewhere and whether the substitution is really like-for-like.

“For example, it cannot readily be assumed that the offsetting of a pollution incident, causing the death of hundreds of fish, is necessarily equivalent to, and exchangeable with, improving public access to a river or delivering sustainability education to school children.

“This, in turn, leads to questions over what types of metrics to use in order to make such assessments (or indeed whether such metrics are at all sufficiently attuned to capturing environmental harms). These metrics are currently not applied in the enforcement process or in the negotiation of the enforcement undertakings”.

7.11 In fact, currently, the ball-park payment likely to be required from an offender is initially calculated by way of a natural capital calculator<sup>53</sup>, which the Agency developed and first used in 2017.

7.12 The Agency tells offenders considering making an EU offer that its water pollution natural capital calculator may be used “to estimate the loss to the public following a pollution incident to England’s waterways” - “the calculator estimates the value the public holds for improvements to rivers, lakes and other waterbodies such as reservoirs, canals”.

7.13 But as the Agency acknowledges, the calculator only provides “a range of guideline values because it is difficult to quantify the value people place on

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<sup>53</sup>[https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment\\_data%2Ffile%2F698604%2FWater\\_natural\\_capital\\_calculator.xlsx&wdOrigin=BROWSELINK](https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fassets.publishing.service.gov.uk%2Fgovernment%2Fuploads%2Fsystem%2Fuploads%2Fattachment_data%2Ffile%2F698604%2FWater_natural_capital_calculator.xlsx&wdOrigin=BROWSELINK)



nature with a specific monetary value and the effects of each pollution incident varies greatly”.

7.14 The results of the calculator are stated to provide a starting point to open discussion with the Environment Agency, “a starting point for negotiations”. How the values are generated by the calculator is very opaque.

7.15 The Agency says it works out the values based on the “loss felt by the general public” and that “the assumption that gain felt by an improved water environment is the same as the loss felt by a deteriorated water environment, however, loss is usually felt more highly than gain”. The Agency also acknowledges that “the value does not include shock or distress caused by the incident. It is based on the time period the environment is of lower quality than usual”<sup>54</sup>.

7.16 When tested, the calculator gives a nil return, unless there is a reduction in water bodies ecological status for fish, invertebrates or plants. The offender is left to decide what if any reduction in ecological status there has been, using a rough guide ‘look-up table’ provided, with the advice being to “contact your local Environment Officer to get advice” on ecological status, any scaling factor to be applied (but not where “the incident is not in a special or protected area and does not seem to have impacted other animals so the result does not need to be scaled up or down”<sup>55</sup>).

7.17 The calculation methodology behind the spreadsheet is not visible for public inspection, but it does throw up some oddities. For example, all other things being equal, damage to a good ecological status waterbody, causing a drop to moderate status, does lead to a higher valuation than an otherwise identical incident causing damage to a moderate status body, causing a drop to poor status.

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<sup>54</sup> Guidance - Water pollution natural capital calculator: guidance, published 11<sup>th</sup> April 2018  
<https://www.gov.uk/government/publications/water-pollution-natural-capital-calculator/water-pollution-natural-capital-calculator-guidance>

<sup>55</sup> Above, Readme notes.

7.18 As far as the EU calculator goes, it is 'cheaper', it seems, to further pollute an already-polluted river.

7.19 The Agency says that "the values [generated by the calculator] are based on local population density". As the Agency explains "people place a higher value on the quality of the environment near to where they live. A pollution incident in an urban area will affect more people than a rural area so the loss will be more highly felt in an urban area" but it also tells offenders that "you must still calculate the cost if the pollution incident affected water where there is no public access or little public interest. This is because the public get benefit from nature as a whole being in a good state", but then offers offenders that "it may be possible to scale the results depending on the individual circumstances of the incident".

7.20 Overall, the key point here is that the final amount to be 'donated' is decided by negotiation between the offender and the Agency. This is inherently opaque and it is impossible for an interested third party to examine if or how the test laid down in the 2010 Order or 2016 Regulations is satisfied.

7.21 As Nehme and Pedersen (2022) also conclude "critically very little is known about the negotiation that takes place for a settlement to be reached" but they report on one participant in their study accepting that "there is likely to be a perception that the undertakings are being 'done behind closed doors, that there's a bit of, some sort of dark arts going on there in terms of making the arrangements ...it isn't as clear and clean a process as if it's done through the courts"<sup>56</sup>.

7.22 The Agency also requires that payments to an eNGO under an EU "must clearly state that the payment is an unrestricted donation"<sup>57</sup>. That seems to run entirely counter to the requirements of the 2010 Order and EPA 2016 which require "action that will secure equivalent benefit or improvement to the environment". It is entirely unclear how the NGO recipient of an EU payment

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<sup>56</sup> Nehme and Pedersen (2022), at page 17.

<sup>57</sup> Environment Agency (undated) Enforcement Undertaking Offer Form - Regulatory Enforcement and Sanctions Act 2008, Section 50 Environmental Civil Sanctions (England) Order 2010, Article 3 & Schedule 4

that, by Agency requirement, must be ‘unrestricted’, can be sufficiently guaranteed or policed to ensure that equivalent benefit or improvement to the environment is indeed secured by an EU.

7.23 In 2006, Professor Macrory<sup>58</sup> said that EUs “would require an increased monitoring role for the regulator, as it will be involved in following up EUs to ensure that the conditions are carried through”. Arguably, that should apply equally to ensuring that “action that will secure equivalent benefit or improvement to the environment” is actually delivered.

7.24 Few would doubt that the projects that are said to result from any particular EU would broadly appear to be of benefit to the environment when delivered, but it is not clear what level of ‘post-donation’ audit is undertaken to ensure that what the EU envisaged is actually delivered on the ground, and whether what is delivered satisfies the legal test, that equivalent benefit or improvement to the environment will be secured.

7.25 As Nehme and Pedersen (2022) suggest “there seems to be no oversight or reporting back to the offender or the regulator once the projects are up and running or finalised. It is left then to the goodwill of the provider to report to the parties regarding the deliverables”<sup>59</sup>.

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<sup>58</sup> Regulatory Justice: Making Sanctions Effective Final Report November 2006  
[https://www.regulation.org.uk/library/2006\\_macrory\\_report.pdf](https://www.regulation.org.uk/library/2006_macrory_report.pdf) para 4.29

<sup>59</sup> Nehme and Pedersen (2022) at page 19

## 8. How do eNGOs get selected to provide equivalent benefit?

8.1 There is no published method or procedure for eNGOs to be identified as suppliers which might deliver action that will secure equivalent benefit or improvement to the environment.

8.2 Nehme and Pedersen (2022) conclude that currently “there is no formal process attached to approaching potential providers”<sup>60</sup> and that there is a danger that “given the limited involvement of third parties, the community projects are likely to reflect the interest of a small subset of actors. The interests at play here may not necessarily match overall government policy or indeed wider public interest”<sup>61</sup>.

8.3 However, what is clear is that would-be recipients of EU funds are keen to advertise themselves. For example, Thames 21, which describes itself as “the voice for London’s waterways, working with communities to improve rivers and canals for people and wildlife”, and developed from a partnership programme supported by Keep Britain Tidy, the Port of London Authority, the Environment Agency, Thames Water, British Waterways, The Corporation of London and 19 local authorities, advertises for EU money<sup>62</sup> on a dedicated enforcement undertakings webpage, suggesting that “the polluter must fund a charity, such as Thames21, to deliver an environmental project – ideally this should correct or offset the damage caused”.

“What Thames21 can offer...

Thames21 has vast experience working with communities to deliver river improvements and getting residents to take an active part in looking after rivers, which face many issues including pollution. We value rivers and

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<sup>60</sup> M Nehme and O W Pedersen (2022) Accountability and Offsetting in Environmental Law Enforcement Final version will appear in Journal of Law & Society (2022), page 13

<sup>61</sup> Nehme, Marina and Pedersen, Ole Windahl, Accountability and Offsetting in Environmental Law Enforcement (September 30, 2021) at page 17

<sup>62</sup> <https://www.thames21.org.uk/about-us/>

waterways as vital resources for wildlife as well as spaces for people to enjoy. Thames21 can help polluters understand their impact and design projects that fully compensate and deliver an improved environment”<sup>63</sup>.

8.4 Many rivers trusts do similarly, for example the Ribble Rivers Trust:

“Ribble Rivers Trust supports enforcement undertakings as they seek to restore and remediate environmental damage locally. Where prosecutions occur, the associated fines do not guarantee in funding being made available local to where the offence occurred. As a result restoration and remediation doesn’t occur”<sup>64</sup>. “Our help can ensure that the best outcomes occur from any environmental offence”.

8.5 Similarly, the Calder Rivers Trust: “Enforcement Undertakings generally fit the ‘polluter pays principle’ – whereby the party responsible for causing pollution of the environment is responsible for paying for the associated clean-up and restoration”.

“In the case of issues caused to rivers, it will be for the Environment Agency to decide if an Enforcement Undertaking can be accepted, if it can, the person or company who caused the damage must provide funds to a charity, such as Calder Rivers Trust, to support the delivery of environmental improvements – either at the exact place of the incident, or in the case of rivers – within the same catchment. Ideally this funding should correct or offset the damage caused”.

“River and habitat restoration projects – support local improvement projects as part of your sustainability goals, on your estate, in your supply chain, with your community, or as part of an enforcement undertaking”<sup>65</sup>.

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<sup>63</sup> <https://www.thames21.org.uk/enforcement-undertakings/>

<sup>64</sup> <https://ribbletrust.org.uk/enforcement-undertakings-ribble-catchment/>

<sup>65</sup> [Enforcement Undertakings – Calder Rivers Trust \(calderandcolneriverstrust.org\)](https://calderandcolneriverstrust.org/)

- 8.6 Note that both Thames21 and the Calder Rivers Trust say, of EU donations, that “ideally this funding should correct or offset the damage caused”, whereas the law says that it must.
- 8.7 Of the four underakings from Northumbrian Water examined in their paper, Nehme and Pedersen (2022) reported that “the consistent message provided by the participants in this pilot study is that they were advised of the sum of money available and were asked to put forward certain projects without any real understanding of the offence”.
- 8.8 It is not clear how this secures that equivalent benefit or improvement is guaranteed.
- 8.9 It is also a concern that the understandable eagerness of some recipient eNGOs to accept monies may not always make those eNGOs the best arbiters of whether monies should or should not be accepted. As Nehme and Pedersen (2022) noted: “the main conclusion emerging from the study is that the organisations receiving community benefits as part of the enforcement undertakings are very favourably disposed towards the civil sanctions regime in general and the use of undertakings in particular – this is not surprising. A central reason for this is that the community benefits often allow the organisations to engage in activities and projects that would otherwise not have been possible or hard to receive charitable funding for”<sup>66</sup>.
- 8.10 They also noted the lack of accountability of eNGO providers for ‘equivalent benefit’ - “the providers of the community benefit have a relationship with both the offenders and the regulator: the providers need to comply with the promises they had given regarding the environmental project they put forward as part of the undertaking” and ask the question “to what extent are both the regulator and the provider accountable?”<sup>67</sup>.

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<sup>66</sup> Nehme and Pedersen (2022) at page 21.

<sup>67</sup> M Nehme and O W Pedersen (2022) Accountability and Offsetting in Environmental Law Enforcement Final version will appear in Journal of Law & Society (2022)

8.11 It is argued that EUs provide funds to NGOs where fines, delivered by way of prosecution, do not, but in accepting the benefit of EUs, NGOs must be very careful not to be the unwitting participants in what could be construed as soft enforcement of environmental offences. Nehme and Pedersen (2022) also expressly warn of the dangers of eNGOs becoming repeat beneficiaries and of ‘capture’ by the offenders: “the risk of capture between the parties involved in the undertaking. Although the risk of capture need not necessarily arise only in the relationship between the Environment Agency and the offender as is traditionally assumed in the context of capture theory. Instead, the risk may arise between the provider of community benefits and the offender. This can arise, for example, where a provider of community benefits over time receives large sums of money through several undertakings from a repeat-offender. Where this is the case, it is not unrealistic to assume that a certain degree of familiarity and rapport between the offender and provider is likely to emerge. This need of course not be a negative development, but a risk might arise that the relationship in practical terms makes the provider of community benefits think twice before engaging in environmental campaigns against the offender”.<sup>68</sup>

8.12 An analysis of moneys paid out under EUs to October 2023 by water companies shows that Wildlife Trusts and Rivers Trusts jointly have received £9,323,563. Rivers Trusts have received £3,987,144. Wildlife Trusts have received £5,336,419. In six and a half years, the Yorkshire Wildlife Trust appears to have had 11 pay-outs from Yorkshire Water, totalling £2,665,000 (see Appendices 1 and 2).

8.13 If the Agency is going to outsource the protection and enhancement of natural capital - the requirement that there be ‘equivalent benefit’ - to private providers, then “a robust system of accountability is needed to be in place to justify and ensure consistency and alignment with government policy. At the end of the day, checks and balances ought to be in place to avoid potential, real or perceived abuse of power”<sup>69</sup>.

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<sup>68</sup> Nehme and Pedersen (2022) at page 17/18.

<sup>69</sup> Nehme and Pedersen (2022) at page 19

8.14 There is a key problem here, highlighted by Nehme and Pederson, that as “providers of the community benefits are not part of the undertaking, there is little to no guidance on what takes place if the provider does not deliver on the project they agreed to. The ‘contracts’ leading to the release of the funds to the providers seem to be mainly symbolic. This is because there is no clarity on who is party to the contract: is it the provider and the offender who is not supposed to benefit from the project? Or is it the provider and the Environment Agency? Since the community benefits are delivered as part of an enforcement process responding to a criminal offence, this implies that the contract is with the Environment Agency. Clear guidelines regarding this matter are needed”<sup>70</sup>.

8.15 The legitimate questions raised by Nehme and Pedersen, to which there are no clear answers at present are:

- How are the providers of the community benefit chosen?
- How are the deliverables resulting from the funds paid by the offender decided upon?
- Do the providers have to answer to their actions? If yes, what are the processes attached to this?
- Are there any sanctions/consequences for not delivering on what was promised?
- What type of interactions exist between the provider of the community benefit, offender, regulator and affected community?
- Does the provider meet the objectives put forward?
- What are the criteria/benchmarks put forward to meet the objectives?
- What is the long-term impact of the project on the environment?

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<sup>70</sup> Nehme and Pedersen (2022) at page 20



## **9. A bar to private prosecution**

9.1 Finally, one aspect of EUs that is often overlooked is that section 50(4)(a) of the Regulatory Enforcement and Sanctions Act 2008 provides that where an EU is accepted by the Agency, a prosecution cannot be brought. That is a technical provision ensuring that an offender can be assured that the Agency will not also prosecute for the same offence.

9.2 However, that applies equally to any private prosecution that NGOs or individuals might seek to bring.

9.3 Private prosecutions were once commonly brought by the Anglers' Conservation Association (now Fish Legal) and Friends of the Earth. Due to the collapse in regulatory oversight of potential offenders by the Agency in recent years, WildFish and others are actively considering whether such prosecutions should now become a significant part of its work going forward.

9.4 Recipient eNGOs need to consider carefully whether their willingness to accept the benefit of EUs in terms of payments made could in certain cases prevent their fellow eNGOs from pursuing a private prosecution.

## 10. Conclusions

- 10.1 Enforcement undertakings are being used increasingly to settle matters relating to water pollution offences committed by a range of offenders, including water companies.
- 10.2 EUs do not provide a strong enough deterrent for serious or persistent offences as they allow the offenders to avoid criminal sanctions. Where EUs are accepted, the useful stigma of prosecution is lost. EUs do not present adequate incentive to offenders to change behaviour.
- 10.3 Predominately, EUs do not secure restoration of rivers that are damaged by pollution, but have been targeted at offsetting damage by seeking to provide for equivalent benefit or improvement to the environment.
- 10.4 Despite formal policy to the contrary, EUs have been used to settle offences committed under water pollution legislation that appears to have caused serious harm (category 1 or 2 incidents).
- 10.5 The Agency uses EUs to save money and reduce its costs, particularly those costs incurred in assembling a case for full-blown prosecution. It is also easier for the Agency to recover all its costs under an EU than via a successful prosecution.
- 10.6 However, the cost or expense of any particular sanction, including prosecution, should not be a relevant factor in the decision-making process applied by the Agency in relation to water pollution offences when deciding which sanctions to employ.
- 10.7 Contrary to Agency guidance, accepted EUs appear to contain actions to secure that an offence does not recur, and actions to secure equivalent benefit or improvement to the environment, that are already otherwise required by law, such as the Environmental Permitting Regulations 2016 or, more generally, pursuant to the obligations to achieve good ecological status under the (now assimilated) Water Framework Directive. EUs should not merely replicate what

should already be delivered under existing legislation and/or the reasonable performance that should be expected of operators of potentially polluting activities.

10.8 It is not clear how actions to secure equivalent benefit or improvement to the environment are assessed by the Agency when an EU is being contemplated. The online calculator and other methods are not transparent as to how a project is selected, which eNGOs are selected to deliver a project and whether or not there is any formal procedure or tendering process.

10.9 Post-agreement of an EU, there appears to be little or no formal monitoring of the delivery of equivalent benefit under the projects funded nor oversight of that delivery nor formal reporting to the Agency.

10.10 Fundamentally, there is very little transparency for the public in terms of how projects are selected, which eNGOs are selected to deliver those projects and whether or not those projects have delivered the actions they are required, at law, to deliver.

10.11 There are serious concerns over the use of EUs in general, and particularly in relation to offences where water companies are failing in their duty to deal effectually with sewage. Contrary to the Agency's own stated policy, water companies have benefitted from having EUs accepted for repeat offences, and where they are repeat offenders.

10.12 The increased use of EUs has occurred at the same time as a huge drop in prosecutions and there is little or no use of other available sanctions and remedies by the Agency to deliver, in a more secure manner, the restoration or offsetting of the damage caused by an offender.

10.13 EUs have raised a sum just over £18 million for what might be considered to be environmental 'good causes', but there is a concern that some of that money, particularly when provided to fund actions to deliver equivalent benefit, is not closely connected enough with the offending behaviour to which the EU relates.

10.14 Some eNGOs are repeat beneficiaries of EUs and indeed advertise their willingness to accept financial contributions under EUs. There is a question as to whether eNGOs are always best placed to deliver equivalent benefit and whether a dependency on EU funding, sometimes from a very small number of offenders, is appropriate and could be leading to 'capture'.

10.15 The willing acceptance by the Agency of EUs can block the bringing of private prosecutions for water-related offences by the public or by those eNGOs publicly interested in so doing.

## **11. Recommendations**

- 11.1 The Agency's formal policy should be altered to make it impossible for category 1 or 2 pollution incidents to be dealt with by way of EU, to match the statement and commitments recently made by the Chief Executive.
- 11.2 No EU should contain actions or commitments that merely reflect or repeat existing regulatory or statutory requirements, such as those contained within environmental permits, or the reasonable performance that should be expected of operators of potentially polluting activities, or wider WFD obligations to meet good ecological status in water bodies.
- 11.3 The ability of the Agency to recover costs should not be a relevant consideration in whether or not it employs EUs or any other sanction, including prosecution.
- 11.4 There needs to be far greater transparency to allow public scrutiny of EUs.
- 11.5 Consideration needs to be given to making actions proposed under an EU to deliver equivalent benefit or improvement to the environment subject to prior public consultation, before an EU can be accepted.
- 11.6 The selection of eNGOs to deliver actions under EUs must be open and, if necessary, subject to tendering. It must be made clear how the eNGO recipients of funds under an EU are chosen and selected.
- 11.7 It must be clear how the level of funds to be paid by the offender are decided upon, including by making the natural capital calculator less opaque.
- 11.8 EUs should never be accepted where it is not clear that the proposed actions under the EUs will secure equivalent benefit or improvement to the environment.

- 11.9 Post-agreement of EUs, the delivery of projects funded must be monitored by the Agency, or perhaps by another completely independent body, with that monitoring published and assessments made available to ensure that the actions to deliver equivalent benefit are, in fact, delivered.
- 11.10 In order to ensure that eNGO providers of projects designed to ensure equivalent benefit are more properly aware of their obligations, they should be required to be signatories to EU and made subject to an enforceable legal requirement to deliver the projects as agreed, with all relevant information on such projects proactively and routinely published.
- 11.11 EUs should be enforceable by any party to them, as well as by any interested parties. Where delivery of projects is not completed, or independent assessment is that equivalent benefit has not been achieved, then the offender and eNGO provider should be jointly responsible for rectifying any 'deficit' and ensuring the requisite equivalent benefit is delivered.
- 11.12 No water companies should benefit from sub-prosecution sanctions, such as EUs, being applied for typical repeat offences associated with sewage works and sewerage infrastructure. Water companies have already benefitted excessively from EUs and should be barred from being able to offer EUs when offending under water pollution related legislation.
- 11.13 In any event, and as a matter of principle, given the thirty-year rolling failure of water companies to meet the duties under section 94 of the Water Industry Act 1991 and the Urban Wastewater Treatment Regulations 1994, no EUs should be accepted from English water companies for at least the next ten years – and certainly not for any of the offences currently being investigated at over 2000 STWs by the Agency and OFWAT. It is strongly in the public interest that the Agency prosecutes for these offences.
- 11.14 The Agency should increase its overall enforcement effort across the board and should end its increasing reliance on EUs as an alternative to prosecution, using other available sanctions to ensure restoration of the environment by offenders.

11.15 When providing projects for equivalent benefit or improvement to the environment, as far as possible, EUs should only seek projects that are close geographically to the location of the offence and, as far as possible, remedy the damage caused and match the purpose of the statute or regulatory provisions breached by the offender.

11.16 The bar on prosecution imposed on acceptance of an EU should be lifted such that it is only prosecutions by the Environment Agency that are excluded, enabling private prosecutions to continue even where EUs have been accepted.

## Appendix 1 – Water company EUs January 2017 to October 2023

Date	Offender name	Total payout	Offence/Act
1 Sep 2017 to 31 Jan 2018	Anglian Water Services Limited	£50,000	Environmental Permitting (England and Wales) Regulations 2010
1 Sep 2017 to 31 Jan 2018	Anglian Water Services Limited	£50,000	Environmental Permitting (England and Wales) Regulations 2010
1 Sep 2017 to 31 Jan 2018	Anglian Water Services Limited	£50,000	Environmental Permitting (England and Wales) Regulations 2010
28 Jan 2017 to 31 Aug 2017	Anglian Water Services Limited	£30,000	Environmental Permitting (England and Wales) Regulations 2010
1 Aug 2016 to 27 Jan 2017	Anglian Water Services Limited	£20,000	Environmental Permitting (England and Wales) Regulations 2010
1 Dec 2019 to 31 May 2020	Anglian Water Services Limited	£130,000	Environmental Permitting (England and Wales) Regulations 2016
1 September 2021 to 31 December 2021	Anglian Water Services Limited	£50,000	Salmon and Freshwater Fisheries Act 1975
1 October 2022 to 31 December 2022	Dwr Cymru Cyfyngedig (Welsh Water)	£50,000.00	Failing to comply with conditions of an environmental permit (water discharge activity) – Regulation 38(2) Environmental Permitting (England and Wales) Regulations 2010/2016
20 Oct 2018 to 22 May 2019	Northumbrian Water Limited	£209,500	Environmental Permitting (England and Wales) Regulations 2010
20 Oct 2018 to 22 May 2019	Northumbrian Water Limited	£225,000	Environmental Permitting (England and Wales) Regulations 2010
20 Oct 2018 to 22 May 2019	Northumbrian Water Limited	£45,000	Environmental Permitting (England and Wales) Regulations 2010
20 Oct 2018 to 22 May 2019	Northumbrian Water Limited	£350,000	Environmental Permitting (England and Wales) Regulations 2010



1 Sep 2017 to 31 Jan 2018	Northumbrian Water Limited	£97,000	Environmental Permitting (England and Wales) Regulations 2010
1 Aug 2016 to 27 Jan 2017	Northumbrian Water Limited	£375,000	Environmental Permitting (England and Wales) Regulations 2010
1 April 2021 to 9 September 2021	Northumbrian Water Limited	£115,000	Environmental Permitting (England and Wales) Regulations 2010/2016
20 Oct 2018 to 22 May 2019	Northumbrian Water Limited	£350,000	Environmental Permitting (England and Wales) Regulations 2016
1 Jun 2018 to 19 Oct 2018	Northumbrian Water Limited	£135,000	Environmental Permitting (England and Wales) Regulations 2016
1 Jun 2018 to 19 Oct 2018	Northumbrian Water Limited	£50,000	Environmental Permitting (England and Wales) Regulations 2016
1 June 2023 to 31 October 2023	Northumbrian Water Limited	£50,000.00	Operating without or other than in accordance with an environmental permit (water discharge activity) – Regulation 38(1) Environmental Permitting (England and Wales) Regulations 2010/2016
15 September 2021 to 31 Dec 2021	Northumbrian Water Ltd	£165,000	Causing or knowingly permitting a water discharge activity, contrary to regulations 12(1)(b) and 38(1)(a) of the
1 September 2021 to 31 December 2021	Northumbrian Water Ltd	£165,000	Causing or knowingly permitting a water discharge activity, contrary to regulations 12(1)(b) and 38(1)(a) of the
1 June 2020 to 30 September 2020	Severn Trent Water Limited	£306,509	Environmental Permitting (England and Wales) Regulations 2010
23 May 2019 to 30 Nov 2019	Severn Trent Water Limited	£40,000	Environmental Permitting (England and Wales) Regulations 2010
20 Oct 2018 to 22 May 2019	Severn Trent Water Limited	£226,000	Environmental Permitting (England and Wales) Regulations 2010

1 April 2021 to 9 September 2021	Severn Trent Water Limited	£368,752	Environmental Permitting (England and Wales) Regulations 2010/2016
1 Dec 2019 to 31 May 2020	Severn Trent Water Limited	£158,000	Environmental Permitting (England and Wales) Regulations 2016
1 Dec 2019 to 31 May 2020	Severn Trent Water Limited	£100,000	Environmental Permitting (England and Wales) Regulations 2016
1 Dec 2019 to 31 May 2020	Severn Trent Water Limited	£60,892	Environmental Permitting (England and Wales) Regulations 2016
1 Dec 2019 to 31 May 2020	Severn Trent Water Limited	£40,500	Environmental Permitting (England and Wales) Regulations 2016
12 September 2021 to 31 Dec 2021	Severn Trent Water Ltd	£112,000	Failing to comply with permit conditions for a water discharge activity, contrary to regulation 38(2) of the Environmental Permitting (England and Wales) Regulations 2016
14 September 2021 to 31 Dec 2021	Severn Trent Water Ltd	£270,000	Failing to comply with permit conditions for a water discharge activity, contrary to regulation 38(2) of the Environmental Permitting (England and Wales) Regulations 2016
1 September 2021 to 31 December 2021	Severn Trent Water Ltd	£112,000	Failing to comply with permit conditions for a water discharge activity, contrary to regulation 38(2) of the Environmental Permitting (England and Wales) Regulations 2016
1 September 2021 to 31 December 2021	Severn Trent Water Ltd	£270,000	Failing to comply with permit conditions for a water discharge activity, contrary to regulation 38(2) of the Environmental Permitting (England and Wales) Regulations 2016

28 Jan 2017 to 31 Aug 2017	South West Water Limited	£64,500	Environmental Permitting (England and Wales) Regulations 2010
28 Jan 2017 to 31 Aug 2017	South West Water Limited	£25,400	Environmental Permitting (England and Wales) Regulations 2010
20 Oct 2018 to 22 May 2019	South West Water Limited	£350,000	Environmental Permitting (England and Wales) Regulations 2016
1 June 2020 to 30 September 2020	Thames Water Utilities Limited	£200,000	Environmental Permitting (England and Wales) Regulations 2010
1 April 2021 to 9 September 2021	Thames Water Utilities Limited	£122,520	Environmental Permitting (England and Wales) Regulations 2010/2016
1 June 2022 to 30 September 2022	Thames Water Utilities Limited	£100,000.00	Discharging matter or effluent that is poisonous or injurious to fish, spawn or spawning areas or food of fish – Section 4(1) of the Salmon and Freshwater Fisheries Act 1975
20 Oct 2018 to 22 May 2019	United Utilities Water Limited	£500,000	Environmental Permitting (England and Wales) Regulations 2010
1 Jun 2018 to 19 Oct 2018	United Utilities Water Limited	£232,000	Environmental Permitting (England and Wales) Regulations 2010
1 Jun 2018 to 19 Oct 2018	United Utilities Water Limited	£208,650	Environmental Permitting (England and Wales) Regulations 2010
1 Feb 2018 to 31 May 2018	United Utilities Water Limited	£76,000	Environmental Permitting (England and Wales) Regulations 2010
1 Sep 2017 to 31 Jan 2018	United Utilities Water Limited	£95,000	Environmental Permitting (England and Wales) Regulations 2010
1 Sep 2017 to 31 Jan 2018	United Utilities Water Limited	£60,000	Environmental Permitting (England and Wales) Regulations 2010
1 June 2020 to 30 September 2020	United Utilities Water Limited	£95,000	Environmental Permitting (England and Wales) Regulations 2016

20 Oct 2018 to 22 May 2019	United Utilities Water Limited	£53,760	Environmental Permitting (England and Wales) Regulations 2016
20 Oct 2018 to 22 May 2019	United Utilities Water Limited	£511,000	Environmental Permitting (England and Wales) Regulations 2016
1 Jun 2018 to 19 Oct 2018	Wessex Water Services Limited	£975,000	Environmental Permitting (England and Wales) Regulations 2010
1 Feb 2018 to 31 May 2018	Wessex Water Services Limited	£200,000	Environmental Permitting (England and Wales) Regulations 2010
1 June 2020 to 30 September 2020	Wessex Water Services Limited	£225,000	Environmental Permitting (England and Wales) Regulations 2016
23 May 2019 to 30 Nov 2019	Wessex Water Services Limited	£200,000	Environmental Permitting (England and Wales) Regulations 2016
20 Oct 2018 to 22 May 2019	Wessex Water Services Limited	£35,000	Environmental Permitting (England and Wales) Regulations 2016
1 Dec 2019 to 31 May 2020	Yorkshire Water Services Limited	£250,000	Environmental Permitting (England and Wales) Regulations 2010
1 Jun 2018 to 19 Oct 2018	Yorkshire Water Services Limited	£200,000	Environmental Permitting (England and Wales) Regulations 2010
1 October 2020 to 31 March 2021	Yorkshire Water Services Limited	£200,000	Environmental Permitting (England and Wales) Regulations 2016
1 October 2020 to 31 March 2021	Yorkshire Water Services Limited	£300,000	Environmental Permitting (England and Wales) Regulations 2016

1 June 2020 to 30 September 2020	Yorkshire Water Services Limited	£300,000	Environmental Permitting (England and Wales) Regulations 2016
1 Dec 2019 to 31 May 2020	Yorkshire Water Services Limited	£200,000	Environmental Permitting (England and Wales) Regulations 2016
20 Oct 2018 to 22 May 2019	Yorkshire Water Services Limited	£200,000	Environmental Permitting (England and Wales) Regulations 2016
1 January 2022 to 31 May 2022	Yorkshire Water Services Limited	£150,000.00	Failing to comply with permit conditions at a regulated facility for a water discharge activity – Regulation 38(2) of Environmental Permitting (England and Wales) Regulations 2010/2016
1 January 2022 to 31 May 2022	Yorkshire Water Services Limited	£250,000.00	Operating without or other than in accordance with an environmental permit at a regulated facility for a water discharge activity – Regulation 38(1) of Environmental Permitting (England and Wales) Regulations 2010/2016
1 January 2023 to 31 May 2023	Yorkshire Water Services Limited	£235,000.00	Operating without or other than in accordance with an environmental permit (water discharge activity) – Regulation 38(1) Environmental Permitting (England and Wales) Regulations 2010/2016
1 June 2023 to 31 October 2023	Yorkshire Water Services Limited	#####	Operating without or other than in accordance with an environmental permit (water discharge activity) – Regulation 38(1) Environmental Permitting (England and Wales) Regulations 2010/2016
1 June 2023 to 31 October 2023	Yorkshire Water Services Limited	£150,000.00	Operating without or other than in accordance with an environmental permit (water discharge activity) –

			Regulation 38(1) Environmental Permitting (England and Wales) Regulations 2010/2016
13 September 2021 to 31 Dec 2021	Yorkshire Water Services Ltd	£300,000	Failing to comply with permit conditions for a water discharge activity, contrary to regulation 38(2) of the Environmental Permitting (England and Wales) Regulations 2016
1 September 2021 to 31 December 2021	Yorkshire Water Services Ltd	£300,000	Failing to comply with permit conditions for a water discharge activity, contrary to regulation 38(2) of the Environmental Permitting (England and Wales) Regulations 2016

## Appendix 2 – Water company EUs involving payments to Wildlife Trusts and Rivers Trusts, to October 2023

Date	Beneficiary Rivers Trust	Beneficiary Wildlife Trust	Offender Water Company	Amount (£s)
Dec 2019 to May 2020	Bristol Avon Rivers Trust		Bristol Water	15000
Oct 2020 to Mar 2021	Don Catchment Rivers Trust		Yorkshire Water	125000
Jan 2017 to Aug 2017	Essex and Suffolk Rivers Trust		Anglian Water	30000
Sep 2017 to Jan 2018	Healthy Rivers Trust (now Mersey RT)		United Utilities	36000
Sep 2017 to Jan 2018	Healthy Rivers Trust (now Mersey RT)		United Utilities	45000
June to September 2020	Mersey Rivers Trust		United Utilities	35000
Oct 2018 to May 2019	Mersey Rivers Trust		United Utilities	285000
June 2018 to Oct 2018	Mersey Rivers Trust		United Utilities	150000
June 2018 to Oct 2018	Mersey Rivers Trust		United Utilities	90000
Feb 2018 to May 2018	Mersey Rivers Trust		United Utilities	35000
Jan 2017 to Aug 2017	Norfolk Rivers Trust		Anglian Water	30000
Dec 2019 to May 2020	River Waveney Trust		Anglian Water	130000
Apr to Sept 2021	Severn Rivers Trust		Severn-Trent Water	368752
Dec 2019 to May 2020	Severn Rivers Trust		Severn-Trent Water	60892
June to September 2020	South East Rivers Trust		Thames Water	200000
June 2018 to Oct 2018	South East Rivers Trust		Thames Water	80000
Oct 2018 to May 2019	Tees Rivers Trust		Northumbrian Water	70000
Oct 2018 to May 2019	Tees Rivers Trust		Northumbrian Water	15000
Oct 2018 to May 2019	Tees Rivers Trust		Northumbrian Water	43000
Oct 2018 to May 2019	Tees Rivers Trust		Northumbrian Water	110000
Oct 2018 to May 2019	Tees Rivers Trust		Northumbrian Water	15000
June 2022 to October 2023	Thames21		Thames Water	50000

Oct 2018 to May 2019	Trent Rivers Trust		Severn-Trent Water	226000
Sept to Dec 2021	Tyne Rivers Trust		Northumbrian Water	165000
Sep 2017 to Jan 2018	Tyne Rivers Trust		Northumbrian Water	47500
June 2022 to October 2023	Tyne Rivers Trust		Northumbrian Water	50000
Sep 2017 to Jan 2018	Wandle Trust		Thames Water	250000
Apr to Sept 2021	Wear Rivers Trust		Northumbrian Water	115000
Oct 2018 to May 2019	Wear Rivers Trust		Northumbrian Water	15000
Oct 2018 to May 2019	Wear Rivers Trust		Northumbrian Water	70000
June 2018 to Oct 2018	Wear Rivers Trust		Northumbrian Water	45000
June 2018 to Oct 2018	Wear Rivers Trust		Northumbrian Water	50000
Oct 2018 to May 2019	West Country Rivers Trust		South West Water	350000
June 2022 to October 2023	Wye and Usk Foundation		Welsh Water	5000
Oct 2020 to Mar 2021	Yorkshire Dales Rivers Trust		Yorkshire Water	80000
June 2022 to October 2023	Yorkshire Dales Rivers Trust		Yorkshire Water	500000
Oct 2020 to Mar 2021		Bedfordshire, Cambridgeshire and Northamptonshire Wildlife Trust	Anglian Water	50000
Sep 2017 to Jan 2018		Bedfordshire, Cambridgeshire and Northamptonshire Wildlife Trust	Anglian Water	50000
Sep 2017 to Jan 2018		Bedfordshire, Cambridgeshire and Northamptonshire Wildlife Trust	Anglian Water	50000
Sep 2017 to Jan 2018		Bedfordshire, Cambridgeshire and Northamptonshire Wildlife Trust	Anglian Water	50000



Jan 2017 to Aug 2017		Bedfordshire, Cambridgeshire and Northamptonshire Wildlife Trust	Anglian Water	100000
Oct 2018 to May 2019		Cheshire Wildlife Trust	United Utilities	150000
Feb 2018 to May 2018		Cheshire Wildlife Trust	United Utilities	4000
Jan 2017 to Aug 2017		Cornwall Wildlife Trust	South West Water	60000
Sept to Dec 2021		Derbyshire Wildlife Trust	Severn-Trent Water	270000
Dec 2019 to May 2020		Derbyshire Wildlife Trust	Severn-Trent Water	40500
Oct 2018 to May 2019		Dorset Wildlife Trust	Wessex Water	10000
Oct 2018 to May 2019		Durham Wildlife Trust	Northumbrian Water	75000
Oct 2018 to May 2019		Durham Wildlife Trust	Northumbrian Water	70000
June 2018 to Oct 2018		Durham Wildlife Trust	Northumbrian Water	45000
Jan 2017 to Aug 2017		Essex Wildlife Trust	Anglian Water	30000
Sept to Dec 2021		Gloucestershire Wildlife Trust	Severn-Trent Water	112000
Dec 2019 to May 2020		Gloucestershire Wildlife Trust	Severn-Trent Water	100000
Jan 2017 to Aug 2017		Herts and Middlesex Wildlife Trust	Thames Water	100000
Oct 2018 to May 2019		Lancashire Wildlife Trust	United Utilities	53760
June 2018 to Oct 2018		Lancashire Wildlife Trust	United Utilities	33650
June 2022 to October 2023		London Wildlife Trust	Thames Water	20000
June 2022 to October 2023		Sheffield and Rotherham Wildlife Trust	Yorkshire Water	150000
Oct 2020 to Mar 2021		Sheffield Wildlife Trust	Yorkshire Water	175000
Jan 2017 to Aug 2017		Somerset Wildlife Trust	Wessex Water	75000
June to September 2020		Staffordshire Wildlife Trust	Severn-Trent Water	306509
Oct 2018 to May 2019		Sussex Wildlife Trust	Southern Water	25000
Oct 2018 to May 2019		Tees Valley Wildlife Trust	Northumbrian Water	75000
Oct 2018 to May 2019		Tees Valley Wildlife Trust	Northumbrian Water	53000
Oct 2018 to May 2019		Tees Valley Wildlife Trust	Northumbrian Water	110000

Oct 2018 to May 2019		Tees Valley Wildlife Trust	Northumbrian Water	70000
Dec 2019 to May 2020		Warwickshire Wildlife Trust	Severn-Trent Water	158000
Jan to May 2022		Yorkshire Wildlife Trust	Yorkshire Water	150000
Jan to May 2022		Yorkshire Wildlife Trust	Yorkshire Water	250000
Sept to Dec 2021		Yorkshire Wildlife Trust	Yorkshire Water	300000
Oct 2020 to Mar 2021		Yorkshire Wildlife Trust	Yorkshire Water	80000
June to September 2020		Yorkshire Wildlife Trust	Yorkshire Water	300000
Dec 2019 to May 2020		Yorkshire Wildlife Trust	Yorkshire Water	200000
Dec 2019 to May 2020		Yorkshire Wildlife Trust	Yorkshire Water	250000
Oct 2018 to May 2019		Yorkshire Wildlife Trust	Yorkshire Water	200000
June 2018 to Oct 2018		Yorkshire Wildlife Trust	Yorkshire Water	200000
June 2022 to October 2023		Yorkshire Wildlife Trust	Yorkshire Water	235000
June 2022 to October 2023		Yorkshire Wildlife Trust	Yorkshire Water	500000