

By email to enquiries@environment-agency.gov.uk

WildFish response to “Consultation on changes to the enforcement and sanctions policy – including implementing new water and waste enforcement powers”

About you or your organisation

To help us when we come to analyse the consultation responses, we would like you to answer a few questions about you, or where relevant, about your organisation.

It would be helpful for us to know who you are responding on behalf of.

Please choose one of the following:

- ☐ Individual response
- ☒ Response on behalf of an organisation or group (for example, business, charity, not-for-profit organisation, trade association)
- ☐ Other

If you're responding on behalf of an organisation or group, what is the name of the organisation or group: WildFish

If you select other, please explain your area of interest:

We would like to keep you informed about the outcomes of this consultation. Please tell us if you would like to:

- ☒ Receive an email telling you when we have published our response to the consultation.

If you have ticked the box above, please provide your email address.

Email: justin@wildfish.org

Can we publish your response? We will not include personal information.

This is a required question.

Please select one of the following:

☒ Yes

☐ No

If you answered 'no', please tell us why as we will need to understand this when responding to any Freedom of Information requests.

Please tell us how you found out about the consultation on changes to the enforcement and sanctions policy.

☒ From the Environment Agency

☐ From another organisation

☐ Through the organisation you're a member of

☐ Press article

☐ Through a trade association

☐ Other (please specify)

We respond to question 1.1 (“*Consistency guidelines for Enforcement Undertakings*”) only.

In section 8, we set out our approach and updates to the “consistency guidelines” for enforcement undertakings. Does the approach require any changes to ensure that it is fair and reasonable?

Please tick the relevant box

☐ *No changes needed*

☐ *No opinion*

☒ *Changes are needed – please provide details below*

The first concern is that all sanction decisions are required to be made in line with the Growth Duty and Regulators Code (including considerations as to whether an

Enforcement Undertaking – or “EU” - is appropriate). We have commented elsewhere that these business-friendly mandates lead to the over-use of inappropriate soft-sanctions such as EUs. Clearly, the growth duty should, at the very least, not apply to water companies as they are not ‘normal’ businesses; they are companies which undertake public administrative functions where profit and growth are not (or should not be) primary considerations.

EUs are used as an alternative to full-blown prosecution when taking enforcement action; for example, in relation to water company pollution offences under the Environmental Permitting Regulations 2016. They are being used increasingly to settle matters relating to water pollution offences committed by water companies. However, WildFish is clear that EUs do not provide a strong enough deterrent for serious or persistent offences as they allow the offenders to avoid criminal sanctions and the useful stigma of prosecution. Despite formal policy to the contrary, EUs have been and continue to be used by the Environment Agency (EA) to settle offences committed under water pollution legislation that appear to have caused serious harm (Category 1 or Category 2 Incidents). Also, contrary to the EA’s own stated policy, water companies have benefitted from having their offers of EUs accepted for repeat offences, and where they are repeat offenders. WildFish has conducted detailed research into the misuse of EUs particularly for water company offences.¹ In our response to the Water (Special Measures) Bill before it became the 2024 Act, we proposed amendments to the Regulatory Enforcement and Sanctions Act 2008 to exclude the use of EUs for water and sewage companies.

In England, the use of EUs has expanded leading to some real problems for transparency and indeed the lack of real change to put right the damage caused by legal breaches.

We are concerned that EU acceptance encourages regulators to hold back on detailed and comprehensive investigations of pollution and their consequences, as it is less administratively burdensome to accept an admission of an offence than conduct an investigation to secure a conviction. This leads to the underreporting of pollutions. We also believe that there are real problems with NGOs accepting such payments from EUs.²

¹ [WildFish-Report-into-Enforcement-Undertakings_200324.pdf](#)

² See the WildFish report: “*Buying a way out? The use of enforcement undertakings to deal with water pollution offences*” [WildFish-Report-into-Enforcement-Undertakings_200324.pdf](#)

Part of the reason why EUs may be preferred is because fines from the court are currently un-hypothecated. It is worth noting, however, that in England and Wales, the courts are perfectly capable of ensuring that, following successful conviction, money is applied to the restoration of the environment that has been affected, for instance, by a sewage pollution. That is because one of the sanctions that a magistrate's court can issue is an ancillary "remediation order" which would mean the water company (or whichever polluter is involved) would need to pay money – maybe in addition to a fine – to put right the damage it has caused.³

If such penalties were used instead of EUs, there would be a better deterrent for future law breaking.

Publicity

One of the key problems with EUs is their opacity. We note that with regard to publicity policy for EUs, in the draft document, there is too much discretion included in the draft policy: "*we will publish the details on the GOV.UK website and it may be included in the public register.*" [5.2] And at 7.1 "*For enforcement undertakings which are accepted we will normally publish information unless we consider this to be inappropriate for any reason*". We then see a list of what the EA "*may include*" in such a publication which allows significant discretion and could (as we have seen) lead to partial publication with insufficient detail (for instance, excluding the name of the person making the undertaking, the amount, the nature of the offence and to whom the cheque has been made).

We are told that "*Details of enforcement undertakings will generally be published following acceptance on a biannual basis, but we may choose to publish details more frequently.*" Again, the room for discretion and inconsistency is startling and does not align with the accountability principle as set out in paragraph 3.1.5.

³ See regulation 44 of the Environmental Permitting (England and Wales) Regulations 2016 and the Environmental Offences Definitive Guideline:
https://sentencingcouncil.org.uk/media/nvek3v5j/final_environmental_offences_definitive_guideline_web1.pdf

We believe that if an EU is accepted, the details should be published in full on each occasion they are accepted: the nature and extent of the offence; the money received and where it has gone / is going. If they do continue to be used for water companies (which is always a bad idea), then entreaties from water companies to exclude details should be avoided.

Paragraph 8.1 deals with when the EA may accept the EU. Of concern is the suitability of some offences for EUs. The document says that

“We are unlikely to consider an enforcement undertaking to be the appropriate regulatory response where: an incident or breach has been classified under the CCS or CICS as category 1 (or a regime specific equivalent); or, the offending or breach was deliberate or persistent.”

Clearly, stating that something is “unlikely” does not rule it out. The wording should at the very least be changed to:

“We will not consider enforcement undertakings for category 1 or 2 incidents or where there has been insufficient and verifiable investigation of the impact of the incident”.

In our experience, the EA rarely investigate pollutions fully. If they are self-reported by a water company, for instance, it is probably the case that the EA will rely on the water company assessment of impact, which is unlikely to fall into Category 1. For instance, dead fish and invertebrates may not be visible and long-term effects could be more subtle and may not be apparent for some time. On the basis of the policy as drafted, an EU could be offered and accepted for a pollution offence where there is little investigation, meaning that the conclusion that it is not Category 1 would be meaningless.

As for the “suitability of the offer” (8.2) we note that the intention is to accept offers where *“the offer includes a payment to an environmental charity or third party to restore any harm caused or achieve equivalent benefit.”* We believe this encourages some NGOs to work with polluters even where the harm caused is utterly distinct from the work planned by the NGO. The “equivalent benefit” part should be excluded.

Paragraph 8.3 outlines cases where the EA will not accept an offer. We believe this provision should be amended to make it clear that water and sewage companies are excluded.

Justin Neal

For and on behalf of WildFish

October 2026