

Environmental Offences Guideline Consultation

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The consultation will end on 6 June 2013

A consultation produced by the Sentencing Council.
This information is also available on the Sentencing Council's website:

www.sentencingcouncil.org.uk

About this consultation

To:

This consultation is open to everyone including members of the judiciary, legal practitioners and any individuals who work in or have an interest in criminal justice.

Duration:

From 14 March 2013 to 6 June 2013

Enquiries (including requests for this paper in an alternative format) to:

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Additional ways to feed in your views:

This consultation exercise is accompanied by a resource assessment, an equality impact assessment, and an online questionnaire, all of which can be found at:

www.sentencingcouncil.org.uk

A series of consultation meetings is also taking place. For further information please use the contact details above.

Response paper:

Following the conclusion of this consultation exercise, a response will be published at:

www.sentencingcouncil.org.uk

Freedom of Information:

We will treat all responses as public documents in accordance with the Freedom of Information Act and we may attribute comments and include a list of all respondents' names in any final report we publish. If you wish to submit a confidential response, you should contact us before sending the response. PLEASE NOTE – we will disregard automatic confidentiality statements generated by an IT system.

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Contents

Introduction	5
Section one: Environmental offences	8
Section two: Developing the guideline	10
Section three: Assessing seriousness	12
Section four: Sentences for environmental offences	20
Section five: Other issues	26
Annex A: Summary of consultation questions	27
Annex B: Background to guidelines	30
Annex C: Draft guideline	32

Introduction

What is the Sentencing Council?

The Sentencing Council is the independent body responsible for developing sentencing guidelines for the courts to use when passing a sentence.

Why environmental offences?

Currently, there is limited guidance for sentencers on sentencing environmental offences in the *Magistrates' Court Sentencing Guidelines*. There is some general guidance in a publication issued by the Magistrates Association called *Costing the Earth*. Court of Appeal authority is limited for environmental offences, although there is more developed authority for health and safety offences, which carry some similarities with environmental offences in terms of sentencing.

The Sentencing Council received a number of requests to produce a guideline for fly-tipping and other environmental offences from a range of parties with an interest in this area, including members of the National Fly-tipping Prevention Group and the Environment Agency. The requests arose from particular concerns that the levels of fines currently being given in the courts for environmental offences are not high enough and so neither reflect the seriousness of the offences committed nor have a sufficient deterrent effect on offenders. Concerns were also raised about the inconsistency in fine levels for similar offences, committed by similar offenders, across the country.

The Council considered these requests and the sentencing data kindly provided by local authorities and the Environment Agency along with data the Council obtained from the Ministry of Justice and from its own research with

sentencers. The research the Council carried out with a sample of magistrates also pointed to a lack of familiarity with sentencing these types of offences. This was due to the infrequency with which they come to court, as well as a lack of confidence in assessing their seriousness and pitching fines at appropriate levels, particularly for corporate offenders.

This lack of familiarity is also evidenced by the results of a survey conducted with 381 magistrates on their attitudes to environmental regulation,¹ which found that, of the 198 magistrates who responded, in the previous five years, 108 magistrates had heard one or more cases. Though this may appear to be large, when compared to the total number of cases heard by the bench (40,000 cases a year), it is a small percentage. Magistrates' experience of sentencing environmental cases is likely to be so infrequent that there is no realistic possibility that substantial experience will be gained by any one individual. In 2011, of the offences covered by the draft guideline, only 1,602 cases were sentenced in magistrates' courts with even fewer cases, only 75, sentenced in the Crown Court.

The Council agrees that there is a need for improved guidance in this area, to address inconsistencies in sentencing, including the levels of fines being given and has produced this draft guideline for consultation.

¹ Moran T. (2005) Magistrates' Courts and Environmental Regulators – Attitudes and Opportunities, *Journal of Environmental Research* Vol. 4, Issue 1

The Council's aims

In preparing this draft guideline, the Council has had regard to the purposes of sentencing and to its statutory duties. The Council's aim throughout has been to ensure that all sentences are proportionate to the offence committed and in relation to other offences. This is reflected in the draft guideline itself which can be found at annex C.

Consistency

As with all other guidelines, the Council seeks to promote a consistent approach to sentencing for environmental offences. However, it is particularly difficult to achieve consistency in sentencing in an area of offending which involves such a wide range of offender types. Some offences are committed by individuals, very small commercial operations or publicly-funded bodies, while others involve large organisations, or multinational companies with multi-million pound assets. The guideline must also deal with a wide variability of culpability and harm. The aim has been to devise a guideline which supports sentencers to apply this combination of factors in a consistent way.

Fines

The Council conducted a review of current sentencing practice for environmental offences to assess both the consistency in the levels of fines given for similar offences and offenders and whether the fines given reflected the seriousness of the offences committed. Levels of fines may differ for quite valid reasons given the variability of culpability, harm and the means of offenders involved. Nevertheless, the Council determined that the levels of some fines given were too low and did not reflect the seriousness of the offences committed.

The Council adopted a principled approach to formulating the starting points and ranges in the draft guideline informed by the sentencing data available to it (please refer to Section Two of this paper for further information on the Council's research). The Council has taken into account section 164 of the Criminal Justice Act

2003, which requires that the fine must reflect the seriousness of the offence and the court to take into account the financial circumstances of the offender. The Council decided that the fine should also fulfil a number of additional important objectives. These are stated in step two and are: the level of fine should reflect the extent to which the offender fell below the required standard; it should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; and, it should not be cheaper to offend than to take the appropriate precautions.

By improving consistency in sentencing, the Council expects the guideline to increase the current levels of fines received for some offences by some offenders. Given the limited sentencing data available (discussed in Section Two), it is not possible to quantify exactly the likely increase to current fine levels. It is anticipated that companies that commit more serious offences will receive higher fines as a result of the guideline. However, it is not anticipated that all fines will increase; for individuals committing less serious offences it is expected that current fine levels will be maintained.

The Council considers that the starting points and ranges in the draft guideline are as fair, consistent and proportionate as possible within each offence and across all offences covered by the draft guideline and will reinforce a consistent approach to the sentencing of these offences, setting out a much clearer position on the setting of fines for corporate offenders.

What is the Council consulting about?

It is important to clarify that the Council is consulting on sentencing for environmental offences and not the legislation upon which such offences are based. The relevant legislation is a matter for Parliament and is, therefore, outside the scope of this exercise.

Through this consultation process, the Council is seeking views on:

- the principal factors that make an environmental offence more or less serious;
- the additional factors that should influence the sentence;
- the sentences that should be given for environmental offences; and
- anything else that you think should be considered.

A summary of the consultation questions can be found at annex A.

What else is happening as part of the consultation process?

During the 12-week public consultation, the Council will organise a number of consultation events to seek the views of criminal justice organisations and other groups with an interest in this area, as well as sentencers. We will also be conducting interviews with a sample of Crown Court judges, District Judges and magistrates to ascertain how they would apply the guideline and to identify whether the guideline presents any practical difficulties for sentencers. Once the consultation exercise is over and the guideline revised, a final guideline will be published and used by all adult courts.

Alongside this consultation paper, the Council has produced an online version which allows people to respond to the consultation questions through the Sentencing Council website. The Council has also produced a resource assessment and an equality impact assessment. These documents can be found on the Sentencing Council's website:
www.sentencingcouncil.org.uk

Section one: Environmental offences

It is proposed that the draft guideline applies to the environmental offences committed under section 33 Environmental Protection Act 1990 and regulations 12 and 38 (1), (2) and (3) Environmental Permitting (England and Wales) Regulations 2010, on account of the relatively high volume of these offences that are sentenced and their relatively high statutory maxima.

Unauthorised or harmful deposit, treatment or disposal, etc of waste

Illegal discharges to air, land and water

- section 33 Environmental Protection Act 1990
- regulations 12 and 38 (1), (2) and (3) Environmental Permitting (England and Wales) Regulations 2010

The maximum sentence is an unlimited fine and/or five years' custody.

These offences are triable either way (the offender may be tried in the Crown Court or a magistrates' court).

However, the Council has decided that the approach to sentencing set out in the guideline will also apply to a range of other relevant and analogous environmental offences that are committed less frequently and have lower statutory maxima. Sentencers may apply steps one and three of the guideline, and sentence bearing in mind the statutory maxima for these offences, which are set out below.

Transportation of controlled waste without registering

- section 1 Control of Pollution (Amendment) Act 1989

The maximum sentence is a level 5 fine (£5,000). This offence is only triable in magistrates' courts.

Breach of duty of care

- section 34 Environmental Protection Act 1990

The maximum sentence is an unlimited fine. This offence is triable either way (the offender may be tried in the Crown Court or magistrates' courts).

Breach of an abatement notice

- section 80 Environmental Protection Act 1990

The maximum sentence is £20,000 where the offence is committed on industrial, trade or business premises. Where the offence is committed on non-industrial etc premises the maximum sentence is a level 5 fine (£5,000) with a further fine of an amount equal to one-tenth of that level for each day on which the offence continues after the conviction.

This offence is only triable in magistrates' courts.

Q1

Do you agree with the proposed grouping of offences under section 33 Environmental Protection Act 1990 and regulations 12 and 38 (1), (2), (3) Environmental Permitting (England and Wales) Regulations 2010?

Q2

Do you agree with the proposed approach taken for the other environmental offences listed?

Applicability of the guideline

The Council proposes that the guideline will apply to all environmental offences covered irrespective of the date of the offence and all offenders. It is to be used in both the Crown Court and magistrates' courts, and updates to the *Magistrates' Court Sentencing Guidelines* will be issued for the offences covered.

Section two: Developing the guideline

Legislation

Recent legislation appears to show an increased sensitivity to the seriousness of environmental crime. The Clean Neighbourhoods and Environment Act 2005² increased the statutory maxima for offences under section 33 Environmental Protection Act 1990 (EPA) to a £50,000 fine and/or 12 months' custody on summary conviction and to an unlimited fine and/or five years' custody on indictment. The Serious Crime Act 2007 expanded the definition of 'serious crime' to include a number of environmental offences, in particular breach of section 33 EPA. The Act gives the Crown Court the power to make serious crime prevention orders against persons, companies and incorporated associations convicted of a serious offence.

The Council believes that if the increased statutory maxima for these offences are to have the desired effect, it is essential that sentencers have appropriate guidance to support them to assess properly the seriousness of these offences so that appropriate penalties can be imposed.

Sentencing data and research

To ensure that the objectives of the guideline are realised, the Council has carried out analytical and research work in support of the guideline.

Research has been conducted with sentencers at magistrates' courts and at the Crown Court. The research was in the form of face-to-face interviews, using three different guideline models for discussion and a short offence scenario to inform the discussion. This piece of research, whilst not representative of all sentencers due to the sample size, is a helpful indication of current sentencing practice and the need for sentencing guidance in this area.

The Council has also undertaken statistical analysis of current sentencing practice to help inform the sentencing ranges in the draft guideline. Detailed statistics for the offences covered by the guideline can be found on the Sentencing Council's website:

<http://sentencingcouncil.judiciary.gov.uk/consultations-current.htm>

² s.41

Official sentencing statistics have been supplemented with a review of recent cases in magistrates' courts and the Crown Court, which has enabled the Council to identify the harm and culpability factors present in offences, and where the offender is a company, its wealth. The sources of this data have been Court of Appeal transcripts, transcripts of cases provided by the Environment Agency and UK Environmental Lawyers' Association, and media reports. However, this information is not available for all cases, and we are aware that availability of data tends to be biased in favour of cases with certain features. For instance, data is more likely to be available for high severity cases or cases that attract media interest for other reasons.

Further research with sentencers is planned during the consultation period.

Structure of the guideline

The Council considered a number of models for the guideline, in relation to the setting of fines for corporate offenders. It discussed three of these models with a small pool of Crown Court judges, District Judges and magistrates from across the country. Two of the models were 'tariff-based' which set out specific starting points and ranges. The third model set out general sentencing principles, but no starting points or ranges. The aim of the exercise was to obtain an initial view from a sentencer's perspective on whether the models conformed to the appropriate sentencing principles and on their ease of use. The feedback from sentencers was that a narrative guideline that lists the principles a sentencer should follow would not be helpful without clear starting points and ranges. However, sentencers felt that a sufficiently flexible tariff-based guideline would provide helpful guidance to sentencers.

The Council is consulting on a tariff-based model. This model clearly sets out the appropriate starting points and ranges for fines, in addition to setting out the principles a sentencer should follow in setting the fine. In proposing a tariff approach, the Council wishes still to provide sufficient flexibility to sentencers to enable them to use their judicial discretion to respond to the wide range of offender types, and the varying levels of culpability and harm that environmental offending encompasses. The Council would welcome views on whether the structure of the guideline provides sufficient guidance as well as flexibility for sentencers.

Q3

Do you think the proposed structure of the guideline provides sufficient guidance as well as flexibility for sentencers?

Section three: Assessing seriousness

Every environmental offence which reaches court is different. The draft guideline aims to help the court to decide how serious an offence is (in the context of other environmental offences), and what the sentence should be.

The guideline sets out a step-by-step decision-making process for the court to use when sentencing each type of offence. This should mean that all courts are following a consistent approach to sentencing across England and Wales.

The first two steps that the court follows when deciding the sentence are about assessing the seriousness of an individual offence. These two steps are described below.

STEP ONE

Determining the offence category

The first step that the court will take is to consider the principal factors of the offence. The guideline directs the court to consider the factors relating to the **harm** that has been caused and the **culpability** of the offender in committing the offence. Harm can be defined as the damage or loss that the offence causes or risks to the environment, individual victim or to society at large. Culpability can be defined as how blameworthy the offender is.

Step one of the draft guideline sets out an exhaustive list of the principal factors relevant to each offence, in relation to harm and culpability. These are the factors that the Council

thinks are the most important in deciding the seriousness of the offence. The Council drew upon the research conducted with sentencers in compiling these lists and is seeking views on whether you agree with the factors that are being proposed. The guideline stresses that the culpability and harm categories represent sliding scales of culpability and harm; there is inevitable overlap between the scenarios described in adjacent categories. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting by the court before it makes an overall assessment and determination of the appropriate offence category.

A full version of the guideline is at annex C.

Harm factors

The Council recognises that the primary harm caused by an environmental offence is the level of actual or potential damage caused by the offender. However, the harm caused or risked should not be assessed solely by reference to physical damage. For example, costs incurred through clean-up, site restoration or animal rehabilitation are also relevant, as is the level of interference with other lawful activities.

Risk

An offence may create a risk of harm that does not materialise and so no actual harm is caused. For example, intervention by the regulator or local authority may have prevented harm from occurring. The Council considered in detail the seriousness of risk of harm relative to actual harm and the elements of risk which make some

offences that create a risk of harm more serious than others. The Council concluded that risk of harm is less serious than the same actual harm. Risk involves consideration of both the likelihood of harm occurring and the extent of it if it does. The guideline sets out that where the offence has created a risk of harm but no (or less) actual harm, normally, the sentencer should move to the category of harm below in the table. However, the guideline also sets out that the sentencer should consider the likelihood or extent of potential harm, and where these are particularly high, it may not be appropriate to move down a category, but, instead, to remain in the category for actual harm.

However, the Council also wishes to consult on an alternative approach to the sentencing of offences that create a risk of harm but no actual harm. This alternative approach is to treat risk of harm and the same actual harm in the same way at step one. In other words, no distinction would be made between risk of harm and actual harm at step one so that, for example, harm which caused a significant adverse effect or damage to land, air or water quality would fall into category 2 along with offences creating a risk of a significant adverse effect or damage. The distinction would be drawn at step two where risk of harm would be included as a mitigating factor which the court could consider and for which it could adjust the sentence downwards, within the category range, from the starting point. One issue with this approach is that it may not give the sentencer sufficient flexibility to arrive at a proportionate sentence where a risk of harm, but no actual harm, has been caused by the offence.

Listed below are the four categories of harm. To ensure a common understanding of the different categories of harm, they have been based on the Environment Agency’s Common Incident Classification Scheme which classifies incidents and their impact on the environment. The most serious category is category 1 and the least serious is category 4, which includes no actual harm, but the risk of category 3 harm.

Harm	
Category 1	<ul style="list-style-type: none"> • Polluting material of a dangerous nature, for example, hazardous chemicals or sharp objects • Substantial adverse effect or damage to land, air or water quality, amenity value, property • Polluting material was noxious, widespread or pervasive with long-lasting effects on animal health, human health or flora • Substantial costs incurred through clean-up, site restoration or animal rehabilitation • Substantial interference with or prevention of other lawful activities due to offence
Category 2	<ul style="list-style-type: none"> • Significant adverse effect or damage to land, air or water quality, amenity value, property • Significant adverse effect on human health, animal health or flora • Significant costs incurred through clean-up, site restoration or animal rehabilitation • Significant interference with other lawful activities due to offence • Risk of category 1 harm
Category 3	<ul style="list-style-type: none"> • Minor, localised adverse effect or damage to land, air or water quality, amenity value, property • Minor adverse effect on human health, animal health or flora • Low costs incurred through clean-up, site restoration or animal rehabilitation • Limited interference with other lawful activities due to offence • Risk of category 2 harm
Category 4	<ul style="list-style-type: none"> • Risk of category 3 harm

Q4 Do you agree with the approach taken in the draft guideline with regard to risk of harm?

Culpability factors

When considering how serious the offence is the court will also look at the offender's culpability, that is how blameworthy the offender is for what he or she has done.

Strict liability

Many environmental offences impose strict liability. Thus, to establish an offence, the only thing that needs to be proved is the act or omission that forms part of the offence. There is no need to prove any negligence or fault on the part of the offender. Although the absence of fault is irrelevant to establishing whether an offence has been committed, it is relevant at the sentencing stage. Here it differentiates between offences that are characterised as having high levels of culpability and those where the strictness of the liability results in the conviction of otherwise blameless offenders.

In fact, there are very few environmental crimes that impose absolute strict liability – that is for which there are no defences. Section 33(7) EPA provides a defence of due diligence subject to a reverse burden of proof. At least for section 33 EPA offences, because of the reverse burden of proof in section 33(7), most cases will fall into the culpability categories of 'deliberate', 'reckless' or 'negligent' (i.e. not 'low or no culpability') set out below. Under both section 33(7) EPA and regulation 40 Environmental Permitting (England and Wales) Regulations 2010 (EPR) it is a defence if the offence is committed in an emergency situation. However, the defence is subject to a requirement to minimise the harm and to report to the enforcement agency within a reasonable period of time. Offenders committing offences under regulation 38 EPR may therefore fall into the 'low or no culpability' category.

The Council has described levels of culpability as follows:

Culpability	
Deliberate	For example, where the offender intentionally breached, or flagrantly disregarded, the law
Reckless	For example, where the offender committed the offence without regard for the obvious consequences and/or the environmental harm that resulted
Negligent	For example, where the offender was in a position to stop or prevent the offence but carelessly failed to recognise the danger or have the correct procedures in place
Low or no culpability	For example, where the offence has occurred as a result of a genuine accident rather than the absence of prudent preventative measures, or where adequate preventative measures and procedures were in place but were overcome by exceptional events

Q5

Do you agree with the harm and culpability factors proposed at step one? If not, please specify which you would add or remove and why.

Determining the offence category

The combination of culpability and harm determines the offence category: for example an offence committed deliberately causing category 1 harm, or an offence committed negligently causing category 3 harm. There are 16 such combinations. For further detail on how these offence categories function, please refer to Section Four of this consultation paper.

Deliberate	Category 1 Category 2 Category 3 Category 4
Reckless	Category 1 Category 2 Category 3 Category 4
Negligent	Category 1 Category 2 Category 3 Category 4
Low or no culpability	Category 1 Category 2 Category 3 Category 4

STEP TWO**Starting point and category range****Principles to follow in setting the fine**

Step two of the guideline sets out the general principles the court should follow in setting a fine. The court should determine the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that a fine must reflect the seriousness of the offence and the court to take into account the financial circumstances of the offender. The level of fine should reflect the extent to which the offender fell below the required standard. A fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions.

Q6

Do you think the principles the guideline proposes the court should follow in setting a fine are the correct ones?

Obtaining financial information

Step two of the guideline also sets out the way in which the court should assess offender means and its powers in compelling disclosure of financial information.

For individuals, the guideline states:

“In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied any financial information to the contrary. It is for the offender to disclose to the court such data relevant to his financial position as will enable it to assess what he can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender’s financial circumstances pursuant to section 164(1) of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender’s means from evidence it has heard and from all the circumstances of the case.”

For companies and bodies delivering public and charitable services:

“Where the offender is a company or a body which delivers a public or charitable service, it is expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender’s means from evidence it has heard and from all the circumstances of the case.

1. *For companies:* published audited accounts (normally covering the previous three years). Particular attention should be paid to turnover; profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. Most companies are required to lodge accounts at Companies House. Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.
2. *For partnerships:* annual audited accounts. Particular attention should be paid to turnover; profit before tax; partners' drawings, loan accounts and pension provision; assets as above. If accounts are not produced on request, see paragraph 1.
3. *For local authorities, police and fire authorities and similar public bodies:* the Annual Revenue Budget (ARB) is the equivalent of turnover and the best indication of the size of the defendant organisation. It is unlikely to be necessary to analyse specific expenditure or reserves unless inappropriate expenditure is suggested.
4. *For health trusts:* the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via www.monitor-nhsft.gov.uk. Detailed analysis of expenditure or reserves is unlikely to be called for.
5. *For charities:* it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure."

Q7

Do you think the guidance on obtaining financial information is sufficiently detailed and helpful?

Aggravating and mitigating factors

The provisional sentence is determined by reference to the offence category identified at step one. In order to determine the provisional sentence within the appropriate category range, the court is provided with a starting point for the relevant offence category. It is then asked to consider any additional factors (which include further factors relating to the offence, as well as some factors relating to the offender) which may indicate an upward or downward movement from this point within the appropriate category range. The starting points and ranges for each of these categories is discussed in Section Four.

These aggravating and mitigating factors relate to the wider circumstances of the offence and also include factors relating to the offender. The lists at this step are not intended to be exhaustive and any other factors present should be taken into account by the court at this step. In exceptional cases, having considered these factors, the court might decide to move outside the given category range.

The Council's intention is to highlight factors which are likely to be relatively common in such cases in order to ensure that they are considered equally by different courts. The Council has included aggravating factors relating to the context of the offence such as location of the offence, for example, near housing, schools, livestock or environmentally sensitive sites or the fact that the offender deliberately concealed the illegal nature of the activity.

Factors relating to the offender include the offender's background such as any relevant previous convictions the offender may have or a history of non-compliance evidenced by receipt of warnings by the regulator. This factor has been highlighted as one which may warrant a

significant upward adjustment from the starting point. The Council decided to highlight the factor as particularly serious given the prevalence of recorded reoffending or non-compliance in this area. Some of the aggravating factors only apply to individual offenders, for example, where the offence is committed whilst the offender is on licence.

The table below sets out the **aggravating** factors being proposed at step two.

Factors increasing seriousness
Statutory aggravating factors
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction
Offence committed whilst on bail
Other aggravating factors include
History of non-compliance evidenced by receipt of warnings by regulator
Location of the offence, for example, near housing, schools, livestock or environmentally sensitive sites
Repeated incidents of offending or offending over an extended period of time, where not charged separately
Deliberate concealment of illegal nature of activity
Breach of an order
Obstruction of justice
Offence committed whilst on licence

The Council has included mitigating factors relating to the context of the offence such as where there is evidence the offender has taken steps to remedy the problem or where the offence was a one-off event and not commercially motivated.

Factors relating to the offender again include the offender’s background such as the absence of previous convictions as well as the offender being of good character or having demonstrated remorse. As with the aggravating factors, some of the mitigating factors only apply to individual offenders, for example, ‘mental disorder or learning disability, where linked to the commission of the offence’ and ‘serious medical conditions requiring urgent, intensive or long-term treatment’.

The table below sets out the **mitigating** factors being proposed at step two.

Factors reducing seriousness or reflecting personal mitigation
No previous convictions or no relevant/recent convictions
Remorse
Evidence of steps taken to remedy problem
One-off event not commercially motivated
Little or no financial gain
Effective compliance and ethics programme
Self-reporting, co-operation and acceptance of responsibility
Good character and/or exemplary conduct
Mental disorder or learning disability, where linked to the commission of the offence
Serious medical conditions requiring urgent, intensive or long-term treatment
Age and/or lack of maturity where it affects the responsibility of the offender
Sole or primary carer for dependent relatives

Q8 Do you agree with the aggravating and mitigating factors proposed at step two? If not, please specify which you would add or remove and why.

STEP THREE**Consider whether there are any further factors that warrant adjustment of the fine**

It is the Council's intention to provide the sentencer with sufficient flexibility to ensure that the sentence fulfils, in a fair and proportionate way, the stated objectives of punishment, deterrence and the removal of any gain the offender has obtained by committing the offence. Step three in the draft guideline therefore guides the sentencer to step back from the fine arrived at in step two and to take into account a range of factors which may warrant an adjustment to the fine. These factors relate to the likely effect of the fine on the offender and others.

Step three contains a non-exhaustive list of factors for the sentencer to consider which includes: the means or worth of the offender; the impact of the fine on employees and customers; and the impact of the fine on the offender's ability to improve conditions and comply with the law. The following specific guidance is also included: "where the fine will fall on public or charitable services, the fine arrived at in step two should normally be substantially reduced. The offending organisation must demonstrate the impact the fine would have on the provision of these services before the court considers making such a reduction."

However, in the Council's view, for corporate offenders, the fine must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to improve regulatory compliance. Such guidance has also been included at step three as well as the following: "whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence." Following a consideration of these factors, the sentencer may increase or decrease the level of the fine.

The Council is clear that, where an offender derives an economic benefit by committing the offence, that is a good indicator of seriousness and therefore the full amount of economic benefit should be included in a fine. Economic benefit includes avoided costs, operating savings, and any gain made as a direct result of the offence. This will be a consideration in the majority of environmental offences, which are committed for economic gain or to avoid economic loss. The sentencer is guided, at step three, to add to the fine any economic benefit the offender has derived through the commission of the offence. Where it is not possible for the court to calculate or estimate the economic benefit, it is guided to draw on information from the enforcing authorities about the general costs of operating within the law.

There is a crossover here with confiscation, but the Council believes that any interference, or confusion, with confiscation would be limited. Ninety per cent of cases are sentenced in magistrates' courts, where confiscation is not available. The Council was alive to the potential impact the inclusion of the principle that the sentence should remove any economic gain could have on committal decisions. The Council has therefore devised, at step three, a clear approach for magistrates to follow to remove economic benefit without the need for lengthy and expensive confiscation proceedings.

It is clearly stated at the beginning of the draft guideline that an offender convicted of an offence in a magistrates' court must be committed for sentence to the Crown Court where confiscation is requested by the prosecution (section 70 Proceeds of Crime Act 2002).

Q9

Do you think the approach in step three achieves the objectives of punishment, deterrence and removal of gain in a fair and proportionate way?

Q10

Are the factors identified in step three the correct ones?

Q11

Is the approach to sentencing bodies delivering public or charitable services correct?

Further steps in the process of deciding the sentence

Having come up with a provisional sentence through the three steps described above, the court will then consider the following additional steps:

STEP FOUR

Consider any factors which indicate a reduction, such as assistance to the prosecution

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FIVE

Reduction for guilty pleas

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP SIX

Compensation and ancillary orders

In all cases, the court must consider whether to make a compensation order and/or other ancillary orders. These may include an order to carry out remedial work; forfeiture of vehicle; deprivation of property; disqualification of directors and disqualification from driving.

STEP SEVEN

Totality principle

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.

STEP EIGHT

Reasons

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE

Consideration for time spent on bail

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Q12

Do you think the wording on ancillary orders in step six is appropriate?

Section four: Sentences for environmental offences

As set out in the Introduction, the Council adopted a principled approach to formulating the starting points and ranges in the draft guideline based on the seriousness of the offence, informed by the sentencing data available to it. In its review of current sentencing practice, the Council determined that the levels of some fines were too low and did not reflect the seriousness of the offences committed.

Despite the evidence which has been collected, understanding current sentencing practice for environmental offences has been more challenging than for many of the other sentencing guidelines produced by the Council. There are several reasons for this.

Firstly, relatively few environmental offences are sentenced. This means that few sentencers have experience of sentencing significant numbers of cases and, as a result, it is difficult to build up a representative picture of how cases are currently dealt with. For instance, the majority of the sentencers who were interviewed as part of the Council's programme of research had recent experience of only one or two cases. Also, data on financial penalties is difficult to interpret because it does not directly correspond to sentencing ranges set out in sentencing guidelines. Data is available on the absolute amount of financial penalties, after any adjustments for the means of the defendant; but the sentencing guideline recommends penalties that apply before any adjustments have been made for means or guilty plea discounts.

For those reasons, whilst the Council expects the guideline to increase the current levels of fines received for some offences by some offenders, it is not possible to quantify exactly the likely increase to current fine levels. The data available to the Council provides greater information about companies than it does about individuals and greater information about the more serious offences than it does about low level offending. It is anticipated that companies that commit more serious offences will receive higher fines as a result of the guideline. However, it is not anticipated that all fines will increase; for individuals committing less serious offences, it is expected that current fine levels will be maintained, because of the requirement to take into account offender means in setting a fine.

Despite the limitations of the data, the Council believes that the guideline proposes fair and proportionate sentence levels that reflect offence seriousness and will both punish and deter future offending. However, it would welcome views on the proposed sentences and the guideline's likely impact on current sentencing practice.

Sentencing data for section 33 Environmental Protection Act 1990 and regulations 12 and 38 Environmental Permitting (England and Wales) Regulations 2010

The sentencing data for 2011 indicate that for these offences, 67 per cent of all offenders received a fine; 18 per cent received a conditional discharge; seven per cent of offenders received a community order; three per cent received a suspended sentence order; just over two per cent received immediate custody and under one per cent of offenders were sentenced to an absolute discharge. Research with sentencers showed that respondents felt that, for individual offenders, a fine was the most suitable disposal type for offences. It is the Council's view that since these offences are mainly committed for economic gain that, where the custodial threshold is not passed, a fine will normally be the most appropriate disposal. This is the case even where the community order threshold has been passed. A fine is the only disposal available to the sentencer where the offender is a company or a body delivering public or charitable services.

Companies and bodies delivering public or charitable services

Step two is split into two distinct sections. The first is for companies and bodies delivering public or charitable services (in this paper collectively referred to as 'organisations') and the second is for individuals. The guideline sets out three different tables of starting points and ranges, which are tailored to the turnover or equivalent of the offending organisation. This approach is based on the categorisation of companies set out in the Companies Act 2006. The greater the organisation's turnover, the higher the starting points and ranges. The aim of this approach is to ensure that fines are set at a level that is both proportionate to

the seriousness of the offence, but also to the wealth of the organisation. Fines should have an equal economic impact on offenders. Therefore, for example, for similar offences, organisations with 'large' turnovers will receive proportionately higher fines than those with 'small' turnovers. Organisations with 'medium' turnovers will receive fines that are proportionately lower than those given to organisations with 'large' turnovers. The Council believes this approach will ensure that fines are both effective in deterring future offending and in encouraging compliance with the law, and are set at a level that the offender can pay.

Where the fine will fall on public or charitable services, the sentencer is guided to reduce substantially the fine in step three. However, the offending organisation must demonstrate the impact the fine would have on the provision of these services before the sentencer considers making such a reduction.

Q13

Do you agree with the way in which the guideline categorises different types of organisations?

Large organisations

An organisation with a 'large' turnover is defined in the draft guideline as having a turnover or equivalent of over £25.9 million.

The most serious category of offence, an offence which caused category 1 harm committed deliberately, has a proposed starting point of a £750,000 fine with a fine range of £270,000 to £2 million. The least serious offence, an offence committed with no culpability which caused category 4 harm, has a starting point fine of £3,000 and a fine range of £1,000 to £5,000.

Large Turnover or equivalent: over £25.9 million		
Offence category	Starting point	Range
Deliberate		
Category 1	£750,000	£270,000 – £2 million
Category 2	£270,000	£100,000 – £750,000
Category 3	£100,000	£60,000 – £270,000
Category 4	£60,000	£35,000 – £100,000
Reckless		
Category 1	£335,000	£125,000 – £1 million
Category 2	£125,000	£45,000 – £335,000
Category 3	£45,000	£25,000 – £125,000
Category 4	£30,000	£15,000 – £45,000
Negligent		
Category 1	£150,000	£55,000 – £395,000
Category 2	£60,000	£20,000 – £150,000
Category 3	£22,000	£10,000 – £60,000
Category 4	£13,000	£5,000 – £25,000
Low or no culpability		
Category 1	£30,000	£10,000 – £75,000
Category 2	£12,000	£5,000 – £30,000
Category 3	£5,000	£3,000 – £15,000
Category 4	£3,000	£1,000 – £5,000

Q14

Do you agree with the proposed sentences (category ranges and starting points) for organisations with large turnovers?

Q15

What effect do you think the draft guideline will have on current sentencing practice relating to organisations with large turnovers?

Medium organisations

An organisation with a 'medium' turnover is defined in the draft guideline as having a turnover or equivalent of between £6.5 million and £25.9 million.

The most serious category of offence, an offence which caused category 1 harm committed deliberately, has a proposed starting point of a £250,000 fine with a fine range of £90,000 to £690,000. The least serious offence, an offence committed with no culpability which caused category 4 harm, has a starting point fine of £1,000 and a fine range of £650 to £2,000.

Medium

Turnover or equivalent: between £6.5 million and £25.9 million (section 465 Companies Act 2006)

Offence category	Starting point	Range
Deliberate		
Category 1	£250,000	£90,000 – £690,000
Category 2	£90,000	£30,000 – £250,000
Category 3	£35,000	£20,000 – £95,000
Category 4	£20,000	£10,000 – £35,000
Reckless		
Category 1	£110,000	£40,000 – £300,000
Category 2	£40,000	£15,000 – £115,000
Category 3	£15,000	£10,000 – £45,000
Category 4	£9,000	£5,000 – £15,000
Negligent		
Category 1	£50,000	£20,000 – £130,000
Category 2	£20,000	£7,000 – £50,000
Category 3	£7,000	£4,500 – £20,000
Category 4	£4,500	£3,000 – £10,000
Low or no culpability		
Category 1	£10,000	£4,000 – £25,000
Category 2	£4,000	£1,500 – £10,000
Category 3	£1,500	£1,000 – £5,000
Category 4	£1,000	£650 – £2,000

Q16

Do you agree with the proposed sentences (category ranges and starting points) for organisations with medium turnovers?

Q17

What effect do you think the draft guideline will have on current sentencing practice relating to organisations with medium turnovers?

Small organisations

An organisation with a ‘small’ turnover is defined in the draft guideline as having a turnover or equivalent of not more than £6.5 million.

The most serious category of offence, an offence which caused category 1 harm committed deliberately, has a proposed starting point of a £25,000 fine with a fine range of £9,000 to £70,000. The least serious offence, an offence committed with no culpability which caused category 4 harm, has a starting point fine of £100 and a fine range of £50 to £200.

Small Turnover or equivalent: not more than £6.5 million (section 382 Companies Act 2006)		
Offence category	Starting point	Range
Deliberate		
Category 1	£25,000	£9,000 – £70,000
Category 2	£9,000	£3,000 – £25,000
Category 3	£3,000	£2,000 – £10,000
Category 4	£2,000	£1,000 – £3,500
Reckless		
Category 1	£11,000	£4,000 – £30,000
Category 2	£4,000	£1,500 – £15,000
Category 3	£1,500	£950 – £5,000
Category 4	£950	£600 – £2,000
Negligent		
Category 1	£5,000	£2,000 – £15,000
Category 2	£2,000	£700 – £5,000
Category 3	£800	£450 – £2,000
Category 4	£450	£250 – £800
Low or no culpability		
Category 1	£1,000	£400 – £2,500
Category 2	£400	£150 – £1,000
Category 3	£150	£100 – £500
Category 4	£100	£50 – £200

Q18

Do you agree with the proposed sentences (category ranges and starting points) for organisations with small turnovers?

Q19

What effect do you think the draft guideline will have on current sentencing practice relating to organisations with small turnovers?

Individuals

The second section of step two sets out the starting points and ranges for individual offenders. The starting points and ranges include conditional discharges, fines, community orders and custody. The inclusion of community orders has been intentionally limited as an alternative to a fine. The Council is of the view that given these offences are mainly committed for economic gain, where the custodial threshold is not passed a fine will normally be the most appropriate disposal. This is the case even where the community order threshold has been passed. The Council would welcome views on whether this guidance is appropriate. The Council would also welcome views on the proposal that, where a community order is deemed to be the appropriate sentence and the offender has benefited economically from the offence, the community order should be combined with a fine set at the same level as the benefit to ensure its removal.

The Council has chosen to adopt the fine bands used in the *Magistrates’ Court Sentencing Guidelines*, since these will be familiar to magistrates, who will be sentencing the vast majority of these offences. The fine bands relate to an offender’s relevant weekly income which is defined in the *Magistrates’ Court Sentencing Guidelines*.³ Guidance on the fine bands is included in the annex to the draft guideline. The starting points and ranges proposed for individuals apply before the sentencer has taken account of the means of the offender.

³ Please see page 148 of the *Magistrates’ Court Sentencing Guidelines* <http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm>

The most serious category of offence, an offence which caused category 1 harm committed deliberately has a proposed starting point of 18 months' custody with a range of 1 to 3 years' custody. The least serious offence, an offence committed with no culpability which caused category 4 harm, has a starting point of a band A fine and a range of conditional discharge to band A fine.

Individuals		
Offence category	Starting point	Range
Deliberate		
Category 1	18 months' custody	1 – 3 years' custody
Category 2	1 year's custody	26 weeks' – 18 months' custody
Category 3	12 weeks' custody	Band E fine or medium level community order – 26 weeks' custody
Category 4	Band E fine	Band D fine – Band E fine
Reckless		
Category 1	26 weeks' custody	12 weeks' custody – 12 months' custody
Category 2	12 weeks' custody	Band E fine or medium level community order – 26 weeks' custody
Category 3	Band E fine	Band D fine – Band E fine
Category 4	Band D fine	Band C fine – Band D fine
Negligent		
Category 1	12 weeks' custody	Band E fine or medium level community order – 26 weeks' custody
Category 2	Band E fine	Band D fine or low level community order – Band E fine
Category 3	Band D fine	Band C fine – Band D fine
Category 4	Band C fine	Band B fine – Band C fine
Low or no culpability		
Category 1	Band D fine	Band C fine – Band D fine
Category 2	Band C fine	Band B fine – Band C fine
Category 3	Band B fine	Band A fine – Band B fine
Category 4	Band A fine	Conditional discharge – Band A fine

The Council has determined that there should be a degree of overlap between the bottom of the ranges for small companies and the fine levels for individuals. The means, for example, of a trader who has not set himself up as a company and of a husband and wife who have structured themselves as a company may be identical. The trader would be prosecuted as an individual, but the husband and wife could be prosecuted as individuals or as a company. The Council, therefore, believes that, on the grounds of proportionality, there should be some degree of

overlap between the ranges for small companies and those for individuals.

A small company that has committed an offence negligently and caused minor harm (category 3 harm) would face, under the draft guideline, a starting point fine of £800 with a range of £450 to £2,000. For the same offence, an individual would face a band D fine starting point with a range of a band C fine to a band D fine. The fine bands are set out in the table on the opposite page.

Fine Band	Starting point	Range
Band A	50% of relevant weekly income	25 – 75% of relevant weekly income
Band B	100% of relevant weekly income	75 – 125% of relevant weekly income
Band C	150% of relevant weekly income	125 – 175% of relevant weekly income
Band D	250% of relevant weekly income	200 – 300% of relevant weekly income
Band E	400% of relevant weekly income	300 – 500% of relevant weekly income

It may be helpful to consider how much 100 per cent of weekly income (the starting point of a band B fine) works out for different portions of the UK population. This is set out in the table below.

Table of weekly after tax income 2010–11 (taxpayers only)			
Percentile (how far into income distribution)	Description	Weekly before tax income	Weekly after tax income
N/A	<i>Magistrates' Court Sentencing Guidelines</i> minimum weekly income ⁴ (e.g. people on benefits)		Assumed to be £110
5th	Very low income	£151	£146
25th	Low income	£244	£225
50th	Median income	£375	£329
75th	High income	£594	£506
95th	Very high income	£1,204	£942

Source: Table 3.1 <http://hmrc.gov.uk/statistics/personal-incomes.htm>

For the purposes of this comparison it is assumed that both the individual trader and the husband and wife company have median weekly incomes of about £350. For the negligent/ category 3 harm offence the guideline provides a starting point fine of £800 and a range of £450 to £2,000 for small companies. For the same offence the individual offender on the same median income would face a starting point fine of 250 per cent which is £875 and a range of 125 per cent to 300 per cent which is about £440 to £1,050. The starting points are roughly the same for small companies and individuals, as are the bottoms of the ranges. However, the top of the range for small companies is about £1,000 higher than the corresponding fine for individuals. This is to reflect the fact that these starting points and ranges apply to companies with turnovers as large as £6.5 million.

The Council would welcome views on whether the proposed sentences (category ranges and starting points) for individuals are appropriate.

Q20

Do you consider the guidance regarding the use of community orders and fines to be appropriate and sufficient?

Q21

Do you agree with the proposed sentences (category ranges and starting points) for individuals?

Q22

What effect do you think the draft guideline will have on current sentencing practice relating to individuals?

⁴ Please see pages 148 and 155 of the *Magistrates' Court Sentencing Guidelines* <http://sentencingcouncil.judiciary.gov.uk/guidelines/guidelines-to-download.htm>

Section five: Other issues

Victims

When preparing guidelines, the Council must have regard to the impact of sentencing decisions on victims.⁵ The Council has sought to have full regard to the impact on victims of the environmental offences covered by the draft guideline. These considerations have been set out in relation to the factors included in steps one and two.

Step six of the guideline states that the court must consider whether to make a compensation order to the victim if the offence has resulted in personal injury (including distress), loss or damage.

The Council would welcome views on whether it can do more in the guideline in relation to the impact on victims, in particular from victims themselves and organisations that represent victims.

Q23

Are there further ways in which you think victims can or should be considered?

Equality and diversity

Alongside this consultation document and the draft guideline the Council has published an equality impact assessment. This assessment has been informed by a review of the relevant literature and data; however this is very limited. No equality matters have been identified to date in relation to the development of the guideline, but the Council is keen to hear through the consultation of any matters that should be considered.

Q24

Are there any equality or diversity matters that the Council should consider? Please provide evidence where possible.

Q25

Are there any further comments you wish to make?

⁵ s.120(11)(c) Coroners and Justice Act 2009

Annex A: Summary of consultation questions

- Q1** Do you agree with the proposed grouping of offences under section 33 Environmental Protection Act 1990 and regulations 12 and 38 (1), (2) and (3) Environmental Permitting (England and Wales) Regulations 2010?
- Q2** Do you agree with the proposed approach taken for the other environmental offences listed?
- Q3** Do you think the proposed structure of the guideline provides sufficient guidance as well as flexibility for sentencers?
- Q4** Do you agree with the approach taken in the draft guideline with regard to risk of harm?
- Q5** Do you agree with the harm and culpability factors proposed at step one? If not, please specify which you would add or remove and why.
- Q6** Do you think the principles the guideline proposes the court should follow in setting a fine are the correct ones?
- Q7** Do you think the guidance on obtaining financial information is sufficiently detailed and helpful?
- Q8** Do you agree with the aggravating and mitigating factors proposed at step two? If not, please specify which you would add or remove and why.
- Q9** Do you think the approach in step three achieves the objectives of punishment, deterrence and removal of gain in a fair and proportionate way?
- Q10** Are the factors identified in step three the correct ones?

Q11

Is the approach to sentencing bodies delivering public or charitable services correct?

Q12

Do you think the wording on ancillary orders in step six is appropriate?

Q13

Do you agree with the way in which the guideline categorises different types of organisations?

Q14

Do you agree with the proposed sentences (category ranges and starting points) for organisations with large turnovers?

Q15

What effect do you think the draft guideline will have on current sentencing practice relating to organisations with large turnovers?

Q16

Do you agree with the proposed sentences (category ranges and starting points) for organisations with medium turnovers?

Q17

What effect do you think the draft guideline will have on current sentencing practice relating to organisations with medium turnovers?

Q18

Do you agree with the proposed sentences (category ranges and starting points) for organisations with small turnovers?

Q19

What effect do you think the draft guideline will have on current sentencing practice relating to organisations with small turnovers?

Q20

Do you consider the guidance regarding the use of community orders and fines to be appropriate and sufficient?

Q21

Do you agree with the proposed sentences (category ranges and starting points) for individuals?

Q22

What effect do you think the draft guideline will have on current sentencing practice relating to individuals?

Q23 Are there further ways in which you think victims can or should be considered?

Q24 Are there any equality or diversity matters that the Council should consider?
Please provide evidence where possible.

Q25 Are there any further comments you wish to make?

Annex B:

Background to guidelines

Sentencing Guidelines Council and Sentencing Advisory Panel

The Sentencing Council was created to bring together the functions of the two previous bodies, the Sentencing Guidelines Council (SGC) and Sentencing Advisory Panel (SAP), which were disbanded. In 2003, the SGC and the SAP were established to work together to produce sentencing guidelines that encouraged consistency in sentencing throughout England and Wales and to support sentencers in their decision making. The SAP's role was to advise on sentencing guidelines for particular offences and other sentencing issues, and following a period of wide consultation and research if required, the SAP would produce advice for the SGC to consider. The SGC would receive advice from the SAP and use this to formulate sentencing guidelines on the subject. The SGC would publish draft guidelines for consultation and then issue final guidelines for sentencers.

The Sentencing Council is a more streamlined body with a greater remit to take forward work on sentencing not only through improvements to guidelines but also through the development of a robust evidence base and by engaging more with the public to improve understanding about sentences. The Council brings together wide experience in sentencing and comprises eight judicial members and six non-judicial members.

Statutory requirements

In producing these draft guidelines, the Council has had regard to a number of statutory requirements.

The purposes of sentencing are stated in section 142 of the Criminal Justice Act 2003:

- the punishment of offenders;
- the reduction of crime (including its reduction by deterrence);
- the reform and rehabilitation of offenders;
- the protection of the public; and,
- the making of reparation by offenders to persons affected by their offences.

The Sentencing Council has also had regard to the statutory duties in the Coroners and Justice Act 2009 which set out requirements for sentencing guidelines as follows:

- guidelines may be general in nature or limited to a particular offence;
- the Council must publish them as draft guidelines;
- the Council must consult the following persons about draft guidelines: the Lord Chancellor, such persons as the Lord Chancellor may direct, the Justice Select Committee of the House of Commons, such other persons as the Council considers appropriate;

- after making appropriate amendments, the Council must issue definitive guidelines;
- the Council may review the guidelines and may revise them;⁶
- the Council must publish a resource assessment in respect of the guidelines;⁷ and,
- the Council must monitor the operation and effect of its sentencing guidelines.⁸

Under the previous bodies (the SGC and SAP), courts had to “have regard to any guidelines which are relevant to the offender’s case”⁹ and give reasons if a sentence fell outside of the range.¹⁰ Section 125(a) of the Coroners and Justice Act 2009 states that, “every court must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender’s case”. Therefore, courts are required to impose a sentence consistent with the guidelines, unless it would be contrary to the interests of justice to do so. Therefore, the Sentencing Council is keen to ensure that the guidelines are as accessible as possible for sentencers.

When preparing sentencing guidelines, the Council must have regard to the following matters:

- the sentences imposed by courts in England and Wales for offences;
- the need to promote consistency in sentencing;
- the impact of sentencing decisions on victims of offences;
- the need to promote public confidence in the criminal justice system;
- the cost of different sentences and their relative effectiveness in preventing re-offending; and,
- the results of monitoring the operation and effect of its sentencing guidelines.¹¹

When publishing any draft guidelines, the Council must publish a resource assessment of the likely effect of the guidelines on:

- the resources required for the provision of prison places;
- the resources required for probation provision; and
- the resources required for the provision of youth justice services.¹²

In order to achieve these requirements, the Council has considered case law on environmental offences, where it is available, evidence on current sentencing practice and drawn on members’ own experience of sentencing practice. The intention is for the decision making process in the proposed guideline to provide a clear structure, not only for sentencers, but to provide more clarity on sentencing for the victims and the public, so that they too can have a better understanding of how a sentence has been reached.

The Council has had regard to these duties throughout the preparation of this draft guideline. In developing an understanding of the cost and effectiveness of different sentences, the Council has considered the available information and evidence and these are contained in the resource assessment which accompanies this consultation paper.

⁶ s.120 Coroners and Justice Act 2009

⁷ s.127(2) *ibid*

⁸ s.128(1) *ibid*

⁹ s.172(1) Criminal Justice Act 2003

¹⁰ s.174(2) *ibid*

¹¹ s.120(11) Coroners and Justice Act 2009

¹² s.127(3) *ibid*

Annex C:

Draft guideline

Applicability of Guideline

In accordance with section 120 of the Coroners and Justice Act 2009, the Sentencing Council issues this draft guideline. When issued as a definitive guideline, it will apply to all offenders aged 18 and older, who are sentenced on or after [date to be confirmed], regardless of the date of the offence.

Section 125(1) Coroners and Justice Act 2009 provides that when sentencing offences committed after 6 April 2010:

“Every court -

- (a) must, in sentencing an offender, follow any sentencing guideline which is relevant to the offender’s case, and
- (b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of the function,

unless the court is satisfied that it would be contrary to the interests of justice to do so.”

When issued as a definitive guideline this guideline will apply only to offenders aged 18 and older. General principles to be considered in the sentencing of youths are in the Sentencing Guidelines Council’s definitive guideline, *Overarching Principles – Sentencing Youths*.

Structure, ranges and starting points

For the purposes of section 125(3)–(4) Coroners and Justice Act 2009, the guideline specifies *offence ranges* – the range of sentences appropriate for each type of offence. Within each offence, the Council has specified a number of *categories* which reflect varying degrees of seriousness. The offence range is split into *category ranges* – sentences appropriate for each level of seriousness. The Council has also identified a starting point within each category.

Starting points define the position within a category range from which to start calculating the provisional sentence. As in earlier Sentencing Council definitive guidelines, this guideline adopts an offence based starting point. **Starting points apply to all offences within the corresponding category and are applicable to all offenders, in all cases.** Once the starting point is established, the court should consider further aggravating and mitigating factors and previous convictions so as to adjust the sentence within the range. Starting points and ranges apply to all offenders, whether they have pleaded guilty or been convicted after trial. Credit for a guilty plea is taken into consideration only at step five in the decision making process, after the appropriate sentence has been identified.

Information on community orders and fine bands is set out in the annex at page 43.

Unauthorised or harmful deposit, treatment or disposal, etc of waste

Illegal discharges to air, land and water

Environmental Protection Act 1990 (section 33)

Environmental Permitting (England and Wales) Regulations 2010 (regulations 12 and 38(1), (2) and (3))

Triable either way

Maximum:

when tried on indictment: unlimited fine and/or 5 years' custody
when tried summarily: £50,000 fine and/or 12 months' custody

Offence range:

companies, bodies delivering public or charitable services: £50 fine – £2 million fine
individuals: conditional discharge – 3 years' custody

Confiscation

An offender convicted of an offence in a magistrates' court must be committed for sentence to the Crown Court where confiscation is requested by the prosecution (s.70 Proceeds of Crime Act 2002).

The magistrates' court must state whether it would have committed the offender to the Crown Court for sentencing had the issue of a confiscation order not arisen.

In the Crown Court, if considering a financial penalty, the court must first consider an order for payment of compensation, taking account of the confiscation order, before imposing a fine. If considering a non-financial penalty, the court must leave the confiscation order out of account in deciding the appropriate sentence (s.13 Proceeds of Crime Act 2002).

STEP ONE**Determining the offence category**

The court should determine the offence category using the table below. The court should determine culpability and harm caused, by reference only to the factors below, which comprise the principal factual elements of the offence. The culpability and harm categories represent sliding scales of culpability and harm; there is inevitable overlap between the scenarios described in adjacent categories. Where an offence does not fall squarely into a category, individual factors may require a degree of weighting before making an overall assessment and determining the appropriate offence category.

Risk involves consideration of both the likelihood of harm occurring and the extent of it if it does. Risk of harm is less serious than the same actual harm. Where the offence has caused risk of harm but no (or less) actual harm the normal approach is to move down to the next category of harm. This may not be appropriate if either the likelihood or extent of potential harm is particularly high.

Culpability		Harm	
Deliberate	For example, where the offender intentionally breached, or flagrantly disregarded, the law	Category 1	<ul style="list-style-type: none"> • Polluting material of a dangerous nature, for example, hazardous chemicals or sharp objects • Substantial adverse effect or damage to land, air or water quality, amenity value, property • Polluting material was noxious, widespread or pervasive with long-lasting effects on animal health, human health or flora • Substantial costs incurred through clean-up, site restoration or animal rehabilitation • Substantial interference with or prevention of other lawful activities due to offence
Reckless	For example, where the offender committed the offence without regard for the obvious consequences and/or the environmental harm that resulted	Category 2	<ul style="list-style-type: none"> • Significant adverse effect or damage to land, air or water quality, amenity value, property • Significant adverse effect on human health, animal health or flora • Significant costs incurred through clean-up, site restoration or animal rehabilitation • Significant interference with other lawful activities due to offence • Risk of category 1 harm
Negligent	For example, where the offender was in a position to stop or prevent the offence but carelessly failed to recognise the danger or have the correct procedures in place	Category 3	<ul style="list-style-type: none"> • Minor, localised adverse effect or damage to land, air or water quality, amenity value, property • Minor adverse effect on human health, animal health or flora • Low costs incurred through clean-up, site restoration or animal rehabilitation • Limited interference with other lawful activities due to offence • Risk of category 2 harm
Low or no culpability	For example, where the offence has occurred as a result of a genuine accident rather than the absence of prudent preventative measures, or where adequate preventative measures and procedures were in place but were overcome by exceptional events	Category 4	<ul style="list-style-type: none"> • Risk of category 3 harm

STEP TWO**Starting point and category range****Companies and bodies delivering public or charitable services**

Having determined the category, the court should refer to the tables for companies, and bodies delivering public or charitable services on pages 36–37. There are three tables of starting points and ranges, one for large organisations, one for medium organisations and one for small organisations. The court should refer to the table that relates to the size of the offending organisation.

The court should use the corresponding starting point to reach a sentence within the category range. The court should then consider further adjustment within the category range for aggravating and mitigating features, set out on page 39.

Individuals

Having determined the category, the court should refer to the table for individual offenders on page 38 and use the corresponding starting points to reach a sentence within the category range. The court should then consider further adjustment within the category range for aggravating and mitigating features, set out on page 39.

General principles to follow in setting a fine

The court should determine the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires that the fine must reflect the seriousness of the offence and the court to take into account the financial circumstances of the offender.

The level of fine should reflect the extent to which the offender fell below the required standard. The fine should meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence; it should not be cheaper to offend than to take the appropriate precautions.

Obtaining financial information**Companies and bodies delivering public or charitable services**

Where the offender is a company or a body which delivers a public or charitable service, it is expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of its financial status. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case.

1. *For companies*: published audited accounts (normally covering the previous three years). Particular attention should be paid to turnover; profit before tax; directors' remuneration, loan accounts and pension provision; and assets as disclosed by the balance sheet. Most companies are required to lodge accounts at Companies House. Failure to produce relevant recent accounts on request may properly lead to the conclusion that the company can pay any appropriate fine.
2. *For partnerships*: annual audited accounts. Particular attention should be paid to turnover; profit before tax; partners' drawings, loan accounts and pension provision; assets as above. If accounts are not produced on request, see paragraph 1.

3. *For local authorities, police and fire authorities and similar public bodies:* the Annual Revenue Budget (ARB) is the equivalent of turnover and the best indication of the size of the defendant organisation. It is unlikely to be necessary to analyse specific expenditure or reserves unless inappropriate expenditure is suggested.
4. *For health trusts:* the independent regulator of NHS Foundation Trusts is Monitor. It publishes quarterly reports and annual figures for the financial strength and stability of trusts from which the annual income can be seen, available via www.monitor-nhsft.gov.uk. Detailed analysis of expenditure or reserves is unlikely to be called for.
5. *For charities:* it will be appropriate to inspect annual audited accounts. Detailed analysis of expenditure or reserves is unlikely to be called for unless there is a suggestion of unusual or unnecessary expenditure.

Individuals

In setting a fine, the court may conclude that the offender is able to pay any fine imposed unless the offender has supplied any financial information to the contrary. It is for the offender to disclose to the court such data relevant to his financial position as will enable it to assess what he can reasonably afford to pay. If necessary, the court may compel the disclosure of an individual offender's financial circumstances pursuant to section 164(1) of the Criminal Justice Act 2003. In the absence of such disclosure, or where the court is not satisfied that it has been given sufficient reliable information, the court will be entitled to draw reasonable inferences as to the offender's means from evidence it has heard and from all the circumstances of the case.

Companies and bodies delivering public or charitable services

Large Turnover or equivalent: over £25.9 million		
Offence category	Starting point	Range
Deliberate		
Category 1	£750,000	£270,000 – £2 million
Category 2	£270,000	£100,000 – £750,000
Category 3	£100,000	£60,000 – £270,000
Category 4	£60,000	£35,000 – £100,000
Reckless		
Category 1	£335,000	£125,000 – £1 million
Category 2	£125,000	£45,000 – £335,000
Category 3	£45,000	£25,000 – £125,000
Category 4	£30,000	£15,000 – £45,000
Negligent		
Category 1	£150,000	£55,000 – £395,000
Category 2	£60,000	£20,000 – £150,000
Category 3	£22,000	£10,000 – £60,000
Category 4	£13,000	£5,000 – £25,000
Low or no culpability		
Category 1	£30,000	£10,000 – £75,000
Category 2	£12,000	£5,000 – £30,000
Category 3	£5,000	£3,000 – £15,000
Category 4	£3,000	£1,000 – £5,000

Medium Turnover or equivalent: between £6.5 million and £25.9 million (section 465 Companies Act 2006)		
Offence category	Starting point	Range
Deliberate		
Category 1	£250,000	£90,000 – £690,000
Category 2	£90,000	£30,000 – £250,000
Category 3	£35,000	£20,000 – £95,000
Category 4	£20,000	£10,000 – £35,000
Reckless		
Category 1	£110,000	£40,000 – £300,000
Category 2	£40,000	£15,000 – £115,000
Category 3	£15,000	£10,000 – £45,000
Category 4	£9,000	£5,000 – £15,000
Negligent		
Category 1	£50,000	£20,000 – £130,000
Category 2	£20,000	£7,000 – £50,000
Category 3	£7,000	£4,500 – £20,000
Category 4	£4,500	£3,000 – £10,000
Low or no culpability		
Category 1	£10,000	£4,000 – £25,000
Category 2	£4,000	£1,500 – £10,000
Category 3	£1,500	£1,000 – £5,000
Category 4	£1,000	£650 – £2,000
Small Turnover or equivalent: not more than £6.5 million (section 382 Companies Act 2006)		
Offence category	Starting point	Range
Deliberate		
Category 1	£25,000	£9,000 – £70,000
Category 2	£9,000	£3,000 – £25,000
Category 3	£3,000	£2,000 – £10,000
Category 4	£2,000	£1,000 – £3,500
Reckless		
Category 1	£11,000	£4,000 – £30,000
Category 2	£4,000	£1,500 – £15,000
Category 3	£1,500	£950 – £5,000
Category 4	£950	£600 – £2,000
Negligent		
Category 1	£5,000	£2,000 – £15,000
Category 2	£2,000	£700 – £5,000
Category 3	£800	£450 – £2,000
Category 4	£450	£250 – £800
Low or no culpability		
Category 1	£1,000	£400 – £2,500
Category 2	£400	£150 – £1,000
Category 3	£150	£100 – £500
Category 4	£100	£50 – £200

Individuals

When sentencing category 1 offences committed negligently; category 1 and 2 offences committed recklessly; and category 1, 2 and 3 offences committed deliberately, the court should consider the custody threshold as follows:

- has the custody threshold been passed?
- if so, is it unavoidable that a custodial sentence be imposed?
- if so, can that sentence be suspended?

When sentencing category 1 and 2 offences committed negligently; category 2 offences committed recklessly; and category 3 offences committed deliberately, the court should consider the community order threshold as follows:

- has the community order been passed?

However, even where the community order threshold has been passed, a fine will normally be the most appropriate disposal. Where confiscation is not applied for, consider, if wishing to remove any economic benefit derived through the commission of the offence, combining a fine with a community order.

Individuals		
Offence category	Starting point	Range
Deliberate		
Category 1	18 months' custody	1 – 3 years' custody
Category 2	1 year's custody	26 weeks' – 18 months' custody
Category 3	12 weeks' custody	Band E fine or medium level community order – 26 weeks' custody
Category 4	Band E fine	Band D fine – Band E fine
Reckless		
Category 1	26 weeks' custody	12 weeks' custody – 12 months' custody
Category 2	12 weeks' custody	Band E fine or medium level community order – 26 weeks' custody
Category 3	Band E fine	Band D fine – Band E fine
Category 4	Band D fine	Band C fine – Band D fine
Negligent		
Category 1	12 weeks' custody	Band E fine or medium level community order – 26 weeks' custody
Category 2	Band E fine	Band D fine or low level community order – Band E fine
Category 3	Band D fine	Band C fine – Band D fine
Category 4	Band C fine	Band B fine – Band C fine
Low or no culpability		
Category 1	Band D fine	Band C fine – Band D fine
Category 2	Band C fine	Band B fine – Band C fine
Category 3	Band B fine	Band A fine – Band B fine
Category 4	Band A fine	Conditional discharge – Band A fine

The table below contains a **non-exhaustive** list of factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in an upward or downward adjustment from the starting point. **In particular, relevant recent convictions and/or a history of non-compliance are likely to result in a substantial upward adjustment.** In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

Factors increasing seriousness	Factors reducing seriousness or reflecting personal mitigation
<i>Statutory aggravating factors</i>	
Previous convictions, having regard to a) the nature of the offence to which the conviction relates and its relevance to the current offence; and b) the time that has elapsed since the conviction	No previous convictions or no relevant/recent convictions
Offence committed whilst on bail	Remorse
	Evidence of steps taken to remedy problem
<i>Other aggravating factors include</i>	One-off event not commercially motivated
History of non-compliance evidenced by receipt of warnings by regulator	Little or no financial gain
Location of the offence, for example, near housing, schools, livestock or environmentally sensitive sites	Effective compliance and ethics programme
Repeated incidents of offending or offending over an extended period of time, where not charged separately	Self-reporting, co-operation and acceptance of responsibility
Deliberate concealment of illegal nature of activity	Good character and/or exemplary conduct
Breach of an order	Mental disorder or learning disability, where linked to the commission of the offence
Obstruction of justice	Serious medical conditions requiring urgent, intensive or long-term treatment
Offence committed whilst on licence	Age and/or lack of maturity where it affects the responsibility of the offender
	Sole or primary carer for dependent relatives

STEP THREE**Consider whether there are any further factors that warrant adjustment of the fine****Economic benefit**

The court should remove any economic benefit the offender has derived through the commission of the offence including:

- avoided costs;
- operating savings;
- any gain made as a direct result of the offence.

Where the offender is fined, the amount of economic benefit should normally be added to the fine arrived at step two, to reach a final fine. If a confiscation order is made, in considering economic benefit, the court should avoid double recovery.

Economic benefit will not always be an identifiable feature of a case. For example, in some water pollution cases there may be strict liability but very little obvious gain. However, even in these cases there may be some avoidance of cost, for example alarms not installed and maintained, inadequate bunding or security measures not installed. Any costs avoided will be considered as economic benefit.

Where it is not possible to calculate or estimate the economic benefit, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.

Final adjustment to the fine

Where the sentence is a fine, the Court should 'step back' and consider whether the level of fine calculated meets the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence in a fair way. The court should consider any further factors relevant to the setting of the level of the fine to ensure that the fine is proportionate having regard to the means of the offender (in the case of an offending company or body delivering public or charitable services) and the seriousness of the offence.

Where the fine will fall on public or charitable services, the fine arrived at in step two should normally be reduced substantially. The offending body must demonstrate the impact the fine would have on the provision of these services before the court considers making such a reduction.

For corporate offenders, the fine must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to improve regulatory compliance. Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.

The table on the opposite page contains a **non-exhaustive** list of such additional factual elements for the court to consider. Identify whether any combination of these, or other relevant factors, should result in a proportionate increase or reduction in the level of fine.

Factors to consider in adjusting the level of fine

Fine fulfils the objectives of punishment, deterrence and removal of gain

The value, worth or available means of the offender

Fine impairs offender's ability to make restitution to victims

Impact of fine on offender's ability to improve conditions in the organisation to comply with the law

Impact of fine on employment of staff, service users, customers and local economy

Fine inhibits performance of public or charitable function

STEP FOUR**Consider any factors which indicate a reduction, such as assistance to the prosecution**

The court should take into account sections 73 and 74 of the Serious Organised Crime and Police Act 2005 (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered) to the prosecutor or investigator.

STEP FIVE**Reduction for guilty pleas**

The court should take account of any potential reduction for a guilty plea in accordance with section 144 of the Criminal Justice Act 2003 and the *Guilty Plea* guideline.

STEP SIX**Compensation and ancillary orders**

In all cases, the court must consider whether to make a compensation order and/or other ancillary orders. These may include an order to carry out remedial work; forfeiture of vehicle; deprivation of property; disqualification of directors and disqualification from driving.

STEP SEVEN**Totality principle**

If sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is just and proportionate to the offending behaviour.

STEP EIGHT**Reasons**

Section 174 of the Criminal Justice Act 2003 imposes a duty to give reasons for, and explain the effect of, the sentence.

STEP NINE**Consideration for time spent on bail**

The court must consider whether to give credit for time spent on bail in accordance with section 240A of the Criminal Justice Act 2003.

Other environmental offences

In sentencing other relevant and analogous environmental offences, the court should refer to the sentencing approach in steps one and three of the guideline, **adjusting the starting points and ranges bearing in mind the statutory maxima** for those offences. Those offences are set out below.

Offence	Mode of trial	Statutory maxima	Guidance
Section 1 Control of Pollution (Amendment) Act 1989 – transportation of controlled waste without registering	Triable summarily only	Level 5 fine	Apply steps one and three bearing in mind the statutory maxima for the offence
Section 34 Environmental Protection Act 1990 – breach of duty of care	Triable either way	<ul style="list-style-type: none"> when tried on indictment: unlimited fine when tried summarily: level 5 fine 	Apply steps one and three bearing in mind the statutory maxima for the offence
Section 80 Environmental Protection Act 1990 – breach of an abatement notice	Triable summarily only	<ul style="list-style-type: none"> where the offence is committed on industrial, trade or business premises: £20,000 fine where the offence is committed on non-industrial etc premises: level 5 fine with a further fine of an amount equal to one-tenth of that level for each day on which the offence continues after the conviction 	<p>Apply steps one and three bearing in mind the statutory maxima for the offence</p> <p>Where the penalty is daily, have regard to totality</p>

Fine bands and community orders

FINE BANDS

In this guideline, fines are expressed as one of five fine bands (A, B, C, D or E).

Fine Band	Starting point (applicable to all offenders)	Category range (applicable to all offenders)
Band A	50% of relevant weekly income	25 – 75% of relevant weekly income
Band B	100% of relevant weekly income	75 – 125% of relevant weekly income
Band C	150% of relevant weekly income	125 – 175% of relevant weekly income
Band D	250% of relevant weekly income	200 – 300% of relevant weekly income
Band E	400% of relevant weekly income	300 – 500% of relevant weekly income

COMMUNITY ORDERS

In this guideline, community sentences are expressed as one of two levels (low or medium).

Examples of requirements that might be appropriate for both levels is provided below. Where two or more requirements are ordered, they must be compatible with each other.

Low	Medium
In general, only one requirement will be appropriate and the length may be curtailed if additional requirements are necessary	
Suitable requirements might include one or more of: <ul style="list-style-type: none"> • 40 – 80 hours unpaid work; • prohibited activity requirement; • curfew requirement within the lowest range (for example, up to 12 hours per day for a few weeks) 	Suitable requirements might include one or more of: <ul style="list-style-type: none"> • greater number of hours of unpaid work (for example, 80 – 150 hours); • prohibited activity requirement; • an activity requirement in the middle range (20 – 30 days); • curfew requirement within the middle range (for example, up to 12 hours for two to three months)

The tables are also set out in the *Magistrates' Court Sentencing Guidelines* which includes further guidance on fines and community orders.

