

Environmental
Offences
Response to Consultation

Contents

Foreword	2
Introduction	3
Summary of responses	4
Response to specific questions	6
Conclusion and next steps	24
Annex A: Consultation respondents	25
Annex B: Consultation questions	27

Foreword



On behalf of the Sentencing Council I would like to thank everyone who responded to our consultation on sentencing guidelines for environmental offences, took part in our research exercises or attended consultation events. We have received views from a range of parties with varied experience and perspectives, which have been very valuable in shaping the definitive guideline. The Council is grateful for the time taken by all those who offered their views.

The environmental offences guideline embraces both a wide range of offending and offenders. The environmental offences within the scope of the guideline may be committed either by individuals or by organisations, which may vary greatly in terms of their size and complexity. In addition, as these are strict liability offences, the guideline also needs to cover a wide spread of culpability. It has been challenging for the Council to produce a guideline capable of covering such a wide range of offenders and offence seriousness; a challenge exacerbated by the fact that environmental offences are relatively infrequently sentenced, making it difficult to build up a comprehensive picture of general sentencing practice.

Consequently, the Council has found the constructive and considered responses received have been of great assistance in producing the definitive guideline. We received 124 responses in total, in addition to feedback obtained from interviews with sentencers and consultation events. We are pleased that the response is generally positive; however, in the light of responses received we have closely reviewed some aspects of the guideline, resulting in a number of changes that are examined in detail in this response paper.

While the Council monitors all of their guidelines, in light of the novel challenges posed by this guideline and the data limitations outlined above, the Council will scrutinise the use of the environmental guideline with particular intensity for the first twelve months that it is in force. The Council is very grateful to the Environment Agency for agreeing to assist us in this exercise by gathering detailed information on how the guidelines are being used by sentencing courts during this period.

**Lord Justice Treacy
Chairman, Sentencing Council**

Introduction

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

The Sentencing Council began the development of a guideline for environmental offences following requests from a range of parties with an interest in this area, including the National Fly-tipping Prevention Group, the Welsh Assembly, the Magistrates' Association and the Environment Agency. In particular, these groups were concerned that the fines being passed by the courts were not high enough to reflect the seriousness of the offences committed or to have a deterrent effect, and that there was an inconsistency in fine levels across the country.

As noted in the consultation paper, prior to this guideline there was limited guidance for sentencers dealing with environmental offences. There is some general guidance in the *Magistrates' Court Sentencing Guidelines* and also 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 have some similarities with environmental offences in terms of sentencing. Through its own research with sentencers, the Council identified a lack of familiarity with sentencing environmental offences, particularly amongst magistrates, and considered that

there was a need for improved guidance in this area. In addition, following its review of current sentencing practice to assess both the consistency in the levels of fines given for similar offences and offenders and whether the fines being awarded reflected the seriousness of the offences committed, the Council determined that the levels of some fines appeared too low.

The Council consulted on a draft guideline for environmental offences between 14 March 2013 and 6 June 2013. During the consultation period the Council held consultation events with legal practitioners, sentencers and Local Authorities and presented to the National Fly Tipping Prevention Group (NFTPG), whose membership comprises a range of organisations. The Council is grateful to Keep Britain Tidy and the NFTPG for hosting these events.

During the consultation period, the Council conducted a second stage of qualitative research with magistrates, district judges and Crown Court judges to test the draft guideline against case scenarios. Findings from this research are referred to throughout this response paper and a full report may be found at: <http://sentencingcouncil.judiciary.gov.uk/facts/research-and-analysis-publications.htm>

The definitive guideline will apply to all individual offenders aged 18 and older and organisations who are sentenced on or after 1 July 2014, regardless of the date of the offence.

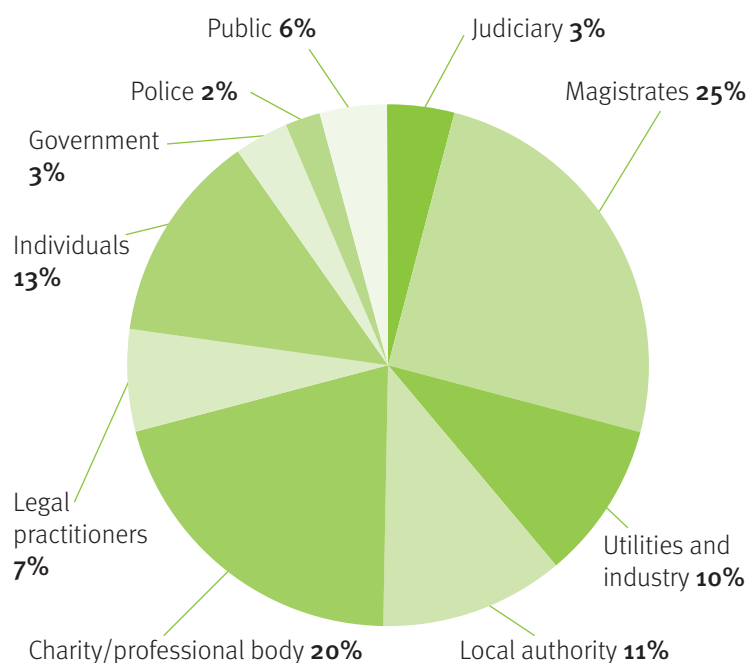
Summary of responses

The consultation sought views from respondents on four main areas: the scope and structure of the guideline, proposals for assessing seriousness, the suggested sentences and any other factors that should influence the sentence. In particular, the Council was keen to receive feedback on the elements of the guideline that were designed to deal with offenders that were organisations and for sentencing strict liability offences;¹ these being particularly challenging features of the guideline.

There were a total of 124 respondents to the consultation of which 90 provided email or paper responses and 34 responded online.

In addition, feedback received from the Council’s consultation event and interviews with sentencers during the consultation period is reflected in the responses to individual questions below.

In producing the definitive guideline the Council has also had regard to ensuring consistency between this guideline and the corporate fraud guideline, which was being developed concurrently, as this similarly addresses issues relating to the sentencing of organisations.



Breakdown of respondents

Type of respondent	Number
Judiciary	4
Magistrates	31
Utilities and industry	12
Local authority	14
Charity/professional body	25
Legal practitioners	8
Individuals	16
Government	4
Police	3
Public	7
Total	124

¹ A strict liability offence is one where there is no requirement to prove the offender had a ‘guilty state of mind’. The offender needs only to have committed the ‘act’ prohibited by the offence to be convicted of the offence

“The NBCF welcomes consistent guidance for environmental offences, which can be difficult to sentence, particularly in relation to the assessment of means.”

National Bench Chairmen’s Forum

In general, there was a favourable response to the proposals. In particular, magistrates welcomed the structure of the guideline and the introduction of clear starting points and ranges. However, the Council was also grateful for constructive criticism and considered suggestions for amending parts of the draft guideline. The principal substantive themes emerging from responses related to:

- the overall flexibility required for an environmental offences guideline given the wide range of offenders and offending types encompassed by the relevant offences;
- the application of culpability categories to organisations;
- the use of turnover to categorise different sized corporate offenders for the purpose of establishing a starting point and range;
- the proportionality of proposed fines for organisations; and
- the use of a starting point of 12 weeks’ custody for some categories of offences committed by individuals.

The Council has carefully considered all of the responses it has received and has made a number of changes in these areas, alongside some more minor adjustments, which are examined in detail below.

The Council has also noted consultation responses and findings from its practical research with sentencers relating to the usability of the guideline; on the basis of the feedback received the Council has restructured elements of the guideline to increase clarity in more complex areas. This has resulted in:

- the addition of steps to address financial orders that the court should consider prior to addressing the fine;
- the separation of the guideline into one for individuals and one for organisations given that in several parts of the sentencing process different considerations apply; and
- the separation of step three of the draft guideline – where the sentencer is required to “step back” and consider factors that may warrant an adjustment to the financial element of the sentence – into distinct stages.

As a result of these changes, the numbering of steps in the definitive guideline is different to those in the draft guideline. Consequently, when referring to a step number, this paper makes clear when the reference is to the ‘draft guideline’ published with the consultation paper or the ‘definitive guideline’.

Response to specific questions

Scope and structure

The draft guideline covered offences under section 33 Environmental Protection Act 1990 (“EPA”) and regulations 12 and 38(1), (2) and (3) of the Environmental Permitting Regulations 2010 (“EPR”). **Question 1** of the consultation sought views on grouping these offences together to form the scope of the guideline. In addition to these offences, the draft guideline directed sentencers that for “other environmental offences” listed at the end of the guideline the court should refer to steps one (harm and culpability) and three (other relevant factors to consider) of the draft guideline, bearing in mind the statutory maxima for the relevant offence. **Question 2** sought views on the approach to “other environmental offences”.

The majority of the 105 respondents answering question 1 were supportive of the approach, with 85 per cent agreeing with the proposed scope of the guideline. Of the 87 respondents to question 2, 83 per cent agreed with the suggested approach for the other environmental offences listed.

Many respondents, including those in overall agreement, considered that other offences could be included either within the main guideline or in the list of “other environmental offences”. A wide range of additional offences was suggested, from the offence of leaving litter (section 87 EPA 1990) to wildlife crime offences.

The Council has reviewed the other offences suggested by respondents for inclusion in the main body of the guideline. The additional offences suggested have different statutory maxima to the offences under section 33 EPA 1990 and regulations 12, 38(1), (2) and (3) of the EPR 2010. As such, the starting points and ranges used in step two of the guideline would not translate across to sentencing the other offences suggested and the Council does not propose to create additional starting points and ranges for these offences which are either very few in number or have a relatively low statutory maxima, with fines being the only available disposal.

A minority of respondents, including legal practitioners such as the UK Environmental Law Association (UKELA), disagreed with the overall approach of the guideline and considered that it should have been drawn up as general guidance to apply widely to more environmental offences. UKELA also reasoned that, given the relatively narrow scope of the guideline, magistrates and judges would nevertheless extrapolate and adapt from it when sentencing other offences that were not expressly included.

As set out below in relation to question 3, the Council believes that courts will benefit more from detailed guidance with clear starting points and ranges for high volume environmental offences than the more general approach suggested by some respondents. This view

was supported by consultation responses from, in particular, magistrates. Consequently, the Council will retain the current structure of a guideline with specific starting points and ranges for high volume offences. However, the Council considers that there is value in broadening the general approach in place for dealing with “other environmental offences” listed in the guideline. The Council considers that this would go some way to meeting the suggestion made by respondents that the guideline should apply more widely.

“...it is important that all relevant environmental offences benefit from the guideline. One possible way to enable this... [is to make] clear in the section on other environmental offences that the sentences referred to are indicative examples of how the guideline may apply to all environmental offences and it is a non-exhaustive list.”

The Law Society

The Council therefore proposes to make clear that the list of other ‘relevant and analogous environmental offences’ at the end of the guideline is ‘indicative’ and not exhaustive, leaving it open to advocates to submit that factors in the guideline apply to offences that are not explicitly named. Given that the guidance for the other environmental offences listed does not include reference to specific starting points and ranges but guides the court to consider relevant factors and general principles, the Council considers that this generality of approach to other offences is acceptable.

The Council is grateful for responses highlighting specific offences that are of growing concern in this area or that have similarities to the offences already covered by the guideline and would benefit from being explicitly highlighted. Additionally, therefore, the Council proposes to include an express reference to two additional offences that have particular similarities to the offences already included in the list of “other environmental offences”. These offences are section 111 of the Water Industry Act 1991,

relating to the disposal of anything likely to cause damage into public sewers, and offences under the Transfrontier Shipment of Waste Regulations 2007, relating to the transportation of waste to countries inside and outside the European Community, a suggestion made by a number of respondents.

The Council also carefully considered submissions from the UK National Wildlife Crime Unit that wildlife crime should be brought within scope of the guideline. The Council has noted the view expressed that sentencing in this area is inconsistent and would benefit from a guideline. The Council considers, however, that the factors the court is required to consider in the environmental guideline – particularly those relating to the harm caused – do not fit with most wildlife crime offences. The Council has therefore concluded that any guideline for wildlife crime would have to be separately constituted; the Council will continue to keep the need for a guideline in this area under review in considering its future work plan.

A number of respondents also strongly recommended including offences under the Control of Major Hazards Regulations 1999 (COMAH) in the guideline. The Council is currently developing a draft guideline for health and safety offences, which will be issued for consultation later in 2014. Given that the COMAH offence is framed in terms that are similar to health and safety offences, the Council considers that any specific sentencing guidance for this offence would be better considered as part of the work on the health and safety guideline.

Question 3 sought views on the proposed structure of the guideline. The draft guideline contained clear starting points and ranges but, unlike other Sentencing Council guidelines, it incorporated a “step back” stage for the sentencer to consider a range of relevant factors that may warrant adjustment of the financial element of the sentence. The Council consulted on whether this structure provided sufficient guidance as well as flexibility for sentencers.

Of the 97 respondents answering question 3, 87 per cent agreed with the proposed structure and 13 per cent disagreed.

Magistrates, in particular, welcomed the use of clear starting points and ranges for the high volume offences covered by the guideline. These respondents also recognised the need to guide the court to move outside the proposed ranges in appropriate cases and welcomed the flexibility imported by step three of the draft guideline for this purpose.

“We feel strongly that clear starting points are required but also recognise the need for flexibility.”

Solihull Magistrates

“A narrative guideline would not be helpful without clear starting points and ranges.”

Conwy Magistrates

On the other hand, a minority of respondents considered that a general narrative would have been preferable to the approach taken in the guideline. Legal practitioners were notably amongst those expressing this view, considering that the tariff-based sentencing tables would lead to cases being ‘pigeon-holed’ without adequate consideration of the issues. These respondents quoted Court of Appeal cases² highlighting the difficulty of producing a tariff based guideline for environmental and analogous regulatory offences given the range of circumstances involved; in some cases the court had stated that consistency is not the ‘primary aim’ of sentencing cases of this type.

The Council is aware of these cases and recognises that sentence levels for offences under section 33 EPA 1990 and regulations 12 and 38(1), (2) and (3) EPR 2010 will differ considerably given the variability of circumstances covered by these provisions. However, the Council does not consider that this justifies resistance to having a

consistency of approach to sentencing in this area. Consequently, the Council has sought to produce a guideline that provides wide discretion to courts to tailor the sentence in individual cases but provides sufficient guidance to promote a consistent approach to sentencing in this area, particularly given that there is a relative lack of familiarity with sentencing these offences. Furthermore, since the vast majority of these offences are sentenced in magistrates’ courts (approximately 93 per cent in 2012), the Council finds it significant that magistrates were supportive of the proposed structure of the guideline in their responses and thought that starting points and ranges were necessary. For these reasons, the Council has retained the structure proposed in the draft guideline in the definitive version.

Some consultation responses indicated a degree of confusion over the breadth of flexibility offered to the court at step three (the “step back” stage) of the draft guideline, questioning, for example, whether this would allow the court to move outside the ranges set out in step two of the draft guideline. Therefore, the Council has added text prior to step five of the definitive guidelines (step three of the draft guideline) to emphasise clearly the wide degree of flexibility afforded, if necessary, to adjust the fine once an initial starting point has been identified using the sentencing tables. The guidance emphasises that, where the sentence is a fine, it may be moved upwards, downwards, including outside the range in appropriate cases.

Use of turnover in the draft guideline

Another important issue raised by a range of respondents, which cut across answers to many of the consultation questions including question 3, related to the use of turnover to categorise broadly different sized corporate offenders for the purpose of identifying a starting point and range at step four of the definitive guideline (step two of the draft guideline).

2 Including R v Thames Water [2010] EWCA Crim 202; R v F&M Dobson [1995] 16 Cr App R(S) 957; R v Milford Haven [2000] Env LR 632

Around 20 respondents raised concerns about the way turnover was used in the guideline, principally on the basis that turnover does not always reflect the financial health of an organisation. Consequently, respondents highlighted that companies within the same bracket of turnover could be affected very differently by the same fine depending on, for example, the profitability of the organisation. They also raised concerns that over-reliance on turnover in setting the fine may create a perverse incentive to structure corporations so that there was a subsidiary ‘risk-taking’ organisation with a small turnover.

“The reasons that turnover is an arbitrary figure are well known and can be summarized by the phrase, different undertakings are organised in different ways for a variety of different reasons.”
Richard Matthews QC

Most respondents in disagreement with the way turnover was used to categorise organisations in the draft guideline considered that the better approach was to refer to a range of factors rather than relying solely on turnover. Profitability was most commonly cited as a measure that should be taken into account in addition to or in the alternative to turnover.

The Council considered that there are important advantages to having a simple scheme of starting points based on turnover, which is a clear measure and less susceptible to manipulation than other financial measures. There was clear support from many consultation respondents for this approach. However, the Council has taken note of the concerns raised regarding the use of turnover and is conscious that in some cases the sentencer should be guided to consider other financial factors to ensure that any fine imposed on a corporate offender is proportionate to its means.

“We agree that [the use of turnover to categorise companies] is simplistic, as it fails to take into account a true financial picture of the company and of the business concerned: some businesses have a very high turnover with very low profit margins; however, we consider that the simplicity of turnover can be the starting point for categorisation, provided that other financial information is taken into account in appropriate cases.”

Justice Select Committee

The Council has therefore clarified that the starting points and ranges categorised according to turnover at step four provide an initial fine level for sentencers, with flexibility at later steps to adjust from that figure, if appropriate, given the wider financial circumstances of the offending organisation. This is achieved in the definitive guideline by indicating in the “obtaining financial information” section that turnover will initially be relevant but that other financial factors relating to the offending organisation may need to be referred to later; and, at step six, highlighting that the financial circumstances of the organisation will need to be considered in the round. The Council has separated this guidance out in a specific step in the definitive guideline for organisations (step six) to highlight its importance and stressed that profit may be a particularly important feature to consider when deciding whether adjustment to the fine is appropriate.

Assessing offence seriousness

Question 4 asked respondents for their views on the treatment of offences which had created a risk of harm but no (or less) actual harm. Respondents were presented with one approach in the draft guideline, which was to guide the sentencer that usually an offence that had created a risk of harm would be less serious, except if the likelihood or extent of the risk was particularly high. The consultation paper also set out an alternative approach, which was to make no distinction between risk of harm and actual harm in assessing the offence seriousness at step one of the draft guideline, but to treat risk of harm as a mitigating factor at step two.

Question 4 created a great deal of debate amongst the 97 respondents answering this question, with 76 per cent ultimately agreeing with the approach taken in the draft guideline as opposed to the alternative presented in the consultation paper. Many respondents stated that the issues were not clear cut. However, the Council has retained the approach taken in the draft guideline in view of the majority response in favour of it, particularly given that flexibility is clearly given to the court to treat a risk of harm as seriously as actual harm in certain circumstances.

Question 5 sought respondents' views on the harm and culpability factors proposed in the draft guideline. Approximately 90 per cent of the 105 respondents answering this question were favourable towards the overall approach; however, around 50 per cent of respondents to this question also provided comments suggesting changes or improvements to the proposed factors.

Harm

A number of respondents considered that the distinctions between the varying levels of harm in the draft guideline could be made clearer. Feedback both from the research of the guideline conducted with sentencers and consultation responses indicated concerns with distinguishing between 'substantial' and 'significant'. Some consultation responses

suggested that a more definite measure could be used to assess harm, such as the costs of clearing up the damage caused by the offence.

In a first stage of research with sentencers conducted prior to the consultation, the Council explored a number of different methods of assessing harm, including one based on the costs of reparation following the offence. However, this method was not well received by sentencers who considered it to be too difficult to quantify the costs of clear up in a number of circumstances, such as where the damage was latent or widely spread. Therefore the Council does not propose to change the overall approach to assessing harm, but in order to clarify the step up from the category 2 to category 1 harm, the Council has changed the descriptor from 'substantial' to 'major'.

Some respondents suggested the inclusion of additional harm factors. One recurring theme, raised by some prosecuting authorities and industry representatives, related to the harm environmental offences cause by undercutting legitimate businesses that are compliant with the regulatory regime.

"The regulated industry ESA represents is one of the most direct victims of environmental crime, as its business activities are often directly undercut by those environmental criminals who cut costs by circumventing or blatantly ignoring the relevant environmental laws."

Environmental Services Association (ESA)

"We would emphasise that there needs to be effective deterrence to allow business to grow rather than being undercut or even put out of business by illegal operators."

Environment Agency

In response to these comments the Council has made a small amendment to the harm factors to recognise the harm of 'undermining' lawful activities or the 'regulatory regime', in addition to the harm already included in the draft guideline relating to "interference with lawful activities".

Another concern, raised by a number of Local Authorities, the Chartered Institute for Environmental Health and the Government in their responses, was that the harm indicators in the draft guideline did not reflect the nature of offences under section 80 of the EPA 1990 (breach of an abatement notice), which is listed in the section on “other environmental offences”. These respondents emphasised that nuisance usually would not create any physical damage, or may not amount to a health effect that was purely clinical in nature. As such, these groups suggested amendments that would better reflect the harm that could result from a section 80 EPA offence.

Further to these submissions, the Council has added to the harm factors a reference to the adverse effect of an offence on ‘quality of life’ to recognise the harm caused by offences that are disruptive, constant or cumulative in nature but do not necessarily cause a health issue. The Council considers that this harm factor will often be relevant in environmental offences – for example, where odour is present – and therefore appropriately suits the general harm scheme.

A small number of responses, from law firms, set out concerns that prior classification of harm by the regulator before the case came to court would disadvantage an offender, particularly if they pleaded guilty. These respondents were concerned that there would be an increased need for *Newton* hearings³ to enable offenders to challenge an initial classification by the regulator.

While the Council has had regard to the regulator’s scheme for classifying environmental incidents, it should be emphasised that the content of the harm scheme in the definitive guideline draws on a range of sources including case law, existing Magistrates’ Court Sentencing Guidelines guidance, the Council’s qualitative research and responses received to this consultation to ensure that it is a standalone

scheme. The Council is confident that courts will appropriately use the factors in the sentencing guideline to assess the seriousness of an offence for the purpose of sentencing, and will not be unduly influenced by earlier classifications by the regulator for the purpose of managing the incident. The Council does not anticipate that the guideline will create an increased need for *Newton* hearings but will monitor this factor as part of its work to closely observe the impacts of the guideline for the first year that it is in force.

Culpability

While the majority of respondents considered that the culpability scheme, based on familiar concepts of criminal intent, was clear and would be easy to use, the Council was grateful for very constructive submissions from some legal professionals on the potential difficulties of applying this structure to organisations. In view of the favourable general response, the Council does not propose to move away entirely from the scheme but to clarify its application to organisations. As such, the culpability scheme for organisations now clarifies that the requisite ‘reckless’ or ‘deliberate’ intention must be held by a person of such a position of responsibility in the organisation that their acts/omissions may properly be attributed to the organisation; or, on an alternative basis, that the levels of culpability relate to degrees of failure by the organisation to put in place and enforce reasonable preventative systems.

³ A *Newton* hearing is held when an offender pleads guilty but disputes the case as put forward by the prosecution and the dispute would make a difference to the sentence. The judge will normally hear evidence from witnesses to decide which version of the disputed facts to base the sentence on

Factors to consider in sentencing environmental offences

Fines and financial information

Question 6 sought views on principles set out in the draft guideline for the court to follow in setting a fine. Of the 94 respondents answering this question 87 per cent agreed with the principles outlined. Those in disagreement tended to reiterate concerns they had raised elsewhere, such as how turnover is used in the guideline and the categorisation of companies, which are considered in response to question 3 and question 13 in this response paper.

Question 7 sought views on whether the guidance on obtaining financial information was sufficiently detailed and helpful. Of the 91 respondents answering this question, 79 per cent agreed that it was.

Some respondents commented that the financial information required may often be difficult to interpret and suggested that magistrates in particular would benefit from training on applying the information that was provided to the court. A small number of respondents considered that the information stipulated was too complex altogether and suggested that instead a pro forma should be produced for an offending organisation to complete with relevant financial details.

The Council considers that it is preferable to draw on audited or other comprehensive accounts than a pro forma as this reduces the risk of misleading information being provided by the offender or, where audited accounts are not available, provides some context to the general financial probity of the offending organisation, assisting the court in assessing the reliability of the information provided. However, the Council agrees that some training in applying the financial information specified to the stages in the guideline would be beneficial. Therefore, the Council is working with the Judicial College, the organisation responsible for judicial training, with the aim of making scenario-based training

available for magistrates by the time the guideline comes into force.

A number of respondents queried whether the assets of a parent company could be taken into account when sentencing one of its subsidiary companies, requesting guidance on this issue. The Council has therefore added guidance that normally only information relating to the organisation before the court will be relevant.

Aggravating and mitigating factors

Question 8 asked whether respondents agreed with the proposed non-exhaustive list of aggravating and mitigating factors and whether there were any factors they would add or remove. Of the 101 respondents who answered this question, 65 per cent of them made suggestions for addition or removal.

A number of factors suggested by respondents were features that are already explicitly included in the harm or culpability factors at step three, and therefore including them again in step four would result in the factors being double counted.

However, a number of different factors were also suggested. In terms of aggravating factors, a frequent comment was that committing the offence for financial gain should be included, particularly as lack of financial gain or commercial motivation was a mitigating factor. While “warnings by regulator” was already included as an aggravating factor in the draft guideline, some respondents highlighted that ignoring concerns raised by others, or by employees, should be capable of increasing the sentence. The Council agrees with both of these suggestions for additions to aggravating factors and has included them in the definitive guideline.

In terms of mitigating factors, a number of industry respondents as well as some prosecuting authorities considered that voluntary payments to remedy the damage to the environment caused by an offence should

be included as a mitigating factor, as recognised by the Court of Appeal in *Thames Water Utilities Ltd*.⁴ The Council agrees and has added this factor.

The “step back” stage

Question 9 and **question 10** related to step three of the draft guideline, which, for the reasons explained below, are now encapsulated in steps five to seven in the definitive guideline for organisations and steps five and six of the definitive guideline for individuals. This stage of the draft guideline sought to ensure that the court had sufficient flexibility to respond to the wide range of circumstances that environmental offending encompasses by requiring the sentencer to “step back” and consider a range of factors that may warrant an adjustment to the fine reached at the previous stage. Question 9 asked respondents whether the approach taken in step three of the draft guideline achieved the objectives of punishment, deterrence and removal of gain in a fair and proportionate way and question 10 asked whether the factors identified were the correct ones.

The majority of respondents were supportive of the approach taken in step three and the factors identified. Of the 94 respondents who answered question 9, 74 per cent were generally positive about the approach, and of the 91 respondents who answered question 10, 87 per cent were generally positive. In particular, there was a great deal of support for the emphasis on removal of economic benefit, with many commenting that this was a primary driver of environmental offending and could, if anything, be even more clearly highlighted.

“Economic gain is the main factor for fly-tipping offences. Much of the reason for fly-tipping is to avoid the legal costs of disposal or treatment of waste. NFTPg supports the guideline in trying to counter this.”

National Fly-Tipping Prevention Group (NFTPg)

“We believe that this [the approach in step three] is an effective way of approaching the assessment of appropriate sentences, and especially welcome the suggestion that economic benefits (avoided costs and operating savings or any gain made as a result of the offence) are included.”

Fish Legal

Notwithstanding the overall support for the content of step three of the draft guideline, a number of comments were made both in consultation and in the Council’s research with sentencers about the clarity of this stage of the guideline. Some consultation responses highlighted confusion about the degree of flexibility offered by this step, while others considered it verbose or their responses demonstrated that they had overlooked factors that had been included. An important theme that emerged, in particular, from road testing was that compensation would need to be considered prior to step three of the draft guideline as the court would need to consider the totality of the financial orders imposed on the offender in order to assess the potential impact of the fine.

On the basis of these consultation responses, road-testing results, and refinements concurrently being made to the Council’s corporate fraud guideline that related to similar issues, the Council has made some structural changes to the guideline.

The Council agrees that the issue of compensation needs to have been settled before approaching the “step back” stage of the guideline. Under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000, priority should be given to the payment of compensation over payment of any other financial penalty where the means of the offender are limited. Consequently, the Council has included a specific step to prompt the court to consider making a compensation order at step one of the definitive guideline.

The inclusion of a step for compensation raises again the issue of how the guideline should deal with confiscation, which similarly is an order that should take priority over the payment of a fine or any other financial order (except compensation). In the draft guideline, confiscation was highlighted at the start of the guideline as being of relevance only in the Crown Court and that magistrates should commit for sentence if confiscation was under consideration. The Council is conscious that the vast majority of the offences covered by the guideline are dealt with in magistrates' courts where confiscation is not available. However, the Council considers that having highlighted compensation at step one, confiscation should also be dealt with in a specific step as the court needs to consider the consequences of the totality of financial orders imposed on the offender in the round at the "step back" stage. Consequently, the Council has included a separate step for confiscation, clearly marked as being only relevant to the Crown Court, at step two of the definitive guideline.

The Council has also made a number of changes to what was step three of the draft guideline to enhance clarity. The Council has separated distinct themes bound up together in the original step three to increase clarity and reduce the chance of an important factor being overlooked. These themes are: the removal of economic benefit; for offenders that are organisations, the proportionality of the fine in view of the wider financial circumstances of the offender; and factors relating to the wider impact of the fine on the offender or others. These themes are now embraced in separate steps: steps five to seven in the guideline for organisations and steps five and six in the guideline for individuals. This change also enabled the Council clearly to flag the guidance it has added on reviewing the financial circumstances of an offending organisation in the round further to concerns raised in the consultation regarding the use of turnover to establish starting points and ranges (see page 9).

Question 11 asked respondents for their views on the approach to sentencing bodies delivering public and charitable services. Of the 87 respondents who answered this question, 69 per cent agreed with the approach and 39 per cent disagreed.

A relatively large proportion, but, nevertheless, a minority of respondents disagreed with the guidance that the fine should "normally be reduced substantially" where the offender was an organisation delivering public or charitable services. A range of types of respondents disagreed with the approach although notably a number of magistrates were amongst this group.

Most commonly a negative answer was made on the basis that the offence was the same regardless of the business of the offender and therefore the same sentence should apply. Some respondents expanded the objection by highlighting that the circumstances of charities and public bodies varied considerably and some may have significant assets or liquidity. A smaller number of respondents stated that the reduction in fine should not be presumed – as suggested by the inclusion of the word "normally" in the draft guideline – but must be argued for.

"We can see absolutely no reason to treat public services any differently to private enterprise... the guidance gives adequate scope to fix a penalty that is appropriate to the means of any charity."

Hartlepool and Teesside Magistrates

"The Government broadly agrees with the approach that the removal of funds from a public or charitable service would disadvantage those who ordinarily benefit from the service. However, the Government agrees that the offender would need to demonstrate the impact sentencing would have on provision of its service."

HM Government

The Council considers that, when sentencing public and charitable bodies, there is a particular risk that these organisations would have limited options for paying the fine imposed without adversely effecting service provision to third party beneficiaries or taxpayers generally. That such a consequence would be wrong as a matter of principle has been recognised by the Court of Appeal in leading cases in the area.⁵ Therefore, the Council believes that in the case of public and charitable bodies this principle should be highlighted over and above the general factor set out in step seven of the guideline for organisations, applicable in all cases for all offenders, directing the court to consider the impact of the proposed fine on service users and others. However, the Council accepts that the guideline should be clearer that a reduction in fine should be made only if a ‘significant’ detrimental impact on the provision of services can be proved, and has amended the wording accordingly.

Question 12 sought views on the wording in the guideline on ancillary orders and compensation. Of the 74 respondents answering this question, 84 per cent provided positive responses.

A number of respondents considered that the importance of compensation orders should be more clearly highlighted. As set out on page 13, compensation has now been isolated in a separate step. Some respondents, including a number of magistrates, considered that further guidance on the ancillary orders available in environmental cases would be helpful given that some of these orders would be relatively unfamiliar to the court. The Council has therefore expanded the guidance provided on ancillary orders in the definitive guidelines.

Question 13 of the consultation asked whether respondents agreed with the way in which the guideline categorised different types of organisations. There were 88 responses to this question, with 69 per cent of respondents

agreeing with the approach in the draft guideline.

Of the 31 per cent of respondents disagreeing with the categorisation of organisations, a number reiterated concerns already considered in this paper about the use of turnover to categorise different sizes of organisations (see page 8), the treatment of public and charitable bodies (see page 14) and the need for guidance on dealing with holding companies or other complex corporate structures (see page 12).

The other issue arising in response to this question was raised by water company respondents, who argued that “statutory undertakers” (such as water companies) should be recognised as a unique category owing to their responsibilities in providing a service to the public, the scale of their operations and the detailed regulatory landscape to which they are subject. The water companies considered that their responsibility for a network of sewers measuring over 300,000 kilometres, which are susceptible to damage from third parties, meant that they would be subject to an unfair amount of punishment. In economic terms, they considered that fines would not have a deterrent effect as their prices and investment plans are already subject to agreement by the regulators; rather, their view was that financial penalties could impact their ability to improve the system for the public and environmental conditions generally.

Overall the Council was not persuaded by this argument. The Council agrees that the impact of a fine on the offender’s ability to improve conditions to achieve compliance with the law or on third parties such as service users or customers may be relevant to sentencing some cases. This is a general factor for the court to consider, set out in step seven of the definitive guideline for organisations, which could be relevant to any offender, including statutory undertakers. However, unlike public

5 R v Milford Haven [2000] Env LR 632

and charitable bodies (see page 14), the Council does not consider that water companies are a special case where there is a particular risk that the organisation would be unable to pay the fine without impacting their service provision to the general public. Rather, water companies are profit-making organisations with shareholders and have a choice of whether to pay fines from profit rather than service delivery funding; consequently, the Council was not persuaded either that further guidance over and above the general factors provided at steps five to seven of the guideline was necessary or that water companies would be impervious to the economic deterrent of a fine. Finally, the Council has constructed the guideline to ensure that lower culpability results in lower penalties. As such, where an offender can prove that they genuinely lack fault for the incident – whether this be owing to the ambit of their operations or for any other reason – the fine will reflect this accordingly.

Sentences for environmental offences

In their review of current sentencing practice prior to issuing the consultation, the Council determined that the levels of some fines were too low and did not reflect the seriousness of the offences committed. Consequently, the Council consulted on sentences that it expected would increase the current levels of fines received for some offences by some offenders, in particular, companies committing more serious offences.

As set out in the consultation paper, understanding current sentencing practice was particularly challenging for environmental offences as relatively few of these offences are sentenced, resulting in data limitations. 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. 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 offender; but the sentencing guideline recommends penalties that apply before any adjustments have been made for means or guilty pleas.

Therefore, the Council consulted both on whether the proposed sentences were proportionate and what effect respondents thought the proposals would have on current sentencing practice. The Council received a number of constructive responses to this section of the consultation and, in response, has made a number of changes.

Organisations

Questions 14 to 19 sought views on the proposed sentences for organisations and the effect these would have on current sentencing practice.

General points

A number of legal practitioners responding to the consultation questioned the relationship between the proposed fines for environmental offences and those currently handed down for health and safety offences. Some argued that the proposed fines were disproportionate on the basis of their relationship with current sentencing practice for health and safety offences.

“...the proposed guideline would result in fines for environmental offences that are significantly higher than those currently imposed for health and safety offences. This immediately raises the question of consistency (or rather inconsistency) as between fines in the two areas.”

UK Environmental Law Association (UKELA)

The Council has already commenced work on developing a draft guideline for health and safety offences, which will be published for consultation later in 2014. This work will help ensure a proportionate and consistent relationship between sentences for environmental offences and for health and safety offences.

In addition, the Council of HM Circuit Judges and UKELA made general comments on the interrelationship between the fine levels for different offence categories in their responses. The Council of HM Circuit Judges submitted that negligence by organisations should be more heavily penalised, particularly in view of the substantial resources larger companies would have available to them in order to secure compliance within their organisations. Meanwhile, UKELA considered that deliberate offences would always be significantly more serious than reckless or negligent offences and that the gap between those latter two categories of culpability would be more contentious; as such, they concluded that there should be a closer overlap between the penalties for reckless and negligent categories.

The Council agrees that there should be a notable increase in fines between categories of no or low culpability and negligence, as one entails fault and the other does not (or very little of it), and has accordingly marginally increased the step up in fines for negligence alongside other changes to the fine levels outlined below. However, the Council considers that, as there is a considerable overlap between the bottom of the range of one offence category and top of the range of the offence category beneath it, there is adequate flexibility for the sentencer to adjust within the range where a case is considered to be on the borderline of a particular offence category. Therefore the Council has not made adjustments to the proportional relationship between fines for reckless and negligent offences.

Specific fine levels

Question 14 sought views on the proposed sentences for organisations with large turnovers. Of the 94 respondents who answered this question, 63 per cent agreed with the proposed fines and 37 per cent disagreed with them.

A small number of respondents, tending to comprise large companies and law firms, considered that the fines were generally too high (often on the basis of comparison with current sentences for health and safety offences).

However, other respondents considered that the fines were, overall, too low. A range of respondents, including the Council of HM Circuit Judges, the Law Society and the Environment Agency, considered that the top bracket was too low to penalise adequately the worst offending by large companies, and advocated removing the upper limit for deliberate and reckless offending. These respondents highlighted that the proposed penalties would be particularly small in the context of corporations with an annual turnover far in excess of £25.9m (the definition for a ‘large company’ in the draft guideline). Some quoted high profile environmental cases occurring in recent years involving international corporations with annual turnovers in tens of billions or more.

“While it is open to a sentencer, giving reasons, to go outside the guideline in a very bad case, we do not consider the £2 million figure for the top of the worst range of offending to be sufficient.”

Council of HM Circuit Judges

“Fines within the proposed category ranges are unlikely to have any significant economic impact upon larger corporations with turnovers many times greater than £25.9m...Thus, the large company category appears too wide, particularly when compared to the other two categories. As such, it seems to guide the sentencer towards disproportionately low fines.”

HHJ Patrick Field QC

Further to such responses, the Council has carefully reviewed the proposed penalties in the draft guideline to determine whether they are consistent with the general principles to follow in setting a fine set out in step four of the definitive guidelines. Under section 164 of the Criminal Justice Act 2003, the fine must reflect the seriousness of the offence and the court, when fixing the amount of the fine, should take into account the circumstances of the case including the financial circumstances of the offender. The level of fine should also meet, in a fair and proportionate way, the objectives of punishment, deterrence and the removal of gain derived through commission of the offence. Additionally, step six of the definitive guideline for organisations emphasises that the fine must be substantial enough to have real economic impact which will bring home to both management and shareholders the need to improve regulatory compliance. However, the Council also considers that the starting points and ranges at step four must be broadly capable of achieving this outcome otherwise disproportionate weight is placed on step six in setting an appropriate fine.

The Council has concluded that the starting points and ranges consulted on would often be

too low to achieve these objectives, particularly if the offending organisation was one with an annual turnover that greatly exceeded £25.9 million. The Council also agrees that the threshold of £25.9 million annual turnover to define ‘large organisations’ in the draft guideline is relatively low; not infrequently there are companies before the courts for committing environmental offences that have turnovers significantly above this level.

The Council has therefore adjusted the definitions for banding the sizes of organisations from those in the draft guideline, which were based on the Companies Act 2006. The Council has broadly based the banding of different sized companies in the definitive guideline on the EU definitions for small and medium enterprise.⁶ The conversion to sterling is an approximate one to avoid issues with fluctuating exchange rates from the euro and to ensure the definitions are clear. As a result of this change, the ‘large’ organisation category now begins at an annual turnover of £50 million. The starting points and ranges have been increased to reflect the greater means of a company in this category and to better fulfil the objectives set out above, and are at a level that the Council considers fair and proportionate.

The Council notes that the definition of £50 million annual turnover is still much lower than the annual turnover of many large corporations. The Council has therefore added guidance that where the organisation is ‘very large’ and has a turnover much above the threshold for ‘large’ organisations, it may be necessary to move outside the range to achieve a proportionate sentence.

The Council believes that these changes to the fines at step four of the definitive guideline will result in courts being directed towards sentences that have a sufficient financial impact on the offender to send a message both to the organisation and to the general public. Where

⁶ <http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/>

appropriate, the sentencer will then have the flexibility at steps five to seven to use their discretion to adjust the fine reached at step four.

Question 16 sought views on the proposed sentences for organisations with medium turnovers. A smaller number of respondents, 82 in total, answered this question, with 74 per cent in general agreement and 26 per cent broadly in disagreement.

As with question 14, a small number of respondents in disagreement with the proposed fines thought that they were too high; however, others thought that they were too low. The comments provided in support of these views tended to mirror those submitted in response to question 14 regarding the penalties for ‘large’ organisations.

For the reasons set out above, the Council has amended the definitions for differently sized organisations in the definitive guideline from those used in the draft guideline so that they are loosely based on the EU definitions for small and medium enterprise. As such, the definition for medium sized organisations has changed from a bracket between £6.5 million to £29.5 million in the draft guideline to a bracket between £10 million to £50 million in the definitive guideline. In view of this change, the Council has reviewed the starting points and ranges for ‘medium’ organisations and adjusted them to correspond with the increased average means of an organisation falling within the newly defined ‘medium’ category.

Question 18 asked for views on the proposed sentences for organisations with small turnovers. Of the 82 respondents who answered this question, 70 per cent broadly agreed with the proposals and 30 per cent disagreed.

The vast majority of respondents disagreeing with the proposed fine levels for small companies considered that they were too low. Often, respondents drew comparisons with the equivalent penalties for individuals (particularly

for the offence categories attracting a custodial starting point) or, in some cases, the proposed penalties for large companies to conclude that the proposals were too lenient. Some respondents, including the Council of HM Circuit Judges, the Environment Agency and Fish Legal, thought that the proposed fines were especially low for certain offence categories; in particular, the starting points and ranges for deliberate category 1 and 2 offences were singled out for criticism.

“A small turnover is considered to be up to £6.5 million with a maximum fine of £70,000 for a deliberate breach of a category 1 offence. This seems low for the level of offence that could potentially have been caused intentionally.”
Council of the Isles of Scilly

A number of respondents highlighted that, given the category extended up to organisations with a turnover of £6.5 million, organisations with turnovers towards this figure would have substantial resources and the proposed fines would not have a significant impact. However, others acknowledged that the proposed penalties would likely have a considerable impact on the much smaller organisations that would also fall within this category.

“...there probably needs to be a lower category for the even smaller business.”
North East Suffolk Magistrates

The Council has reviewed the penalties and structure of this part of the draft guideline further to the responses received. The Council agrees that companies falling within the upper end of the ‘small’ organisation category as defined in the draft guideline would receive penalties that were disproportionately low.

As set out in the consultation paper, the proposed starting points for ‘small’ organisations in the draft guideline were designed to overlap with the equivalent starting points for individuals. This was to avoid a disparity in sentence for an offender that could

be treated as a ‘small organisation’ but had very similar circumstances to an individual – for example, a family run business that had incorporated as a company. The Council considers that it is important to maintain this principle. However, the Council has reconsidered whether it should be the starting point that overlaps with individual penalties (as opposed to elsewhere in the range) in light of the responses received. The Council notes that the turnover of an offending organisation that could be considered equivalent to an individual offender (for example, a ‘man and van’ type business) would have a value much towards the bottom of a category for organisations with turnovers ranging up to £6.5 million. Consequently, the Council has concluded that it is more appropriate that the bottom of the range overlaps with penalties for individuals rather than the starting point, as otherwise the sentencer is pointed to disproportionately low sentences.

The Council also agrees with those respondents who considered that organisations with turnovers towards the bottom of the definition for ‘small’ organisations used in the draft guideline, of up to £6.5 million, require particular consideration. The Council has concluded that it is especially challenging to set starting points and ranges for a single category that spans organisations with such small turnovers that they could be considered equivalent to individual offenders, right up to relatively substantial organisations with turnovers in millions of pounds.

Therefore, given that the EU definitions for small and medium enterprise also include a definition for ‘micro’ organisations, the Council has introduced an additional category of organisations within the definitive guideline for ‘micro’ organisations with annual turnovers of up to £2 million. The Council has adjusted the fine levels for organisations within both the ‘micro’ category and freshly defined ‘small’ category, of organisations with turnovers between £2 million and £10 million, to a level that the Council considers to be fair and proportionate.

The starting point for the micro category is based on a company with a notional turnover within the middle of the range (in other words, around £1 million) rather than the smallest type of organisation that may be considered equivalent to an individual offender, but the bottom end of the range has been calculated to ensure an overlap with equivalent sentences for individuals.

The Council considers that the totality of changes it has made to the sentences for organisations are fair and proportionate. However, as set out above, with the assistance of the Environment Agency the Council will intensively monitor the impacts of the guideline during the first months that it is in force to ensure that it has the intended effect on sentencing practice.

Questions 15, 17 and 19 sought respondents’ views on how the proposed penalties for ‘small’, ‘medium’ and ‘large’ organisations respectively would change current sentencing practice.

Only around half of the total respondents to the consultation answered these questions, with many respondents emphasising that they had insufficient experience or knowledge of the area to comment. Those that did provide answers often commented broadly on the wider effects the sentencing guideline would have, such as incentivising compliance with environmental legislation. The majority of those commenting narrowly on sentencing practice thought that sentences would increase for all categories of organisations; however, a significant number of respondents commenting on how sentencing practice for ‘small’ organisations would be impacted thought there would be no change. A large number of respondents commented generally that the guidelines would increase consistency in sentencing practice.

“Irrespective of the size of organisation we believe that the guidelines will introduce a degree of consistency to sentencing practice across England and Wales and will also promote confidence in sentencing practice.”

Chartered Institute of Environmental Health

Individual offenders

Question 20 sought views on the Council's stipulation in the guideline that, when sentencing individuals, "even where the community order threshold has been passed, a fine will normally be the most appropriate disposal". There were 87 responses to this question.

The majority of respondents to this question, 82 per cent, agreed with the Council's view that, as the offences covered by the guideline are mainly committed for economic gain, a fine would usually be a more appropriate disposal than a community order; however, a minority of respondents strongly disagreed. Some respondents – for example, the Probation Chiefs' Association, Enfield Council and a handful of magistrates' responses – commented that environmental crimes were antisocial and therefore a fitting response may be to impose community order requirements, such as unpaid work, on an offender.

The Council acknowledges that in many cases a community order may be an appropriate disposal. However, the Council considers that it remains the case that a fine will more often be the correct response to a crime that is carried out for economic benefit. The Council considers that the framing of the guidance in the guideline provides flexibility to impose a community order (or a combination of a fine and community order) where appropriate and that the emphasis is correctly placed, and therefore does not propose to make any changes to this section of the guideline.

Question 21 asked for views on the proposed sentences for individuals in the draft guideline. Of the 87 respondents who answered this question, 76 per cent were in agreement with the proposed sentences and 24 per cent were in disagreement with them.

While the majority of respondents were in general agreement with the proposals, there were some particular points of disagreement. Most commonly, respondents considered that a starting point of 12 weeks' custody for deliberate / category 3 offences, reckless / category 2 offences and negligent / category 1 offences was too high. Notably a number of magistrates were amongst the group expressing this view, with the Magistrates' Association emphasising that 'about half' of all the offences they dealt with would likely constitute a deliberate / category 3 offence by an individual. These respondents thought that a starting point of 12 weeks' custody was inappropriate as the sentencer would not usually be able to conclude that the custody threshold was passed in such cases. These respondents sometimes commented that a custodial sentence appeared particularly punitive when compared with the equivalent financial penalty levied on 'small' organisations for the same offence category.

"...it was a surprise to see a starting point of 12 weeks custody suggested for this high volume category [deliberate / category 3].... We believe that a fine; or a community order and a fine; plus forfeiture of the vehicle used to commit the offence is a more appropriate sentence than custody for the types of flytipping cases seen most frequently in the magistrates' courts."
Magistrates' Association

"Our [seminar] invitees considered that a starting point of 12 weeks custody for individuals assessed as falling within the offence categories for Category 1, Negligent, Category 2, Reckless, and Category 3, Deliberate, was disproportionately high, and disproportionate in relation to current sentencing practice and in relation to sentences for small companies and similar bodies. We see no reason to disagree with this view, and recommend that, whilst custody should remain an option, the starting point should be reduced."
Justice Select Committee

The Council is persuaded that a starting point of 12 weeks' custody is inappropriate for these categories of offences. The Council has therefore amended the starting point for deliberate / category 3, reckless / category 2 and negligent / category 1 offences to a starting point of a Band F fine, which is defined as 600 per cent of weekly income with a range of 500 per cent – 700 per cent weekly income. The Council has created this fine band specifically for the environmental offences guideline on the basis, set out above, that a fine will usually be the most appropriate disposal for these offences. The Council considers that the levels set out for the Band F fine are at an appropriate level to reflect the seriousness of offending that would fall within these categories, and are more commensurate with the equivalent fines available in the revised sentencing ranges for 'micro' organisations. As with the other categories of offences for individuals, the fine may be combined with a community order where appropriate.

Notwithstanding the reduction in the starting point for these categories from a 12 week custodial sentence, the Council believes that custody must be available as an option for dealing with offenders falling within these categories in appropriate cases. Therefore, the range continues to extend up to 26 weeks' custody for these offence categories.

A small number of respondents, including the Environment Agency and the Law Society, considered that the range for category 1 / deliberate offences should be increased from three years' custody to the statutory maximum of five years. In addition, the Council of HM Circuit Judges stated that should the penalties for organisations be increased in the manner they proposed in earlier responses, then the penalties for individuals should be increased in a consistent manner.

The Council has reviewed the proposed sentences for individuals in light of these responses but considers that no further adjustment is necessary. While it is open to the sentencer, giving reasons, to go outside the ranges proposed in the guideline and up to the statutory maximum should it be in the interests of justice to do so, the Council considers that the ranges it has proposed will be proportionate in the vast majority of cases. The Council has considered whether further adjustments need to be made to penalties for individuals further to the amendments made to sentences for organisations; however, it considers that one of the issues highlighted by respondents was the lack of relativity between sentences for 'small' organisations and those for individuals in the draft guideline, which has been addressed by the changes made to the penalties for organisations outlined above. Therefore the Council has concluded that no further changes to the penalties for individuals proposed in the draft guideline are necessary.

Question 22 sought respondents' views on how the proposals would affect current sentencing practice. Only around 50 per cent of total respondents to the consultation answered this question, which elicited a range of comments. Around 35 per cent of respondents answering this question considered that penalties would, generally, increase, while around 16 per cent considered that the guideline would have no or little effect on sentencing practice.

Victims, equality and diversity and other comments

In **Question 23**, the Council consulted on whether there were any further ways in which victims could or should be considered in the draft guideline. A number of respondents considered that greater emphasis should be given to compensation; for the reasons outlined on page 13, clear emphasis is now given to compensation as part of the sentencing process as it is included as a distinct step at the start of the guideline.

A small number of respondents thought that a specific reference should be made to victim personal statements in the guideline. In *Assault: Definitive Guideline* the Council decided not to include guidance on victim personal statements as it was considered that the existing guidance in the Consolidated Criminal Practice Direction and the decision of the Court of Appeal in *Perks*⁷ covers the use of these statements in court. The Council believes that, for the same reasons, it is unnecessary to repeat this guidance in the environmental offences guideline. In addition the Council is satisfied that the impact on the victim is reflected in the factors to be taken into account at earlier steps of the guidelines. Furthermore, there is a wider issue of the inconsistent use of victim personal statements. This is an issue that should be looked at in the context of the police and prosecutors, rather than something that is addressed in sentencing guidelines.

A number of respondents additionally commented that reference should be made to community impact statements. The Council agrees that emphasising the community wide harm that may be caused by environmental offences is important; however, given similar issues with inconsistent usage of community impact statements the Council has added, as an aggravating factor, “established evidence of wider/community impact” rather than

specifically referencing the statements themselves.

The Council published an equality impact assessment to accompany the consultation but did not identify any equality issues. **Question 24** asked respondents to identify any equality or diversity matters arising from the guideline that the Council should consider.

Very few comments were made by respondents on this question. Some respondents reiterated concerns they had raised earlier in the consultation regarding the proposed approach to sentencing public and charitable bodies; the Council’s response to this is on page 14. Others commented that the guideline would promote consistency, thus better ensuring equality.

Question 25 provided respondents with an opportunity to make any general comments. Many responses reiterated issues covered elsewhere in this paper. A small number of respondents commented on the relative complexity of this guideline in comparison to other Sentencing Council guidelines. The Council has endeavoured to make the guideline as simple and concise as possible; however, owing to the variety of offenders covered by the guideline and the breadth of offending types these offences could entail, some level of complexity is inevitable.

7 [2001] 1 Cr App R (S) 19

Conclusion and next steps

The consultation has been an important part of the Council's consideration of this guideline. Responses received from a variety of organisations and individuals have informed changes made to the definitive guideline.

The definitive guideline will apply to all individual offenders aged 18 and older and organisations who are sentenced on or after 1 July 2014, regardless of the date of the offence.

An update will be provided for the *Magistrates' Court Sentencing Guidelines*, which will be update 11.

The Equality Impact Assessment Initial Screening is available on the Sentencing Council website. No evidence was provided during the consultation period which suggested that the guideline would have any adverse impact on equalities issues which would warrant a full Equality Impact Assessment. Following the implementation of the definitive guideline, the Council will monitor the impact of the guideline, with particular intensity for the first year that it is in force.

Annex A

Consultation respondents

Responses were received from the following organisations:

- Anglian Water
- Association of Noise Consultants
- Bedford Borough Council
- Berkshire Magistrates
- Birmingham Magistrates
- Bristol, Gloucester, Somerset and Wiltshire Pollution Group and Stroud District Council
- British Association of Landscape Industries
- Broadland District Council
- Canal and River Trust
- Central and South West Staffordshire Magistrates
- CEMEX UK
- Chartered Institute of Environmental Health
- Chartered Institution of Wastes Management
- Clyde and Co LLP
- CMS Cameron McKenna LLP
- Conwy Magistrates
- Cornwall Magistrates
- Council of HM Circuit Judges
- Council of the Isles of Scilly
- Criminal Justice Alliance
- Crown Prosecution Service
- Department of Environmental, Food and Rural Affairs (Neighbourhood Noise and Nuisance Team)
- EDF Energy
- Energy UK
- Enfield Council
- Environment Agency
- Environmental Health Lancashire
- Environmental Protection UK (North West and Yorkshire Divisions)
- Environmental Services Association
- Fish Legal
- Fly-tipping Action Wales
- Gloucestershire Pollution Group
- Grundon Waste Management
- Hartlepool and Teesside Magistrates
- Justice Select Committee (enclosing comments from the Environmental Audit and Environment, Food and Rural Affairs Select Committees)
- Justices' Clerks' Society
- Keep Britain Tidy
- Keep Wales Tidy
- Kingston upon Hull City Council
- Law Society
- Liverpool Law Society
- Macclesfield Magistrates
- Magistrates' Association
- Mid and South East Northumberland Magistrates
- Mineral Products Association
- Ministry of Justice
- National Bench Chairmen's Forum
- National Farmers Union
- National Fly-Tipping Prevention Group
- National Wildlife Crime Unit
- Natural Resources Wales
- Newcastle City Council
- Newham Local Borough Pollution Control
- North East Suffolk Magistrates
- North Hertfordshire District Council

- North London Local Justice Area Magistrates' Courts
- North Norfolk District Council
- Northampton Borough Council
- Pinsent Masons (on behalf of a range of companies)
- Pinsent Masons
- Police and Crime Commissioner for Wiltshire and Swindon
- Probation Chiefs' Association
- Rural Environmental Law Association
- Scarborough Magistrates
- Sefton Magistrates
- Solihull Magistrates
- Somerset Magistrates
- South Cambridgeshire Magistrates
- South East London Magistrates
- South London Local Justice Area Magistrates' Courts
- South Oxfordshire District Council and Vale (Environmental Protection Team)
- SSE
- Stroud District Council
- Swansea Magistrates
- Thames Water
- Trafford Metropolitan Magistrates
- UK Contractors Group
- UK Environmental Law Association
- United Utilities Water PLC
- Veolia
- Wakefield and Pontefract Magistrates
- Wandsworth Borough Council
- Water UK
- Welsh Water
- Willmott Dixon
- Yorkshire Water

Responses were also received from the following individuals:

- James Airey, Environment Agency
- Eric Bodger, Magistrate
- Peter Burke, Runnymede Borough Council
- Benjamyn Damazer, Magistrate
- David Charles Ely, Magistrate
- Henry Emblem, Environmental Packaging Solutions
- His Honour Judge Field
- Ken Fletcher, Magistrate
- His Honour Judge Foster
- Dr Myrna Gilbert, Magistrate
- Dr Matthew Hall, University of Sheffield
- Anna Heslop, E.ON E&P
- Alan Lloyd Jones, Deputy District Judge
- Liz Knox, East Cambridgeshire District Council
- Derek Lees, Magistrate
- Jason Lowther, University of Plymouth
- Robert Maddocks, Gwent Police
- Simon Mansfield, Merseyside Fire and Rescue Service
- Richard Matthews QC, 2 Bedford Row Chambers
- Gordon Milward, Northumbria Police
- Cllr Dave Mitchell, Metropolitan Borough
- Colin Newmarch, Dartford Borough Council
- Simon Rowe, Wigan Council
- Stephen Russell, Magistrate
- Jennifer Sadler, Cardiff Council
- Rafael Salasnik, Magistrate
- Carolyn Shelbourne, University of Sheffield
- Simon Walker, Unitary Authority
- R E Wood, Magistrate
- David Woodbridge, Mendip District Council
- Martin Wright, Cheshire West and Chester Council

Responses were also received from members of the public

Annex B

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?