

Research to support the development of a guideline on sentencing environmental offences

Introduction

In developing its guidelines the Sentencing Council often conducts research with sentencers in order to ensure that guidelines are well-grounded in sentencing practice. As part of the process to develop a sentencing guideline on environmental offences, the Sentencing Council undertook a small-scale exercise to explore current sentencing practice and proposals for a new guideline. This involved a two stage approach:

- interviewing 14 magistrates, District judges and Crown Court judges about current sentencing practice and their views on three early draft models for sentencing environmental offences (conducted during summer 2012); and
- interviewing a further 22 magistrates, District judges and Crown Court judges (during April and May 2013) to discuss a proposed single model that had been put out to public and professional consultation.

This bulletin should be read alongside the research materials presented in the accompanying annexes. These include different guideline models as well as the case studies used with participants. The consultation version of the draft guideline can be found online:
http://sentencingcouncil.judiciary.gov.uk/docs/Environmental_Consultation_web_final.pdf

Background

In 2012, 570 offenders were sentenced in England and Wales for the environmental offences covered by the Sentencing Council's definitive guideline (Section 33 Environmental Protection Act 1990 and regulations 12 and 38(1), (2) and (3) Environmental Permitting (England and Wales) Regulations 2010). Although this number is not small, it is much lower compared to some other offences (for example, in 2012, there were 112,685 offenders sentenced for theft and handling offences as categorised by the Ministry of Justice¹) and as such environmental offences are seen relatively rarely by the courts. Nearly all environmental cases covered by the environmental offences guideline (in 2012, 93 per cent) are sentenced in magistrates' courts.

Prior to this work, there was no definitive sentencing guideline covering environmental offences. The Magistrates' Court Sentencing Guidelines contained some general guidance on sentencing for these offences (within the 'explanatory material' section) and in September 2009, the Magistrates' Association published "*Costing the Earth: guidance for sentencers*", a practical handbook for a wide range of environmental sentencing issues.² The latter document emphasised the importance of guidance in this area due to the significant impact of many environmental offences and the strict liability nature of many offences.³

Requests for further guidance in this area were received by the Sentencing Council from a range of parties with an interest in this area, including the National Fly Tipping Prevention Group, the Magistrates' Association, the Welsh Assembly and the Environment Agency. These groups were concerned that the fines being passed by the courts were not high enough to reflect the

¹ See Offending Histories Tables, December 2012, figure taken from Table Q7L:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/203851/7-offending-histories-tables-dec12.xls

² See <http://www.magistrates-association-temp.org.uk/dox/Costing%20the%20Earth%20for%20MA%20with%20cover.pdf>

³ 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.

seriousness of the offences committed or to have a deterrent effect, and that there was an inconsistency in fine levels across the country.

In order to address these concerns, the Sentencing Council has developed a guideline for sentencing these offences. The research supporting the development of the guideline was centred on two main stages:

- Early drafts of guidelines comprising three different suggested models for approaching sentencing; and
- A second guideline (the consultation version) with one draft model following changes made as a result of feedback on the three models.

A final definitive version of the guideline was published on 26th February 2014.

Aims and methodology

The research involved a two-staged approach.

Stage 1 (July-August 2012)

The aims of this stage were as follows:

- to explore sentencers' thinking and current decision-making in sentencing environmental offences including:
 - assessing the seriousness of an offence;
 - assessing the means/financial health of offending organisations;
 - views on sentencing different types of organisation;
 - the influence of previous convictions; and
 - the use of ancillary orders (including compensation orders).
- to explore general views on three early draft guideline models and what might work in practice.

This stage involved semi-structured qualitative interviews with 14 participants across six court regions.⁴ The sample comprised four Crown Court judges, seven magistrates and three district judges.⁵ Participants were selected using different approaches. Three participants were chosen using a 'pool' of research volunteers held by the Office of the Sentencing Council; the remaining participants were selected purposively as it was known that they had recently sentenced a relevant case and would be able to reflect on this to help them discuss issues associated with the draft guidelines.

The interviews were conducted face-to-face and included general questions on sentencing environmental offences, as well as the use of an offence case study to help stimulate discussion around the three different models.⁶ The interviews focussed on issues relating to how to sentence organisations (although the guidelines cover sentencing both organisations and individuals);⁷ participants were also asked which model they preferred at the end of each interview. A summary of the three early draft models can be found at Annex A and the actual models in Annex B. The case study scenarios are contained in Annex C.

Stage 2 (April-May 2013)

The aims of this stage were to gain insight into the following issues:

- sentencers' thinking and decision-making when sentencing environmental offences under the draft consultation guideline;
- any potential unintended consequences or practical issues in the application of the new proposals;

⁴ London, South East, South West, Midlands, North East and North West.

⁵ In one interview, a legal advisor was present with a magistrate.

⁶ Two different case studies were used: one for magistrates and District judges and one for Crown Court judges that was later amended for clarity and used in one Crown Court judge interview.

⁷ This was so that the research could focus on exploring views on the suggested models for calculating fines, which is the only sentence available when an organisation is the offender.

- specific issues in the draft guideline, such as the way in which culpability and harm are assessed as part of sentencing environmental offences, guidance relating to economic benefit through commission of the offence and factors to consider in making any final adjustment to fines; and
- any other issues that sentencers felt were relevant to developing a sentencing guideline in this area.

This stage involved semi-structured qualitative interviews with 22 participants across all seven court regions.⁸ The sample comprised five Crown Court judges, 13 magistrates and four District judges. Sentencers were contacted to discuss in detail the draft guideline that was published for consultation in March 2013.

Interviews were conducted face-to-face and participants were asked to sentence two case studies⁹ with the draft guideline in order to explore how the guideline worked in practice. Their views of the guideline in general were then explored.

As with stage 1, in order to ensure that around half of the participants in stage 2 had recent experience in sentencing an environmental offence two different recruitment methods were used. Eleven participants were recruited purposively (by identifying recent environmental cases and contacting the sentencing judge or magistrates); the remainder were recruited via the research 'pool' mentioned previously or through other contacts held internally.

A summary of the draft consultation guideline can be found at Annex A. The consultation version of the guideline can be found online:

http://sentencingcouncil.judiciary.gov.uk/docs/Environmental_Consultation_web_final.pdf. Case study scenarios are contained in Annex D.

Limitations of the approach

Findings from each stage should be treated with caution due to the small sample sizes used. Also, participants should not be considered to represent a full range of experience amongst these groups and the findings do not purport to represent all magistrates, District judges and Crown Court judges in England and Wales.

It should also be noted that even where participants were recruited purposively to have experience of sentencing environmental cases they tended to have relatively limited environmental experience (most had only sentenced one or two cases). This is because environmental cases form a very low proportion of all cases going to court.

Key findings

This section outlines key findings from both stages of research.

Key findings Stage 1

General views on sentencing environmental offences

Purpose of a fine¹⁰

Participants cited several purposes of a fine for an environmental offence: deterrence, punishment, and reparation. Deterrence and punishment often overlapped in discussion as some participants

⁸ London, South East, South West, Midlands, North East, North West and Wales.

⁹ Six case studies were designed – three for use in the Crown Court and three in magistrates' courts. Case studies were rotated so that participants received them in different orders and combinations in order to address concerns about any differences in responses linked to ordering or in case the interviewer did not have sufficient time for the second case study. The cases studies can be found in Annex D.

¹⁰ It should be noted that in some cases, the interviewer had to prompt quite heavily to establish views on the purposes of these fines.

commented that not only should fines prevent future offences, but that they should be sufficiently stringent to ensure they impacted financially. Deterrence in this context seemed to cover both individual and general deterrence (to prevent future offences by the same offender as well as by others). Participants also mentioned needing to mark the seriousness of the offence, send a message to an offending organisation's shareholders and ensure offending organisations didn't profit from their actions.

Setting the level of fines

When setting the level of fines, participants raised the following factors of importance:

Offence seriousness: In discussions around assessing the seriousness of an environmental offence, participants mentioned a number of key issues linked to harm and culpability:

- the type of offence (including the type of waste material, the amount, where it was dumped, etc);
- the likely impact of the offence (whether there were toxic or noxious materials, the scale of the impact);
- the length of time over which the offence had been committed; and
- whether, and what, the offender could have done to prevent or anticipate it.

The means/ financial health of the organisation: this seemed to be a key issue for many participants, with some stating that it was important not to put companies out of business by setting too high a fine.¹¹ Participants were clear that fines should be related to the organisation's means, although views differed in terms of whether this should be in relation to turnover, profit, reserved profit etc.¹²

Compensation awarded: related to the organisation's available means, several participants said that the compensation that had been awarded as part of the case would have an impact on the level of fine set.¹³ They explained that compensation should be awarded first as it would affect the organisation's remaining means and ability to pay a fine.

The benefit/ savings derived through the offence: A few participants felt the level of a fine should be related to the benefit or savings that had been derived through the commission of an offence and that the organisation should not profit through their actions.

Previous convictions: not all participants discussed the impact of previous convictions, but where they did, they tended to say this would definitely aggravate an offence and affect perceptions of culpability.

Size/ type of organisation: A small number of participants talked about fines needing to take into account organisation size or structure – one felt that fines should be proportionate to the size of the organisation, and another that the structure of the organisation was important. Some participants were also directly asked if the level of a fine would be affected by whether the organisation was a charity or non-profit making organisation as opposed to a commercial organisation. There were mixed views on this, with several saying that this shouldn't make any difference: *"it's the same offence no matter what the outfit... People who are from charities and publicly funded should know better anyway"* (magistrate).

Others felt that the type of organisation would make a difference with one participant expressing views on the need to consider the impact on a company's charitable purposes and there being more mitigation for these than commercially motivated companies, and another explaining that the distinction would happen in practice because a charity may have lesser finances which may therefore lead to a smaller fine. Another felt that if the organisation was, for example, a hospital,

¹¹ This was also apparent when participants worked through the offence scenarios at a later stage of the interview.

¹² This variation in views regarding what financial information should be taken into account was also apparent when working through the case studies with the participants.

¹³ One participant also mentioned any confiscation ordered would need to be taken into account.

some sort of educative route (via programmes run by the Environment Agency) would be a more appropriate punishment than a fine. One other participant said that whether a distinction was made would depend on the severity of the case.

Views of the draft guideline models¹⁴

Participants from stage 1 were asked to focus on how they would use the draft guideline models for sentencing organisations as opposed to individuals. This was so that views on the models to calculate fines for organisations could be fully explored.

Overall, a guideline on sentencing environmental offences was welcomed, with Model 2 being preferred by most participants. The issues relating to the different steps are discussed in further detail below.

Step 1

Culpability: Participants generally commented very little on the culpability categories and factors in the guidelines – those that did generally said they were appropriate.

Harm: On balance, most participants who expressed a view disliked the approach in Model 1 of attributing a financial figure to harm: they felt that it would be problematic to try and quantify harm considering that some offences may have an impact over a very long period.

“this is very difficult. Couldn’t put a figure on it. What if asbestos had been pumped out over a school playground? That harm couldn’t be quantified for years”

District judge

They also argued that harm was more than a financial issue and thus could not be assessed in purely financial terms.

“harm here is the seriousness of what has happened and the cost to remove the waste as opposed to the avoidance of a tax...harm shouldn’t just be a financial measure – it’s ‘wrong’”

Crown Court judge

Participants therefore tended to prefer the approach for categorising harm in Model 2 (more narrative factors) as this allowed them to combine issues associated with the financial aspects of harm with the wider impacts of the offence, thus allowing for “flexibility”. This contributed to overall more positive views of Model 2, with many participants describing it as “good”, “logical” or “methodical”.

There were still some concerns and suggestions for improvement raised with regard to Model 2. In particular, some felt the approach to risk of harm could be clearer.

Step 2

Starting point and category range: When using Model 1, several participants became very confused when moving from step 1 to step 2 and needed the interviewer to explain how to use the table of starting points in step 2. This confusion resulted from harm being expressed as a financial figure in step 1 which then had to be multiplied by another figure in step 2 in order to obtain the starting point. This meant that many viewed Model 1 as too “complicated” or too “vague”.

Step 2 of Model 2 was more widely favoured. However, some participants did feel that the ranges were too wide and consequently there was insufficient guidance on where in the range to place a

¹⁴ These are summarised in Annex A and the full models are available at Annex B.

starting point for a fine. Some therefore suggested that the individual ranges within the table should be subdivided to provide more of a steer and to differentiate between offence categories.

The lack of guidance on where to place a fine in step 2 of Model 2 was also demonstrated by the variation in ways in which different participants chose to set their fines for the offence case studies.¹⁵ Some looked purely at the turnover of the organisation/ the financial information provided, some the offence category from step 1 and some both. Others seemed to disregard any categorisation in either step 1 or 2 and looked straight to the financial information they had been provided with in the case study and set the fine according to that.

It therefore seemed that some participants focused on the means of the offender to a greater extent than the factors involved in the actual offence and were effectively giving greater weight in their decision-making to steps 2 and 3 than step 1. The issue that differed amongst these participants was what proportion of the organisation's means they thought would achieve this balance and be an effective fine.

There was also some disagreement that fines should be based on the turnover of the organisation as recommended by the guideline.¹⁶ Several participants felt that profit, retained profit or available means would be more appropriate:

"I'm not happy about turnover. It should be based on disposable income (even with retained profit, it might be a one off profit)"

Magistrate

"It means a very large organisation with low profit might be in trouble. It's their profitability you should end up hitting"

District judge

Aggravating and mitigating factors: Very little comment was generated on these factors, but of those who provided a view, they thought that the factors listed were generally appropriate.

Step 3

In Models 1 and 2, step 3 provided an opportunity for the sentencer to 'take a step back' and consider whether the sentence set at step 2 required any adjustment to ensure it met the objectives of punishment, deterrence and removal of gain derived by the commission of the offence in a fair way.

General views: Participants were generally split on whether they favoured the principle of the third stage in the guideline. Some participants very much favoured this step: one said he was "enthusiastic" (*Crown Court judge*) about this and another that "this might be useful" (*magistrate*). However, others were less in favour, saying it gave too much discretion or that it could be problematic in practice: "[this just] gives the defence an opportunity to wheedle down the fine" (*District judge*). Another felt that the presentation of the bullet points on economic benefit in the text box in step 3 "gives them more importance than they should have/ is elevating them higher" (*Crown Court judge*). Other questions included whether these principles were also to cover individuals as they felt the current drafting implied that it was only relevant to organisations.

Deterrence multipliers (Model 1): Specifically, in relation to the additional step in Model 1 of deterrence multipliers, whilst some people were in favour of these as a principle, many did not support certain aspects of the actual multipliers:

¹⁵ There was more variation in the sentences given for the case studies when using Model 2 compared with Model 1.

¹⁶ This was raised in discussions on both Models 1 and 2.

- the lower end of the multipliers: many people felt that having a lower range for these was restrictive and would, in reality, mean they were unlikely to use them at all as even at the lower end, the resulting fine would be too high;
- the size of the multipliers: some people felt the ranges were extremely wide, resulting in very high numbers, potentially very high fines (that companies would not be able to pay) and a potential inconsistency in sentencing as too much discretion was built into it;
- relating to views on how to set the fine at step 2, some also felt that turnover was not the right figure to use for the deterrence multipliers; and
- lack of guidance about which multiplier in the range to select: one judge felt this could lead to problems in practice:

“Judges and advocates won’t understand this ... the judge will have to do a lot of work to justify the multiplier chosen. There would be big arguments as to why a particular multiplier had been chosen and the defence and the prosecution would want others to be used.”

Crown Court judge

A small number of participants did, however, say that they liked the multipliers and one said that they would be good when setting fines for large companies.

Model 3

Although the interviews did not focus on Model 3 in any detail, where they had a view, participants felt that using a more structured guideline approach was preferable. They therefore tended not to favour the type of narrative approach in Model 3 (comments varied and included that it was “*too vague*”, “*too wordy*”, and “*not helpful*”). One participant¹⁷ did, however, prefer Model 3 as their view was that the more complex models were likely to lead to errors.

A small number of participants also commented that some of the factors and sentences (particularly in relation to individuals) were different in Model 3 to those in Models 1 and 2.

Other issues

Ancillary Orders: where they commented (some participants needed to be prompted on this), compensation was frequently mentioned as something to consider when fining organisations for an environmental offence. Some participants also mentioned disqualification of organisation directors, confiscation of vehicles, and confiscation of other proceeds of crime in general. A small number of magistrates also mentioned they had no experience of using ancillary orders.

Several participants questioned the fact that the issue of compensation did not appear in the draft guideline models. They said that compensation was the priority in these cases - so that reparation for the offence could be factored in - and that this should be settled before the level of any fine was set:

“If appropriate, compensation goes a long way – it’s a priority over a fine – it’s to deal with the people who’ve suffered. If compensation is requested in any offences, it’s more important than the fine.”

Magistrate

Another participant said that the absence of reference to confiscation proceedings in the guidelines was also: “*an omission – you need to resolve before setting a fine.....The guidelines should say that fines should take account of this*” (Crown Court judge).

In this sense, compensation and confiscation were additional factors that participants said they would need to consider when deciding on the eventual level of a fine (along with costs); these

¹⁷ A District judge.

would affect the organisation's means overall and what was available to be taken into account for a fine.

Strict liability offences: discussion of strict liability offences arose in a small number of interviews. Comments that were provided on this included that: it would not be appropriate to have just one culpability level for all strict liability offences; there should perhaps be a different guideline for these offences; and culpability should be given as much weight in strict liability offences as for any other type of offence.

Stage 1 findings and their impact on the consultation guideline

The above findings from stage 1 of the research on sentencing environmental offences led to some important developments in terms of arriving at a single guideline model. These changes are described below and are reflected in the consultation version of the guideline.

The value only based approach to assessing harm (step 1) from Model 1 was reconsidered in favour of the general approach in Model 2 which takes not only value into account but other factors indicating greater or lesser harm. The factors indicating culpability (step 1) in Model 2 were also expanded following feedback on sentencing strict liability offences; this led to the categories of 'higher' and 'lower' culpability being expanded into four: 'deliberate', 'reckless', 'negligent' and 'low or no culpability', with narrative examples of the types of activity/ behaviour that would fall within these. The number of harm categories (step 1) was also increased to four in order to provide clearer guidance on how to deal with risk of harm as opposed to actual harm. Sentencers were directed normally to drop to the next category down if a risk of harm was present but no actual harm had occurred (this resulted in four categories: three based around whether the harm was 'substantial', 'significant' and 'minor' and a fourth to cover 'risk' of minor harm). However, the guideline also indicated that dropping a harm category may not be appropriate where either the likelihood or extent of potential harm was particularly high.

The multiplier approach to calculating the offence starting point and category range for organisations under steps 2 and 3 of Model 1 was also replaced with more value-defined figures in step 2 that would not involve sentencers having to make a calculation to arrive at the fine.¹⁸ Feedback on the category ranges in Model 2 led to these being further refined; with more sub-categories provided (the deterrence multiplier approach under step 3 of Model 1 was therefore also not taken forward).

The narrative-based Model 3 was not favoured and would not have provided the level of detail requested by participants in their feedback (largely on Models 1 and 2) and therefore this approach was also not carried forward.

In light of comments regarding compensation and confiscation, guidance was included in the guideline directing magistrates to commit an offender to the Crown Court for sentence where confiscation is requested by the prosecution and in all cases to consider whether to make a compensation order in step six of the draft guideline.

Key findings Stage 2

Stage 2 explored views on the draft guideline model that went out for consultation. This is summarised in Annex A and the full model can be found here:

http://sentencingcouncil.judiciary.gov.uk/docs/Environmental_Consultation_web_final.pdf

Step 1

Culpability: When questioned directly, participants generally agreed that the culpability section of

¹⁸ This calculation involved taking the financial gain/ loss caused and multiplying it by a set amount depending on the level of harm and culpability arrived at in step 1.

the guideline was clear and easy to use. There were some views in relation to the proximity of the 'reckless' and 'negligent' categories. However most participants who raised this issue said that they would be able to distinguish between the two categories and use the guideline in its current form. When explaining their understanding of the terms, most of those that were asked said that being reckless would involve the offender being aware of the risk/ potential harm but committing the offence anyway, whereas a negligent offender would not have considered or be aware of the potential harm.

“Reckless is doing something and not really having much regard for the consequences whereas negligent is doing something without thinking about the consequences, and again that is close together but there is a difference, well there would be to me.”

Magistrate

Despite this, responses to the case studies indicated that interpreting what was 'reckless' and what was 'negligent' would be a difficult task in practice for some people and resulted in some differences in categorising the culpability of certain offences. This was down to differences in individual interpretations of what behaviours constituted 'reckless' and 'negligent'.

Harm: Although, when questioned directly, participants generally agreed that the harm section of the guideline was clear and easy to use, on balance, there were more issues raised in relation to determining harm than culpability. Some participants had some difficulties with the assessment of harm under the draft guideline. Distinguishing between what constituted 'substantial' and 'significant' harm when sentencing using the offence scenarios was most problematic since it was not clear what the difference between the two would be. Some participants suggested changes to the wording to improve the clarity of the guideline.

“You have to work out the difference between substantial and significant . . . this is where it comes back to case law and other guiding factors, but no I wouldn't necessarily know what the difference was between substantial and significant ...”

Magistrate

“Substantial adverse effect or damage to landscape...what's the difference between a substantial adverse effect and a significant adverse effect?... Very significant and significant I can see a difference in.”

District judge

When questioned about the approach to risk of harm in the draft guideline most participants agreed that creating risk of harm was less serious than causing actual harm. Some participants expressed that they were content with the current approach of moving down a category when only a risk of harm was present, as opposed to actual harm having been caused. Others preferred the alternative approach suggested in the guideline consultation, where risk of harm and actual harm are treated as equal at step 1 but risk on its own could be used to mitigate at step 2.

Discussion around the case studies and the sentences that were awarded revealed some differences in sentencing for the same offences. These were largely attributable to differences in the culpability and harm factors chosen at step 1 (and therefore the applicable starting points at step 2)¹⁹.

Step 2

Step 2 of the guideline was felt by most participants to be clear and workable. Many welcomed the approach to categorising companies by size/ turnover. One key issue that arose however was a lack of clarity as to how to best categorise sole traders who were running their own company, in

¹⁹ Please note the limitations of this research outlined on page 3, including the fact that participants were presented with limited information in interview (see Annex D).

particular whether to classify them as a company or an individual. Accordingly, there was some confusion around one of the offence case studies where the offender was a scrap merchant who was charged as an individual but who employed staff.

“We don’t have sole traders [covered in the guideline], and I would imagine that he [offender, scenario 5] is a sole trader and I think that there is a difference between an individual and a sole trader because he was doing something that was in relation to his business.”

Magistrate

Although participants were largely content with the approach to categorising companies, there were some suggestions made when probed. Two participants suggested the need for inclusion of a further category for ‘very large’ companies with particularly high turnover as the draft guideline had one category for companies with a turnover of over £25.9 million; they thought that some would sit substantially above this. Not many participants commented on the starting points/ ranges for small companies. Of those who did, the most common feedback was that they would be quite high for a small company and not high enough for a larger one with a turnover at the top of the threshold. This indicated that the threshold for classification as a small company may be set too high.

Those who offered a view generally felt the guideline would increase fine levels for large corporate offenders, but that this was appropriate since they felt that current sentencing was too lenient. Participants were generally comfortable with the emphasis on fines over other sentence outcomes for individual offenders; however responses to the case studies indicated this comfort level decreased if the offender had previous convictions.²⁰ In these instances most wanted to give a different disposal (either a community order or custody). Some participants also explained that they would not be comfortable in sentencing a first time offender (an individual as opposed to an organisation) to custody for some offences.

Participants were happy with the guidance regarding obtaining financial information for classifying corporate offenders²¹ though many highlighted that in reality such information was not always readily available or detailed or high quality enough, and hence the need for it should be made clearer to the prosecution in advance of the case coming to court. Some participants also raised questions about the guideline’s reliance on turnover rather than profit as an indication of financial means. For these participants, profit, rather than turnover, was thought to provide a more reliable indication of a company’s financial status.

Step 3

When asked for their general views on the approach taken in step 3 in principle, most of those asked responded positively. Most participants welcomed the chance to review the sentence at this stage especially in light of any economic gain. Some also highlighted the importance of considering the means of the offender, viewing step 3 as a chance to review whether a fine would have a proper impact on shareholders of a company.

However, general views and responses to the offence case studies suggested that many participants, particularly magistrates, were confused about what they should do in practice at step 3. Specifically, some magistrates questioned if this step could be used to reduce a fine as well as increase it. Others, again particularly magistrates, were not sure whether or not they could go outside of the range at this point. This pointed to the need for clarification on this issue.

Magistrates in particular also appeared generally more wary in adjusting the sentence at this stage (this was evidenced in responses to case studies and in more direct questions on this step), possibly due to their lack of clarity regarding whether sentences could be adjusted outside of the

²⁰ The only time when participants were not very supportive of the use of fines was when an offender had a number of previous convictions for environmental offences or when they had a history of defaulting on fines or had a number of outstanding fines (as seen in one of the offence case studies).

²¹ The guidance sets out that a company should provide comprehensive accounts for the last three years and sets out factors for key consideration in setting a fine.

range. Though most magistrates agreed with the idea of adjusting the sentence based on the economic gain, some were concerned about the possibility of double counting if economic gain had already been considered as part of assessing culpability.

Other concerns raised by (all types of) participant focussed on:

- adjusting a fine purely based on the means of the offender, which they felt was unfair as this was related to the offender rather than the offence;
- several commented that there was no justification to reduce a fine purely because the offender was a public body or charity;
- the necessity of such a step when they would consider the totality principle²² in sentencing at a later stage. They therefore questioned whether this step was needed; and
- as indicated earlier, some doubted the quality and reliable provision of financial information provided in court and thus were concerned about whether a sentence could be adjusted reliably at this step.

Some participants (all types) suggested that improvements to the formatting of this section of the guideline may improve its readability and therefore clarity. Suggestions included:

- reducing the text to one page (making it less 'wordy' and bringing the factors on the second page onto the same page as the rest of step 3);
- boldening specific sections to make them stand out more, such as the section on economic gain; and
- removing the additional factor on inhibiting performance of a public or charitable function (following concerns over double counting and misinterpretation of what this actually meant).

Some magistrates also felt that step 3 could only be considered after knowing what compensation or other costs the offender would pay, and thus suggested it should come after step 6.²³

Stage 2 findings and their impact on the final definitive guideline

Overall, the stage 2 research indicated that most participants supported the development of a guideline for sentencing environmental offences and thought that the proposed consultation guideline would largely work in practice. Some useful feedback was however provided for relatively minor amendments to steps 1 and 2 and general amendments to step 3 to improve the clarity of these three steps. As a result, the findings contributed, alongside responses to the consultation of the draft guideline, to some important changes to the guideline. These changes are explained in full in the response to consultation:

[http://sentencingcouncil.judiciary.gov.uk/docs/Final_Environmental_Offences_Response_to_Consultation_\(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Final_Environmental_Offences_Response_to_Consultation_(web).pdf).

In brief summary, elements of the definitive guideline influenced by the findings from stage 2 of the research include:

- the decision to split the draft guideline into separate guidelines for individuals and organisations to ensure clarity as to which factors apply to each type of offender;
- the creation of a specific step for compensation at step 1 of the guidelines;
- an amendment to descriptors used for harm factors, to substitute the word 'substantial' for 'major';
- the substitution of a new Band F fine band instead of a 12 week custodial starting point for some offence categories;
- a number of changes made to the turnover values used to categorise different sizes of organisations and the number of categories used;
- the addition of guidance to sentencers to ensure that the proposed fine reached using the

²² The totality principle was highlighted at step 7 of the draft guideline which stated: "if sentencing an offender for more than one offence, or where the offender is already serving a sentence, consider whether the total sentence is proportionate to the offending behaviour".

²³ Step 6 related to compensation and ancillary orders. It stated: "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 a vehicle; deprivation of property; disqualification of directors and disqualification from driving."

starting points and ranges based on turnover is proportionate, having regard to the wider financial circumstances of an organisation; and

- a number of changes made to step three of the draft guideline to improve the clarity and usability of this stage of the guideline.

Conclusion

This research provided valuable feedback and insight into the draft guideline proposals at different stages of their development from sentencers who will be using them once they are implemented. It particularly helped clarify an approach for sentencing environmental offences and for using financial penalties for organisations. In conjunction with other responses received as part of the consultation phase, the research has helped refine the definitive guideline: see [http://sentencingcouncil.judiciary.gov.uk/docs/Final_Environmental_Offences_Definitive_Guideline_\(web\).pdf](http://sentencingcouncil.judiciary.gov.uk/docs/Final_Environmental_Offences_Definitive_Guideline_(web).pdf)

Acknowledgements

Our thanks go to all the participants in the research – magistrates, District judges and Crown Court judges - who kindly offered their time to take part in this research.

Many thanks also to members of the Office of the Sentencing Council who helped with fieldwork and fieldwork arrangements.

Karen Moreton, Catherine Mottram and Emma Marshall

Annex A – Summary of draft guideline models used for Stages 1 and 2 of the research

Stage 1 - Early guideline models

Stage 1 of the research explored three early draft models for sentencing environmental offences. These have been summarised below.

Model 1: This model consisted of three steps.

- At step 1, the court was directed to categorise the offence according to the level of culpability. This was determined only by reference to a range of factors given on the guideline and based on these the court would decide if the offence was higher culpability (and therefore in category 1) or lesser culpability (which would result in category 2). They were also asked to calculate a value for the harm, determined by the greatest of either the financial gain derived from the offence (including cost saved) or the financial loss caused by the offence.
- At step 2 the court would reach a sentence - for organisations the sentence would be a fine. The starting point for the fine (for offending organisations) was determined by multiplying the harm (monetary sum) by a multiplier representing culpability. Step 2 also included a non-exhaustive list of aggravating and mitigating factors which may warrant an adjustment up or down from the starting point.
- At step 3, the court was guided to 'step back' from the sentence reached at step 2 and consider additional factors which may warrant adjustment, in order to ensure that the sentence met the objectives of punishment, deterrence and the removal of gain derived by the commission of the offence. This step included a table of deterrence multipliers which the court could apply to increase the sentence to ensure the sentence was proportionate to the offence and the size of the organisation (based on turnover).²⁴

Model 2: This model also consisted of three steps.

- At step 1 the court was directed to categorise the offence according to both culpability and harm with reference to factors listed on the guideline, and as a result there were three categories. If the offence involved greater harm and higher culpability it was category 1; if it was greater harm and lower culpability OR lesser harm and higher culpability it was category 2 and if it was lesser harm and lower culpability it was category 3.
- As with Model 1, step 2 was where the court would reach a sentence. There was some change from Model 1, as this model provided a fine range based on the size of the organisation, linked to turnover. Only one range was provided for all three offence categories and it was up to the court to determine the precise fine within the range. The guideline noted that fines for category 1 offences should be higher than category 2 offences and substantially higher than category 3 offences for the same offender. As with Model 1, this step included a number of aggravating and mitigating factors to guide courts as to where to sentence the offender within the range.
- Like Model 1, at step 3 the court was asked to 'step back' to ensure that the fine met the objectives of punishment, deterrence and the removal of gain derived by the commission of the offence in a fair way. However, in this model there were no 'deterrence' multipliers, only the additional factors were listed.

Model 3: This model only consisted of two steps.

- Step 1, the categorisation of the offence, was exactly the same as Model 2.
- Step 2, where the sentence would be reached, worked in the same way as Model 2 for individual offenders but no starting points or category ranges were provided if the offender

²⁴ The categorisation of companies was based on definitions set out in the Companies Act 2006.

was an organisation. Instead there was narrative guidance, which provided an indication of the minimum amount to fine a company, linked to the seriousness category. It also included factors included at step 3 in the other two models to assist sentencers in reaching a precise fine level.

- No opportunity was provided to 'step back' and review the level of fine in a third step (as per Models 1 and 2).

Stage 2 - Draft consultation guideline

Stage 2 of the research explored only the guideline that was out to consultation during the research period. The guideline is summarised below.

Like Models 1 and 2 explored at Stage 1, this model also consisted of three steps.

- At step 1, sentencers were asked to classify the defendant according to their culpability and the harm caused, based on factors set out in the draft guideline. There were four culpability categories: 'deliberate', 'reckless', 'negligent' and 'low or no culpability'. There were also four harm categories - when determining which of these the offender fell into the sentencer was guided to consider both the actual harm caused as well as any risk of harm (with risk of harm normally to be treated as being less serious).
- At step 2, sentencers were directed to determine a starting point and range for the sentence. For organisations, this would depend on their size (in terms of turnover) as well as the culpability and harm categories chosen at step 1 (for individuals this would only depend on the culpability and harm categories chosen at step 1). This step also included a number of aggravating and mitigating factors to guide courts as to where to sentence the offender within the range.
- At step 3, the court was given an opportunity to adjust a financial penalty to ensure that any economic benefit from committing the offence was removed. The guideline directed courts to step back and consider if the fine met the objectives of punishment, deterrence and the removal of gain derived by the commission of the offence in a fair way. It prompted them to consider reductions for offenders who were public or charitable services and, for corporate offenders, to ensure that the fine had some real economic impact. A list of non-exhaustive factors to assist the court in adjusting the level of fine was provided.

Annex B – Stage 1 (pre-consultation) guideline models

MODEL 1

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

Environmental Protection Act 1990 (section 33)

Environmental Permitting Regulations 2010 (regulation 38(1), (2) and (3) and regulation 12)

Triable either way

Maximum: 5 years' custody and/ or unlimited fine

STEP ONE: Determining the offence category

The court should determine the offence category using the table below.

Category 1	Harm and higher culpability
Category 2	Harm and lower culpability

The court should determine the offender’s culpability with reference only to the factors below, which comprise the principal factual elements of the offence. 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.

The harm caused by the offence will be reflected by the greatest of the actual or estimated financial gain (including cost saved) to the offender from the offence or the actual or estimated financial loss caused by the offence. Where it is not possible to calculate an estimate of that amount, the court may wish to draw on information from the enforcing authorities about the general costs of operating within the law.

Harm	<p>The harm caused is determined by the greatest of:</p> <ul style="list-style-type: none"> • the financial gain derived from the offence (including cost saved); or • the financial loss caused by the offence
-------------	---

Factors indicating higher culpability	<ul style="list-style-type: none"> • Deliberate breach of the law with commercial motive • Repeated incidents of offending or offending over extended period of time, where not charged separately • Deliberate concealment of illegal nature of activity • Substantial financial gain, either profit or cost-saving • Failure to respond to advice or warning from relevant regulatory authority • Failure to respond to concerns of employees or others • Knowledge of specific risks involved, for example, ‘special’ waste • Violation of an order • Obstruction of justice
Factors indicating lower culpability	<ul style="list-style-type: none"> • One off event, not commercially motivated • Genuine lack of awareness or understanding of the regulations specific to the activity in which engaged • Little or no financial gain • Mental disorder or learning disability, where linked to the commission of the offence • Effective compliance and ethics programme • Self-reporting, co-operation and acceptance of responsibility

STEP TWO: Starting point and category range

Having determined the category, the court should refer to the tables below and use the corresponding starting points to reach a sentence within the category. The harm figure reached at step 1 is multiplied by a figure to reach an initial level of fine. The starting point within a table applies to all offenders of that type, irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability in step 1, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

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. Where the offender is an organisation, 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. If necessary, the court may compel the disclosure of the offender's financial circumstances pursuant to section 126 of the Powers of Criminal Courts (Sentencing) Act 2000.

General principles to follow in setting the level of fine

Sentencers should determine the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires offence seriousness and the financial circumstances of the offender to be taken into account.

The level of fine should reflect the extent to which the offending organisation fell below the required standard. The fine should also reflect any economic gain or cost saved from the offence. It should not be cheaper to offend than to take appropriate precautions; the fine must be higher than the cost of complying with the law.

For the most serious offences, the fine must be substantial enough to have a real economic impact which will bring home to the management (and shareholders) the need to improve regulatory compliance.

Organisations

Criminal purpose organisations

If the offending organisation operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organisation of all its assets.

Non-criminal purpose organisations

The fine range for an offending organisation that did not operate primarily for a criminal purpose or primarily by criminal means should be based on the harm caused by the offence and the culpability of the offending organisation.

Offence category	Starting point (Applicable to all offenders)	Category range (Applicable to all offenders)
Category 1	Harm £ x 4	Harm £ x 2 - £ x 6
Category 2	Harm £ x 2	Harm £ x 1 - £ x 4

Individuals

Offence category	Starting point (Applicable to all offenders)	Category range (Applicable to all offenders)
Category 1	Community order	Community order - custody
Category 2	Fine	Fine – community order

The table below contains a **non-exhaustive** list of additional 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 some cases, having considered these factors, it may be appropriate to move outside the identified category range.

For individual offenders, when sentencing **category 1** offences, the court should also 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?

For individual offenders, when sentencing **category 2** offences, the court should also consider the community order threshold as follows:

- has the community order threshold been passed?

Factors increasing seriousness	<p><i>Statutory aggravating factors:</i></p> <ul style="list-style-type: none"> • 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 <p><i>Other aggravating factors include:</i></p> <ul style="list-style-type: none"> • Location of the offence, for example, near housing, schools, livestock or environmentally sensitive sites • Any escape of waste into water or air • Established evidence of community impact • Offence committed whilst on licence
Factors reducing seriousness or reflecting personal mitigation	<ul style="list-style-type: none"> • No previous convictions <u>or</u> no relevant/ recent convictions • Remorse • Prompt self reporting of offence and ready co-operation with enforcement authorities • Evidence of steps taken to remedy problem • Good character and/ or exemplary conduct • Serious medical conditions requiring urgent, intensive or long-term treatment • Age and/ or lack of maturity where it affects the responsibility of the offender • Mental disorder or learning disability, where not linked to the commission of the offence • Sole or primary carer for dependent relatives

STEP THREE: Consider whether there are any further factors which require adjustment to level of fine

At step three the court should ‘step back’ and consider whether the amount of fine calculated at step 2 meets the objectives of punishment, deterrence and the removal of gain derived by 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. The table below 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 an increase or decrease in the level of fine within the category range at step two. In exceptional cases, having considered these factors, it may be appropriate to move outside the category range.

Additional factors to consider in setting the level of fine and period of payment	<ul style="list-style-type: none"> • The value, worth or available means of the offending organisation • Ability to pay fine within specified period • 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 function • Fine impairs offender’s ability to make restitution to victims
--	--

Deterrence multipliers

The fine level arrived at in step two may require further adjustment to change the behaviour of the offender and deter future offending. Where the court considers it appropriate, it should multiply the fine arrived at in step 2 by a multiplier in range in the table below depending on the size/nature of the offending organisation.

Type of organisation	Deterrence multiplier
Large companies (annual turnover over £25.9m)	50 – 100
Medium companies (annual turnover not more than £25.9m)	20 – 50
Small companies (annual turnover not more than £6.5m)	5 – 20
Publicly-funded organisations or charities	2 – 5

Payment of the fine

Criminal purpose organisations

If the offending organisation operated primarily for a criminal purpose or primarily by criminal means, immediate payment of the fine will be required.

Non-criminal purpose organisations

If the offending organisation did not operate primarily for a criminal purpose, immediate payment of the fine shall be required unless the court finds that the organisation is financially unable to make immediate payment or that such payment would place an undue burden on the organisation. If the court permits other than immediate payment, it shall require full payment at the earliest possible date, whether by requiring payment on a certain date or by establishing an instalment schedule. Normally the fine should be payable within 12 months. The period provided for payment shall not exceed five years.

Individuals

A fine is payable in full on the day on which it is imposed. Where that is not possible, the court may allow payments to be made over a period set by the court. Normally the fine should be payable within 12 months.

MODEL 2

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

Environmental Protection Act 1990 (section 33)

Environmental Permitting Regulations 2010 (regulation 38(1), (2) and (3) and regulation 12)

Triable either way

Maximum: 5 years' custody and/ or unlimited fine

STEP ONE: Determining the offence category

The court should determine the offence category using the table below.

Category 1	Greater harm and higher culpability
Category 2	Greater harm and lower culpability OR Lesser harm and higher culpability
Category 3	Lesser harm and lower culpability

The court should determine culpability and harm caused or intended or risked, by reference **only** to the factors below, which comprise the principal factual elements of the offence. 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.

Factors indicating greater harm	<ul style="list-style-type: none"> • Waste of dangerous nature, for example, hazardous chemicals or sharp objects • Waste was noxious, widespread or pervasive, or liable to spread widely or have long-lasting effects • Adverse effect on human health, animal health or flora • Substantial costs incurred through clean-up, site restoration or animal rehabilitation • Significant interference with or prevention of other lawful activities due to offence
Factors indicating lesser harm	<ul style="list-style-type: none"> • Minor, localised effect or damage • Minor adverse effect on human health, animal health or flora • Low costs incurred through clean-up, site restoration or animal rehabilitation • Limited interference with or prevention of other lawful activities due to offence
Factors indicating higher culpability	<ul style="list-style-type: none"> • Deliberate breach of the law with commercial motive • Repeated incidents of offending or offending over extended period of time, where not charged separately • Deliberate concealment of illegal nature of activity • Substantial financial gain, either profit or cost-saving • Failure to respond to advice or warning from relevant regulatory authority • Failure to respond to concerns of employees or others • Knowledge of specific risks involved, for example, 'special' waste • Violation of an order • Obstruction of justice
Factors indicating lower culpability	<ul style="list-style-type: none"> • One off event, not commercially motivated • Genuine lack of awareness or understanding of the regulations specific to the activity in which engaged • Little or no financial gain • Mental disorder or learning disability, where linked to the commission of the offence • Effective compliance and ethics programme • Self-reporting, co-operation and acceptance of responsibility

STEP TWO: Starting point and category range

Individuals

Having determined the category, the court should refer to the table and use the corresponding starting points to reach a sentence within the category. The starting point within a table applies to all offenders of that type, irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step 1, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out below.

Organisations

Criminal purpose organisations

If the offending organisation operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organisation of all of its assets.

Non-criminal purpose organisations

The fine for an offending organisation that did not operate solely for a criminal purpose or primarily by criminal means should be based on the harm caused by the offence and the culpability of the offending organisation.

There are three tables which contain different fine ranges depending on the size and nature of the offending organisation. The court should determine the appropriate amount of fine within the range for the particular type of organisation, reflecting the seriousness of the offence and to deter future offending. **Fines for category 1 offences will be higher than for category 2 offences and substantially higher than category 3 offences.**

General principles to follow in setting the level of fine

Sentencers should determine the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires offence seriousness and the financial circumstances of the offender to be taken into account.

The level of fine should reflect the extent to which the offender fell below the required standard. The fine should reflect any economic gain or cost saved from the offence. It should not be cheaper to offend than to take appropriate precautions; the fine must be higher than the cost of complying with the law.

For the most serious offences, the fine must be substantial enough to have a real economic impact which will bring home to the management (and shareholders) the need to improve regulatory compliance.

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. Where the offender is an organisation, 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. If necessary, the court may compel the disclosure of the offender's financial circumstances pursuant to section 126 of the Powers of Criminal Courts (Sentencing) Act 2000.

Large companies

- Turnover: over £25.9m

Example company	Category range (covering categories 1 – 3)
Company with turnover above £1bn	£800,000 - £5m
Company with £400,000,001 - £1bn turnover	£400,000 - £3m
Company with £100,000,001 - £400m turnover	£150,000 - £2.25m
Company with £25,900,001 - £100m turnover	£72,520 - £1.05m

Medium companies

- Turnover: not more than £25.9 million (s. 465 Companies Act 2006)

Example company	Category range (covering categories 1 – 3)
Company with £18,000,001 - £25.9m turnover	£93,600 - £471,380
Company with £12,000,001 - £18m turnover	£73,200 - £262,800
Company with £6,500,001 - £12m turnover	£47,500 - £230,400

Small companies, publicly-funded organisations or charities

- Turnover: not more than £6.5 million (s. 382 Companies Act 2006)

Example company	Category range (covering categories 1 – 3)
Company with £1,500,001 - £6.5m turnover or annual revenue budget or equivalent	£15,000 - £234,000
Company with £400,001 - £1,500,000 turnover or annual revenue budget or equivalent	£4,500 - £120,000
Company with £100,001 - £400,000 turnover or annual revenue budget or equivalent	£3,000 - £48,000
Company with £25,001 - £100,000 turnover or annual revenue budget or equivalent	£1,750 - £22,000
Company with £10,000 - £25,000 turnover or equivalent	£1,500 - £7,500

Individuals

Offence Category	Starting point	Category range
Category 1	Custody	Community order - custody
Category 2	Community order	Fine – community order
Category 3	Fine	Fine - fine

The table below contains a **non-exhaustive** list of additional 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 for individual offenders, or within the fine range for offending organisations. In some cases, having considered these factors, it may be appropriate to move outside the identified category range.

For individual offenders, when sentencing **category 1** offences, the court should also 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?

For individual offenders, when sentencing **category 2** offences, the court should also consider the community order threshold as follows:

- has the community order threshold been passed?

Factors increasing seriousness	<p><i>Statutory aggravating factors:</i></p> <ul style="list-style-type: none"> • 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 <p><i>Other aggravating factors include:</i></p> <ul style="list-style-type: none"> • Location of the offence, for example, near housing, schools, livestock or environmentally sensitive sites • Any escape of waste into water or air • Established evidence of community impact • Offence committed whilst on licence
Factors reducing seriousness or reflecting personal mitigation	<ul style="list-style-type: none"> • No previous convictions <u>or</u> no relevant/ recent convictions • Remorse • Prompt self reporting of offence and ready co-operation with enforcement authorities • Evidence of steps taken to remedy problem • Good character and/ or exemplary conduct • Serious medical conditions requiring urgent, intensive or long-term treatment • Age and/ or lack of maturity where it affects the responsibility of the offender • Mental disorder or learning disability, where not linked to the commission of the offence • Sole or primary carer for dependent relatives

STEP THREE: Consider whether there are any further factors which require adjustment to level of fine

At step three the court should 'step back' and consider whether the amount of fine calculated at step 2 meets the objectives of punishment, deterrence and the removal of gain derived by 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. The table below 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 an increase or decrease in the level of fine within the category range at step two. In exceptional cases, having considered these factors, it may be appropriate to move outside the category range.

Additional factors to consider in setting the level of fine and period of payment	<ul style="list-style-type: none">• The value, worth or available means of the offending organisation is materially different to that indicated by turnover• Ability to pay fine within specified period• Any financial gain or cost saved by the commission of the offence• 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 function• Context of industry in which offending organisation operating e.g. offending organisation operating in an industry with endemically low profitability• Fine impairs offender's ability to make restitution to victims
--	---

Payment of the fine

Criminal purpose organisations

If the offending organisation operated primarily for a criminal purpose or primarily by criminal means, immediate payment of the fine will be required.

Non-criminal purpose organisations

If the offending organisation did not operate primarily for a criminal purpose, immediate payment of the fine shall be required unless the court finds that the organisation is financially unable to make immediate payment or that such payment would place an undue burden on the organisation. If the court permits other than immediate payment, it shall require full payment at the earliest possible date, whether by requiring payment on a certain date or by establishing an instalment schedule. Normally the fine should be payable within 12 months. The period provided for payment shall not exceed five years.

Individuals

A fine is payable in full on the day on which it is imposed. Where that is not possible, the court may allow payments to be made over a period set by the court. Normally the fine should be payable within 12 months.

MODEL 3

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

Environmental Protection Act 1990 (section 33)

Environmental Permitting Regulations 2010 (regulation 38(1), (2) and (3) and regulation 12)

Triable either way

Maximum: 5 years' custody and/ or unlimited fine

STEP ONE: Determining the offence category

The court should determine the offence category using the table below.

Category 1	Greater harm and higher culpability
Category 2	Greater harm and lower culpability OR Lesser harm and higher culpability
Category 3	Lesser harm and lower culpability

The court should determine culpability and harm caused or intended, by reference **only** to the factors below, which comprise the principal factual elements of the offence. 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.

Factors indicating greater harm	<ul style="list-style-type: none"> • Waste of dangerous nature, for example, hazardous chemicals or sharp objects • Waste was noxious, widespread or pervasive, or liable to spread widely or have long-lasting effects • Adverse effect on human health, animal health or flora • Substantial costs incurred through clean-up, site restoration or animal rehabilitation • Significant interference with or prevention of other lawful activities due to offence
Factors indicating lesser harm	<ul style="list-style-type: none"> • Minor, localised effect or damage • Minor adverse effect on human health, animal health or flora • Low costs incurred through clean-up, site restoration or animal rehabilitation • Limited interference with or prevention of other lawful activities due to offence
Factors indicating higher culpability	<ul style="list-style-type: none"> • Deliberate breach of the law with commercial motive • Repeated incidents of offending or offending over extended period of time, where not charged separately • Deliberate concealment of illegal nature of activity • Substantial financial gain, either profit or cost-saving • Failure to respond to advice or warning from relevant regulatory authority • Failure to respond to concerns of employees or others • Knowledge of specific risks involved, for example, 'special' waste
Factors indicating lower culpability	<ul style="list-style-type: none"> • One off event, not commercially motivated • Genuine lack of awareness or understanding of the regulations specific to the activity in which engaged • Little or no financial gain • Mental disorder or learning disability, where linked to the commission of the offence

STEP TWO: Starting point and category range

Having determined the category, the court should refer to the principles below in sentencing offending organisations and to the principles and the table below, in sentencing individual offenders, using the corresponding starting points to reach a sentence within the category. The starting point within a table applies to all offenders of that type, irrespective of plea or previous convictions. A case of particular gravity, reflected by multiple features of culpability or harm in step 1, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features.

General principles to follow in setting the level of fine

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. Where the offender is an organisation, 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. If necessary, the court may compel the disclosure of the offender's financial circumstances pursuant to section 126 of the Powers of Criminal Courts (Sentencing) Act 2000.

Sentencers should determine the appropriate level of fine in accordance with section 164 of the Criminal Justice Act 2003, which requires offence seriousness and the financial circumstances of the offender to be taken into account.

The level of fine should reflect the extent to which the offender fell below the required standard. The fine should also reflect any economic gain or cost saved from the offence. It should not be cheaper to offend than to take appropriate precautions; the fine must be higher than the cost of complying with the law. Fines for category 1 offences will be higher than for category 2 offences and substantially higher than for category 3 offences.

For the most serious offences, the fine must be substantial enough to have a real economic impact which will bring home to the management (and shareholders) the need to improve regulatory compliance.

Organisations

Criminal purpose organisations

If the offending organisation operated primarily for a criminal purpose or primarily by criminal means, the fine should be set sufficiently high to divest the organisation of all of its assets.

Non-criminal purpose organisations

The fine range for an offending organisation that did not operate solely for a criminal purpose or primarily by criminal means should be based on the harm caused by the offence and the culpability of the offending organisation.

Where the offence is category 1 the appropriate fine will be seldom less than £x. Where the offence is category 2 the appropriate fine will be seldom less than £x. Where the offence is category 3 the appropriate fine will be seldom less than £x.

For the most serious offences, the fine should be large enough to bring the message home not only to the management of an organisation but also to its shareholders (where they exist). In the case of a company with substantial financial resources, the fine should have a material economic impact and should be higher than the cost of complying with the law. For companies with more limited financial resources, the fine must be higher than complying with the law.

For the most serious offences and where the company has substantial financial resources, a fine in the region of xx% of xx may be appropriate.

In order to gauge the resources of the offender, the court should look carefully at both turnover and profit and also at assets (or equivalent). It may be appropriate to consider an offender's financial circumstances in the context of the industry in which the offender is operating e.g. an offending company operating in an industry with endemically low profitability.

The court should consider whether a large fine may make it difficult to improve conditions in an organisation to comply with the law or cause unemployment and affect the local economy. In some serious cases, particularly where there has been serious reoffending, putting the company out of business may be an acceptable and appropriate consequence. In the case of small companies where it is undesirable that the fine should cause it to be put out of business and for individuals the court may consider ordering the fine to be paid over a period which may be up to a number of years.

The effect upon the provision of services to the public will be relevant. Whilst a public organisation such as a local authority, hospital trust or police force must be treated the same as a commercial company where the standards of behaviour to be expected are concerned, and must suffer a punitive fine for breach of them, the court may consider that a different approach to determining the level of fine is justified. The same consideration will be likely to apply to non-statutory bodies or charities if providing services.

Individuals

Offence Category	Starting point	Category range
Category 1	Custody	Community order - custody
Category 2	Community order	Fine – community order
Category 3	Fine	Discharge - fine

The table below contains a **non-exhaustive** list of additional 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.

For individual offenders, when sentencing **category 1** offences, 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?

For individual offenders, when sentencing **category 2** offences, the court should consider the community order threshold as follows:

- has the community order threshold been passed?

Factors increasing seriousness	<p><i>Statutory aggravating factors:</i></p> <ul style="list-style-type: none"> • 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 <p><i>Other aggravating factors include:</i></p> <ul style="list-style-type: none"> • Location of the offence, for example, near housing, schools, livestock or environmentally sensitive sites • Any escape of waste into water or air • Established evidence of community impact • Failure to comply with current court orders • Offence committed whilst on licence
---------------------------------------	--

Factors reducing seriousness or reflecting personal mitigation	<ul style="list-style-type: none"> • No previous convictions <u>or</u> no relevant/ recent convictions • Remorse • Prompt self reporting of offence and ready co-operation with enforcement authorities • Evidence of steps taken to remedy problem • Good character and/ or exemplary conduct • Serious medical conditions requiring urgent, intensive or long-term treatment • Age and/ or lack of maturity where it affects the responsibility of the offender • Mental disorder or learning disability, where not linked to the commission of the offence • Sole or primary carer for dependent relatives
---	--

Payment of the fine

Criminal purpose organisations

If the offending organisation operated primarily for a criminal purpose or primarily by criminal means, immediate payment of the fine will be required.

Non-criminal purpose organisations

If the offending organisation did not operate primarily for a criminal purpose, immediate payment of the fine shall be required unless the court finds that the organisation is financially unable to make immediate payment or that such payment would place an undue burden on the organisation. If the court permits other than immediate payment, it shall require full payment at the earliest possible date, whether by requiring payment on a certain date or by establishing an instalment schedule. Normally the fine should be payable within 12 months. The period provided for payment shall not exceed five years.

Individuals

A fine is payable in full on the day on which it is imposed. Where that is not possible, the court may allow payments to be made over a period set by the court. Normally the fine should be payable within 12 months.

Annex C – Case study scenarios: stage 1²⁵

Magistrates' scenario

The offender, A, is a family owned waste management business. The company has a licence to receive and store waste at a site. The offender pleaded guilty to the charge of **unlawful storage of waste** (asbestos) on land opposite A's permitted site that did not benefit from a permit.

The charge was brought by the Environment Agency under section 33 of the Environmental Protection Act 1990. The maximum penalty on summary conviction is a £50,000 fine and/ or 6 months imprisonment and, on indictment, imprisonment for a term not exceeding 5 years and/ or an unlimited fine. The cost of a permit is £1,500.

A was contracted to remove asbestos lagging from a site where demolition works were being carried out. In November 2011, two skips were delivered to the site by A and later collected for disposal. Both skips were then deposited on land where no environmental permit was in force. This land was opposite a permitted facility owned and operated by A. However, under the terms of their environmental permit, they were not allowed to accept asbestos at their site. The waste remained until the Environment Agency began to investigate.

A has been cautioned for similar offences. The asbestos stored unlawfully at the site did not endanger human health or the environment. Following intervention by the Environment Agency, the asbestos was finally disposed of correctly in December 2011. A regrets the incident and is ashamed of its actions.

Company accounts were served by the defence.

Crown Court scenario

The offending company, B, a retailer, pleaded guilty to 3 charges of illegally depositing and disposing of waste at two sites, contrary to section 33 of the Environmental Protection Act 1990.

Site 1

On 14 March 2012, Environment Agency officers visited the company's store on the edge of a park and discovered two illegal landfills.

The first illegal landfill, concealed behind a bund of earth and piles of waste tyres, contained stone, plastic, electrical goods, pipes, broken paving, concrete, wood, packaging, pots of paint, chemicals and broken dustbins.

The second illegal landfill contained about 6,200 tonnes of waste, including 200 sheets of asbestos. A large pit was also discovered, where waste had been burnt.

Site 2

The Environment Agency then initiated an investigation of the retailer's other stores. A director had assured the Environment Agency there was no illegal dumping at site 2 but a tip was found when inspectors flew over it and spotted a stockpile of waste in a wooded valley on land owned by B at this site. The stockpile contained substantial amounts of wood, pallets, furniture, rubble and cardboard. On a further visit in Spring 2012 Agency officers found the remains of a bonfire which had been burning for 14 days. The ash was waist-deep in places.

It is established that B's senior management were aware of the illegal activity despite their claim that they knew nothing about it and that the company's recycling policy had been breached by staff. The company has not co-operated with the Agency in clearing up the sites. By dumping this waste illegally it has avoided paying £25,000 in tipping and landfill tax.

A clean up operation has begun. The costs of clear up are expected to be around £200,000.

²⁵ Some details have been slightly changed to preserve confidentiality.

Annex D – Case study scenarios: stage 2²⁶

Crown Court scenario 1

A discount department store chain (turnover £85m) pleaded guilty to five charges of illegally dumping and burning waste under section 33 Environmental Protection Act 1990 at two of its sites in the countryside. Two of the charges were dumping without an environmental permit; a further two were of treatment of waste without a licence; and the fifth charge was dumping waste in a way likely to cause pollution or harm to human health.

11,700 tonnes of illegal waste were dumped across the two sites. Of that, 66 tonnes were classed as hazardous and just over three tonnes were asbestos.

According to a report from the Environment Agency, in Summer 2009, video footage taken from a helicopter showed a large stockpile of waste on land belonging to the company. The pile contained substantial amounts of wood including pallets and furniture, timber, tree cuttings, rubble and cardboard packaging. During a visit later in the year, Agency officers found the remains of a huge fire, where the illegal burning of materials including plastic, tyres and treated wood had taken place, producing polluting and toxic smoke.

The illegal operations had taken place over a lengthy period of time. The company had recycling schemes in place, but avoided costs by illegal dumping. The cost of disposing of the hazardous waste at a registered waste site would have been approximately £15,000 plus transport costs. The cost of disposing of the non-hazardous waste is approximately £800,000.

The company has since worked with the Environment Agency to remove the illegally dumped waste. It employed extra staff to help recover and sort the waste. The clean-up operation has cost the business almost £500,000 and took several months.

Crown Court scenario 2

A landowner pleaded guilty to 13 charges contrary to regulations 12 and 38 of the Environmental Permitting (England and Wales) Regulations 2010 for allowing his tenants to operate illegal waste operations on his land.

The offender owns a site, where he let 18 units for vehicle breaking, skip waste transfer, waste burning and scrap storage.

The units did not have concrete surfaces or proper drainage to protect the environment. The waste was being treated and stored without supervision. Some of the waste stored and treated at the site was hazardous and had contaminated the ground. Plastics, rubber and treated wood had also been burned illegally causing a nuisance and could have been harmful to health.

The offender let the units with no written agreements; he did not check whether his tenants had permits.

Police aerial photography showed illegal waste activities on site in Summer 2009. The illegal activities continued the following year. The offender was interviewed by the Environment Agency three times and written to twice in Autumn 2010 explaining that he must not allow waste operations on his land.

An extensive clean-up was needed for many of the sites.

The site had been used for industrial purposes since the early 1900s. The offender has now obtained a permit for one unit to allow for the depollution of vehicles. The offender had also served notices to quit on his tenants who were operating illegally.

The offender derived £207,000 in rent payments from the illegally operated waste sites. He has high means.

²⁶ Some details have been slightly changed to preserve confidentiality.

Crown Court scenario 3

The offender was found guilty of allowing his vehicle to be used in the commission of fly-tipping, an offence under section 33(5) of the Environmental Protection Act 1990.

In November 2010, the Environment Agency received a report of fly-tipping by two men from a flat bed truck on land to the rear of a bed shop in a town.

About 2 tonnes of waste was fly-tipped. When tested, the waste was found to contain Chrysotile asbestos – a hazardous waste that is toxic and carcinogenic.

A check of the vehicle's registration showed it belonged to the offender and was used in connection with his business. When questioned, the offender said he had been away when the illegal tipping occurred and denied any involvement. He claimed he was no longer the owner of the flat bed truck identified dumping waste.

The offender falsified a DVLA document and signed waste documents using a false name. The offender has two previous convictions for fly-tipping.

The cost of disposing of asbestos at a registered waste site is approximately £250 per tonne plus transport costs. This cost was avoided by the offender and borne by the Environment Agency.

The offender showed a total disregard for the law. He accepted £500 in payment to remove the waste but instead disposed of it in a highly irresponsible manner close to a public footpath and people's homes. The offender did not co-operate with the Environment Agency and maintained an obstructive attitude during investigations.

Magistrates' court scenario 1

A waste company (turnover of £573,800,000 in 2011/12) which runs a landfill waste management site, pleaded guilty to 5 offences under regulations 12 and 38 of the Environmental Permitting (England and Wales) Regulations 2010.

The company had breached its permit by allowing leachate²⁷ to escape from the site and by failing to notify the Environment Agency about the pollution.

Leachate control is particularly important at the site, which is located at a former quarry, because the quarry is situated on a Magnesian Limestone aquifer that feeds into the drinking water supply to a nearby city.

There were a number of management failings on site at the time which contributed to the pollution. The Environment Agency carried out an investigation after pollutants were recorded in groundwater at nearby boreholes in April 2010. Investigations to determine the source of the pollution found leachate was leaking out of the landfill's protective lining wall. Investigating officers believed this to have been caused by the construction of an access road in July 2009, which inadvertently provided a route for the leachate to pass over the protective walling.

In a separate incident the Agency said leachate was seen spilling out of one of the site's leachate storage tanks, creating a stream of the liquid on an area outside of the site's protective barriers. It said this occurred because inadequate controls had been used by the company to prevent the tank from overflowing.

The company told the court that it takes its environmental responsibilities seriously. The offences were not carried out deliberately. The company co-operated fully in order to prevent further pollution and had removed and reconstructed the access road in line with Environment Agency guidance. The company added that although the aquifer was affected by the leachate, there would be no impact on the safety of the public drinking water. The Agency said the firm is also required to drill more boreholes so that the spread of the contamination can be more accurately monitored.

²⁷ Leachate from landfill sites is typically caused by rain that has drained through the waste deposited on the site.

Magistrates' court scenario 2

A scrap merchant was found guilty of dumping 50 tyres in woodlands in breach of section 33 Environmental Protection Act 1990.

The tyres were traced to the offender because a number of them were covered in dried yellow foam similar to ones at the yard of his business. The offender said that the tyres in his yard were covered in the expandable DIY foam because two men who worked for him had been 'clowning around' with a tin of the substance when it had exploded – but he maintained that the tyres in the wood had nothing to do with him.

In Winter 2011, officers from the Environment Agency had visited the offender's yard and told him to remove the waste – but two months later he had not done so, and an enforcement order was issued.

Again nothing was done, and the order was extended.

Later, scrap tyres were found dumped in woods near to a field where the offender kept an animal. The tyres had not just been thrown from the lane but had been carried to the woods and concealed among the bushes and trees.

The offender maintained that the tyres were nothing to do with him, and that he had no need to dump them anywhere as he had a proper arrangement with a tyre salvage company to take tyres from his business.²⁸

The offender currently has more than £6,500 in outstanding fines relating to other environmental offences.

Magistrates' court scenario 3

A public body pleaded guilty to causing pollution after soil and silt disturbed by heavy machinery strayed into a brook contrary to regulations 12 and 38 of the Environmental Permitting (England and Wales) Regulations 2010. Three nearby rivers were also polluted.

The Environment Agency found the brook has been polluted during an operation and contractors working for the body were responsible.

The offence resulted in a 20 mile (33km) stretch of the brook and three rivers, impacting on water quality. There were no reports of dead fish as a result of the offence but silt is harmful to fish and wildlife and impairs the enjoyment of anglers.

The body has apologised "unreservedly" for the incident and has taken action to prevent it happening again. The controls it had put in place to protect the brook and rivers were inadequate due to the unusually high rainfall, which resulted in surface water flowing onto a track that was being used by heavy machinery.

During the incident, the body was fully co-operative with the Environment Agency's investigation and immediately undertook remedial measures to prevent further pollution entering the river. The body said it had subsequently improved its site planning procedures for operations in order to prevent a recurrence, and improve safeguards for rivers.

The body has carried out hundreds of similar operations, but this was the first pollution incident for more than 10 years. The body had a budget in 2011/12 of £51.7m.

²⁸ Disposing of the tyres legally would have cost around £50.