

Consultation on extending civil sanction variable monetary penalty powers Blueprint for Water Response – October 2023

Wildlife and Countryside Link is a coalition of 80 organisations working for the protection of nature. Together we have the support of over eight million people in the UK and directly protect over 750,000 hectares of land and 800 miles of coastline.

Blueprint for Water, part of Wildlife and Countryside Link, is a unique coalition of environmental, water efficiency, fisheries and recreational organisations that come together to form a powerful joint voice across a range of water-based issues.

This response is supported by the following Link members:

- Angling Trust
- British Canoeing
- Friends of the Earth
- Marine Conservation Society
- Rivers Trust
- Surfers Against Sewage
- The Wildlife Trusts

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Blueprint for Water welcomes the opportunity to respond to this consultation on extending civil sanction variable monetary penalty powers.

In [our response](#) to the previous consultation in May 2023, we welcomed the proposal to strengthen environmental civil sanctions through lifting the cap on the penalties that the Environment Agency can impose, and through introducing Variable Monetary Penalties into the EPR. We also flagged our concern with the lack of detail on the proposed removal of the cap, and how the Water Restoration Fund – announced in the Plan for Water – will work alongside these proposals.

Further detail is still required to explain how these variable monetary penalties will be calculated. For example, it remains unclear how different factors – such as an offender’s ‘ability to pay’ - will be weighted in determining the size of the penalty. It is also unclear precisely what ‘other public interest

factors' will be taken into account. We would also welcome further explanation of how environmental and social impact will be assessed.

The purpose of penalties must ultimately be to deter environmental harm. This deterrent can only be effective if regulators are adequately resourced to monitor and enforce legislation, and to impose penalties. There remains a significant risk that the efficacy and impact of uncapped variable monetary penalties will be undermined by Environment Agency resource and funding gaps.

We would be pleased to discuss any of the points in this, or our previous response, further.

Questions

Question 1: Is it clear within the enforcement and sanctions policy when we can use variable monetary penalties?

Please explain your answer

Yes. It is clear that the Environment Agency can only use variable monetary penalties (VMPs) when satisfied beyond reasonable doubt that a person or organisation has committed an offence, and that this will be the same position under the Environmental Permitting Regulations (EPR).

However, it remains unclear as to *how* the Environment Agency will be able to make full, effective use of VMPs. The burden of proof for using a VMP is the same as for a criminal prosecution, and as such will require intensive investigative procedures. Yet the Environment Agency's ability to monitor and enforce regulation has been constrained by significant cuts to funds and resources. Analysis from 2022 showed that the Agency's budget has been cut by 50% over the past decade.¹ From 2013-2019, the number of water quality samples taken by the Agency fell 45%, and the number of sampling points by nearly 40%.² In 2022, Environment Agency staff were being instructed to ignore 'low-impact' pollution incidents due to capacity issues.³

Additionally, there has been significant public and political concern regarding the reliance placed on water companies to self-monitor their performance, for example in relation to discharges from wastewater treatment works. In 2022, it was reported that self-monitoring by water companies was a hundred times less likely to detect breaches than testing by the Environment Agency.⁴

¹ August 2022. <https://www.independent.co.uk/climate-change/news/water-pollution-sewage-environmentagency-funding-b2154848.html>

² Unchecked. (2020). 'The UK's enforcement gap 2020'. <https://www.unchecked.uk/wpcontent/uploads/2020/11/The-UKs-Enforcement-Gap-2020.pdf>

³ The Guardian. (2022). 'Environment Agency tells staff to ignore pollution complaints, says ex-employee'. <https://www.theguardian.com/environment/2022/aug/29/environment-agency-tells-staff-to-ignore-riverpollution-complaints-age-of-extinction>

⁴ Engineering and Technology. (2022). 'MPs demand action as data calls into question water company selfmonitoring'. <https://eandt.theiet.org/content/articles/2022/09/mps-demand-action-as-data-calls-into-question-water-company-self-monitoring/>

Unless these resourcing challenges are addressed, there is a significant risk that the ability of the Environment Agency to use VMPs will be constrained, and therefore that the efficacy of uncapped VMPs as a deterrent will be undermined.

Question 2: Is the calculation method clear and easy to understand?

Please explain your answer

Further detail is needed to fully understand the calculation method. For example, the consultation document states that ‘Other public interest factors, including the offender’s ability to pay, are also taken into account when deciding the final penalty’. It is unclear how an offender’s ‘ability to pay’ is calculated, and what weight this will have in determining an appropriate penalty compared with other factors – for example, the level of culpability, and the environmental impact.

Further explanation of what counts as ‘other public interest factors’ is also required. For example, political and public interest in the poor state of the freshwater environment, and the environmental responsibilities of the water industry, has never been greater. Polling from 2023 shows that 83% of the public back stronger requirements for big businesses to take greater environmental responsibility, including paying to clean up the pollution that they create.⁵ Public expectations for clean, healthy waters and water industry accountability should be factored into VMP calculations.

We would also welcome further detail on how environmental and social impact will be calculated. The purpose of increased penalties must ultimately be to deter and disincentivise environmental harm from happening in the first place. Therefore, it is crucial that penalties are fully reflective of the environmental harm caused. In our previous consultation response, we suggested that calculations should include not only an assessment of harm, but also the cost of restoration to the standard before the harm was caused, and the further costs to support enhancement and achievement of Good Ecological Status (GES), plus administration costs.

Question 3: Do you think that by amending our approach to performing the calculation we will be able to issue proportionate and fair variable monetary penalties?

Please explain your answer

As discussed, we remain unclear as to how the Environment Agency will be able to issue proportionate, fair and effective VMPs given current financial and resource constraints.

VMPs are arguably less conspicuous – and therefore less damaging to companies’ reputation – than prosecution. It is therefore important that when penalties are issued, this process is fully transparent. The public should be made aware of company non-compliance, to ensure that companies are fully held

⁵ Wildlife and Countryside Link. (2023). Nature 2030 campaign polling. <https://www.wcl.org.uk/nature-2030-campaign-launches.asp>

to account. Full details of the breach, the harm caused, and the reasons for the penalty imposed should be made publicly accessible, in the same manner that criminal proceedings are public record.

Question 4: Do you think our current policy on appeals gives enough information and clarity to customers to understand the process?

Please explain your answer

The current policy on appeals is clearly set out on the relevant government webpage, and provides sufficient information to guide understanding. However, this relies on customers knowing where to look to find it.

The Environment Agency and water industry should explore ways to make information on VMPs, and instances of non-compliance, more accessible to the public. For example, through the Discover Water website.