

Environmental charities benefit from regulatory action

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Corporate Crime analysis: A recent press release from the Environment Agency (EA) noted that its enforcement action has led to charities receiving over £1.5m for various environmental projects. Christopher Badger, barrister at 6 Pump Court, considers the background to this development, the broader environmental regulatory regime and current trends.

Original news

Charities get £1.5m from companies breaking environmental laws, [LNB News 01/02/2017 102](#)

Thirty environmental charities and projects stand to benefit from a pay-out of over £1.5m from companies that have broken environmental laws, the EA has announced. Following EA enforcement actions, a number of companies have agreed to make payments to a range of charities and have pledged to make improvements to avoid future offences.

Briefly, what is the factual background of the current situation?

The Regulatory Enforcement and Sanctions Act 2008 gave the EA the power to issue enforcement undertakings in respect of certain criminal offences. The purpose of this civil sanction was to broaden the toolkit available to the EA to regulate environmental incidents, in particular aimed at those offences that fell towards the lower end of the scale. Initially the scope of offences for which the EA could accept an enforcement undertaking was very limited and tended to be restricted to highly technical offences. However, this has now been extended to include certain offences contrary to the Environmental Permitting (England and Wales) Regulations 2016, SI 2016/1154.

In short, which offences can enforcement undertakings be used for?

The EA has created a document setting out the available enforcement response options for any particular offence, see: [Enforcement and Sanctions Guidance](#).

Critically, however, the Environmental Permitting (England and Wales) Regulations 2016, SI 2016/1154, Sch 26 (and its predecessor under the Environmental Permitting (England and Wales) Regulations 2010, SI 2010/675) allows for enforcement undertakings to be accepted for a number of EPR offences, including offences under reg 38(1) and 38(2) (offences of operating without a permit, causing or knowingly permitting a water discharge or groundwater activity and failing to comply with an environmental permit condition). This is a significant step forwards for the use of enforcement undertakings, as it substantially broadens the factual circumstances in which it may be acceptable to resolve an environmental investigation by the means of a civil sanction.

What is the power of the EA to accept enforcement undertakings which include the granting of charitable donations from companies in breach of environmental laws?

Where restoration of harm arising from a particular offence is not possible, the enforcement undertaking offer can include 'action that will secure benefit or improvement to the environment'. Enforcement undertaking offers can also include the payment of a sum of money to benefit any person affected by the particular offence. These actions can include a charitable payment. The power to accept such payments derives directly from the legislation, for example the Environmental Permitting (England and Wales) Regulations 2016, SI 2016/1154, Sch 26, para 2 identifies the criteria that any enforcement undertaking offer must meet. It should also be noted that the official enforcement undertaking [offer form](#) available on the gov.uk website provides considerable guidance to lawyers and clients on the contents of an enforcement undertaking offer.

What are the recent cases in which the EA included charitable donations in the undertaking and the learning points for practitioners?

As identified in the EA press release, the following cases have included a six figure financial contribution to environmental charities as part of the enforcement undertaking:

- o Filippo Berio UK Limited agreed to make a financial contribution of £253,906.91 to the Herts & Middlesex Wildlife Trust
- o Anglian Water Services Limited agreed to make financial contributions of £100,000 to the River Nene Regional Park Community Interest Company, £100,000 to the Rockingham Forest Trust and £20,000 to the Wildlife Trust for Bedfordshire, Cambridgeshire and Northamptonshire
- o Heineken UK Limited agreed to make a financial contribution of £160,000 shared between the Wye and Usk Foundation and 'Bugs & Beasties'
- o Northumbrian Water Limited agreed to make a financial contribution of £375,000 shared between Tyne Rivers Trust, Northumberland Rivers Trust, Wear Rivers Trust, Tees Rivers Trust and Groundwork
- o Kerry Ingredients (UK) Limited agreed to make a financial contribution of £127,975 shared between Gloucestershire Wildlife Trust, Wildfowl and Wetlands Trust, Severn Rivers Trust and Bristol Zoological Society
- o Sandoz Limited agreed to make a financial contribution of £120,932.23 to the Surrey Wildlife Trust

The key learning point for practitioners is that enforcement undertakings provide an alternative route for resolving environmental offences, which can often be in the interests of environmental charities and to the benefit of the client by avoiding a criminal conviction. This is particularly the case for offences that tend to be highly technical in nature, such as a failure to comply with the producer responsibility obligations, but it can also be the case for a broader range of offences, including those contrary to the Environmental Permitting (England and Wales) Regulations 2016, SI 2016/1154. It is incumbent on those advising clients to be aware of the various options and to be able to weigh up their potential advantages at an early stage in any environmental investigation, as the chances of having an enforcement undertaking offer accepted are far higher the earlier in time that the offer is made.

What are the recent trends in EA enforcement and the increased use of enforcement undertakings (including use of enforcement undertakings for water pollution offences)?

The recent trend has been for the acceptance of enforcement undertakings for those offences that do not carry a high degree of culpability (for example, low/no culpability or negligence, according to the [Definitive Guideline on Sentencing Environmental Offences](#)) and which also do not have a high degree of harm (for example, not an offence above harm category 3 according to the guideline).

Official guidance doesn't limit the ability of the EA to only accept enforcement undertakings where the offence falls within this category, but an offer is more likely to be accepted where culpability and harm are assessed as no greater than negligent category 3.

There is therefore an increased emphasis on undertaking the necessary work as early as possible in order to demonstrate to the regulator that the offence under investigation falls into this bracket of culpability and harm and is consequently suitable for an enforcement undertaking. It is much more difficult to attempt to persuade the regulator to change its view on culpability and harm at a late stage in the investigation, after much of the ground work has already been completed, than it is to influence that assessment of culpability and harm at an early stage. Taking the necessary steps at an early stage in the investigation have the added effect of preserving the client's position so far as possible, in the event that an enforcement undertaking offer is rejected and the matter ends up being resolved in the criminal courts. Responding proactively to an incident and putting in the groundwork at an early stage has therefore become a high priority for those involved in advising in this area of law.

Interviewed by Alex Heshmaty.

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