

## Water quality under pressure

08/03/2018

**Environment analysis: As part of its enforcement measures against water pollution by companies, the Environment Agency (EA) plans to impose fines for offences, with the size of fines proportionate to offending companies' turnover. Christopher Badger, barrister at Six Pump Court Chambers, says a recently published report by the EA is useful for understanding the current state of water quality in England, but that its findings are not a great deal more than aspirational as to the steps the EA would like others to take to improve water quality.**

### **What is the background leading to the report?**

The report provides the EA's assessment of water quality in England and the pressures it faces. Defra has recently published the 25-year environment plan which has an ambition to improve the quality of at least three-quarters of waters to be close to their natural state. It is the view of government that the EA needs to work closely with water companies, farmers, businesses, environmental organisations and the public to improve water quality in England. The report sets out ways in which these different groups can help improve water quality.

### **What are its main findings?**

The report states there are still far too many serious pollution incidents in England—317 water incidents in 2016. In 2016, 86% of river water bodies had not reached good ecological status. The main reasons for this are agriculture and rural land management, the water industry and urban and transport pressure. Water quality issues were the cause of 38% of all fish test failures, and 61% of invertebrate test failures in rivers in 2015.

While pollutant loads to rivers from water industry discharges have declined in recent years, over the past decade the number of serious water pollution incidents from water companies has remained broadly the same, with about 60 incidents each year.

For assessed river water bodies in England, 55% were at less than good status for phosphorus in 2016. Nearly half of groundwater bodies will not reach good chemical status by 2021. For groundwaters protected for drinking water, nitrate levels were responsible for 65% of failures to achieve good chemical status. In respect of bathing water, 98% passed minimum standards and 65% were at excellent status in 2017.

Population growth, climate change, emerging chemicals, plastic pollution, nano-particles and fracking were identified as potential future threats to water quality.

### **What does the EA recommend to meet the aims of the 25-year environment plan?**

The report puts forward a number of actions to be adopted by differing sectors.

To address problems relating to nutrients in rivers and groundwater, farmers are to adopt the government's new farming rules for water and use fertilisers and manures with greater care, and manage land better, to minimise pollution incidents and nutrient losses to water. Water companies are to continue to improve wastewater treatment processes to reduce nutrient impacts on water.

To address problems linked to chemicals in rivers and groundwater, water companies are directed to understand the range of chemicals in sewerage systems and how they may be controlled, the public

are asked to minimise the use of household chemicals and pesticides and dispose of them responsibly, and farmers are asked to use pesticides with greater care to prevent run-off to water.

To address water pollution, farmers are actioned to manage farming practices better to reduce pollution incidents, water companies are to reduce pollution incidents from sewer systems and sewage treatment works, and the public and businesses are tasked to keep fats, oils, greases and household chemicals out of drains.

Finally, looking towards future pressures, the only action that is recorded in the report is for the public and business to minimise the use of single-use plastics. This is a potentially surprising lack of action, given the number of future pressures that have been identified in the report, and may reflect a lack of concrete policy initiatives for tackling future water pollution and environmental problems.

## **How does the EA intend to approach enforcement of water pollution offences?**

The report states:

‘The Environment Agency will work closely with others to make this happen, but we won’t hesitate to prosecute where necessary. We will put things right quickly through voluntary enforcement undertakings for minor breaches, but the size of fines for more serious offending needs to be proportionate to turnover and consistently applied by the courts. Company boards have to take environmental risk seriously and not see it as an operational expense.’

It is interesting that the report specifically identifies that fines need to be proportionate to turnover. This is not the current basis on which criminal courts impose financial penalties for environmental offending. Fines must be proportionate to the objectives of punishment, deterrence and the removal of gain through the commission of the offence, as well as the means of an offender, which doesn’t simply equate to turnover.

Although turnover is an important starting point for sentencing when looking at the Definitive Guideline, there are other crucial elements that a court must consider when determining what the appropriate and proportionate financial penalty should be, such as the steps that have been taken by any organisation to remedy any harm caused, the extent to which an organisation has recognised the impact of any particular criminal offence at a senior level and then acted on that recognition, and the criminal record of an offender.

## **Is there anything else in the report of interest to lawyers and their clients?**

The report is useful for understanding the current state of water quality in England, but not a great deal more than aspirational as to the steps the EA would like others to take to improve water quality.

Concrete steps should be identified to incentivise the protection of national water resources which go beyond the high-level observations in this report. Developments that are not contained within the report could include improving the quality of corporate reporting on the impact on the natural environment through the publication of prescriptive guidance on non-financial reporting, or developing the fiduciary duties of directors towards the natural environment under the [Companies Act 2006](#).

That said, lawyers will be able to glean those areas that are likely to be of interest to the EA and where we can expect to see enforcement resources being targeted. Water companies in particular are likely to find themselves under increasing pressure, in particular as a result of a perceived lack of progress in tackling serious pollution incidents.



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