

Sentencing Guidance for Environmental Offences

By Oliver Campbell and James Purnell

The Sentencing Council has published a new Definitive Guideline in relation to Environmental Offences. The Guideline is effective from 1 July 2014.

The Guideline

1. The Guideline has been issued in accordance with s. 120 of the Coroners and Justice Act 2009 and must be taken into account by any court imposing a sentence in relation to a relevant environmental offence on or after 1 July 2014.
2. The Guideline applies to offences of the unauthorised or harmful deposit, treatment or disposal of waste, and illegal discharges to air, land and water under s. 33 of the Environmental Protection Act 1990 and regs 12 and 38 of the Environmental Permitting Regulations 2010 and certain related offences.
3. The Guideline provides a twelve step formula in relation to sentencing organisations and individuals. Broadly, it requires the court (a) to assess culpability by putting the offence into one of four categories of culpability (“deliberate”; “reckless”; “negligent”; and “low or no culpability”) and then (b) assess harm by placing the offence into one of four categories of harm

(category 1 being the most serious types of harm, and category 4 being a risk of minor harm).

4. In respect of a corporate defendant, the court is then required to put the defendant into one of four categories of size depending on its turnover. The categories are “large” (turnover of £50m plus); “medium” (turnover of £10-50m); “small” (turnover of £2-10m); and “micro” (turnover of less than £2m).

5. The Guideline contains tables giving the recommended starting point and range of fine, depending upon the category the defendant falls into in terms of size, culpability and harm. For example, for a large company, whose actions are deemed deliberate and who causes category 1 (the most serious) harm, the recommended starting point is a fine of £1,000,000 and the recommended range of fine is £450,000 - £3,000,000.

6. There are separate tables for individuals being sentenced for the equivalent environmental offences.

Comment

7. The Sentencing Council has chosen to give far more prescriptive recommendations than it has so far considered appropriate in health and safety cases. It will be interesting to see whether the Sentencing Council will seek to develop its guidance in health and safety cases in a comparable way.

8. In its Definitive Guideline in relation corporate manslaughter and health and safety offences causing death (2010), the Council concluded: “A fixed

correlation between the fine and either turnover or profit is not appropriate. The circumstances of defendant organisations and the financial consequences of the fine will vary too much; similar offences committed by companies structured in differing ways ought not to attract fines which are vastly different; a fixed correlation might provide a perverse incentive to manipulation of corporate structure”. It is interesting that those concerns did not prevail in relation to environmental cases.

9. In its Response to Consultation, the Council stated that the starting points and ranges categorised according to turnover at step four provide an initial fine level for sentencers, with flexibility at later steps to adjust from that figure, if appropriate, given the wider financial circumstances of the offending organisation. This is achieved in the Definitive Guideline by indicating in the “obtaining financial information” section that turnover will initially be relevant but that other financial factors relating to the offending organisation may need to be referred to later; and, at step six, highlighting that the financial circumstances of the organisation will need to be considered in the round. Thus, it remains to be seen how the Guideline will be applied to companies with a high turnover but low profitability, or how they will apply to organisations with a complex corporate structure.

9. In its press release accompanying the Guideline, the Council stated that it expected the Guideline to result in higher fines for the most serious offences.

10. However, in the case of very large companies, the Guideline does not fit entirely comfortably with the guidance of the Court of Appeal in January 2014 in the case of *R v Sellafield* [2014] EWCA Crim 49. In *R v Sellafield* the

Court of Appeal upheld a fine of £700,000 imposed on Sellafield in a case where the court regarded the culpability of the defendant as “medium” and the “the actual harm in effect nil and the risk of harm very low”. The new Guideline did not apply to that case as the sentence was imposed prior to July 2014. However if the Guideline had applied then the case would probably have been regarded as a category 3 case, falling into the “negligent” category, with a recommended fine falling into a range of between £35,000 and £150,000.

11. The Guideline will make it easier to predict the likely level of fine in many environmental cases. However difficulties will arise where the extent of the culpability or harm is unclear or disputed, and will also arise in the case of very large companies, or companies with an unusual structure.

Oliver Campbell and James Purnell

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