



Department  
for Environment  
Food & Rural Affairs

# Consultation on strengthening environmental civil sanctions

Increasing the cap on variable monetary penalties and  
broadening their use

Date: April 2023

We are the Department for Environment, Food and Rural Affairs. We are responsible for improving and protecting the environment, growing the green economy, sustaining thriving rural communities and supporting our world-class food, farming and fishing industries.

We work closely with our 33 agencies and arm's length bodies on our ambition to make our air purer, our water cleaner, our land greener and our food more sustainable. Our mission is to restore and enhance the environment for the next generation, and to leave the environment in a better state than we found it.



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VMP-EPR-amendments2023@defra.gov.uk

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# Executive summary

Protecting our natural environment is a government priority. Strengthening regulations that enable polluters to be held to account is one piece of the wider plan in reducing pollution to protect biodiversity and the ecology of our rivers and seas.

The government wants to strengthen the abilities of the Environment Agency (EA) to issue monetary penalties for environmental offences in England, and to raise the cap for such penalties. This will involve:

- increasing the overall cap for variable monetary penalties in the Environmental Civil Sanctions (England) Order 2010 from its current amount of £250,000
- introducing powers to issue variable monetary penalties for breaches of environmental permits into the Environmental Permitting Regulations.

The options for change to the cap for consultation are to raise the cap to £25 million, to £250 million or to have no cap at all with unlimited penalties.

The EA calculates variable monetary penalties in accordance with the [Sentencing Council Guidelines](#), which set out different levels of penalty according to the seriousness of the offence and with consideration of the financial circumstances of the offender.

This consultation seeks input on changes for the variable monetary penalty cap and introduce variable monetary penalties into the Environmental Permitting Regulations to increase the EA's ability to take action on environmental offences.

# Part 1: Introduction

## 1.1 About this consultation

This consultation seeks your views on the proposed approach to amending the Environmental Civil Sanctions (England) Order 2010 ('the 2010 Order') and the Environmental Permitting (England and Wales) Regulations 2016 ('EPR') to improve the effectiveness of civil penalties that can be levied by the Environment Agency (EA). The consultation package comprises:

The **consultation document** where:

- **Part 1** sets out the background to the consultation.
- **Part 2** sets out each of the options for updating the 2010 Order and the EPR. Consultation questions are included where there is an opportunity for you to shape the proposed approach.

A glossary of acronyms used throughout the consultation document can be found in **Annex A**.

Although this consultation covers England only, the existing EPR also apply to Wales. Environment is a devolved matter, subject to a small number of reserved areas. The territorial application of these proposed amendments will be England only.

## 1.2 Context

The EA is responsible for enforcing laws that protect the environment. Their work protects people and the environment and improves water, land and biodiversity. Within England they are responsible for:

- regulating major industry and waste
- treatment of contaminated land
- water quality and resources
- fisheries
- inland river, estuary and harbour navigations
- conservation and ecology

Effective regulatory enforcement by the EA is essential for delivering the government's priorities. If companies break the law, they should expect to be penalised. Improving the civil sanctions regime will mean that the EA can act more quickly and prevent repeat offenders from polluting.

The EA investigates incidents where there appears to have been breaches of environmental regulations. If they identify that an offence has occurred, they can take action through the following routes:

- Use of notices powers to stop offending and restore and remediate any damage to the environment.
- Provision of advice and guidance
- Use of warning letters
- Provision of simple cautions
- Civil penalties
- Civil sanctions
- Criminal prosecutions

This consultation relates only to the **civil sanctions**.

## 1.3 Civil sanctions

Environmental civil sanctions are intended to provide a proportionate alternative to criminal prosecution for businesses and other persons who fail to comply with environmental regulation despite having a good general approach to compliance.

The power to provide for civil sanctions originates in The Regulatory Enforcement and Sanctions Act 2008 (RES Act). This consultation focuses on changes to:

- **the 2010 Order**: this created powers to impose civil sanctions for a range of environmental offences
- **the EPR**: the current EPRs provide for civil sanctions only to the extent of enforcement undertakings.

The 2010 Order provides for the following types of civil sanction:

- Fixed monetary penalties
- Variable monetary penalties (capped at £250,000)
- Compliance notices
- Restoration notices
- Stop notices
- Enforcement undertakings
- Third-party undertakings

Restoration notices and enforcement undertakings are the sanctions most used by the EA. Additional information on these sanctions can be found online at [The Environmental Civil Sanctions \(England\) Order 2010 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2010/1012)

The proposed changes outlined in the consultation relate specifically to the use of variable monetary penalties.

An increase to the variable monetary penalties cap in the 2010 Order will impact all variable monetary penalties that are based on legislation connected to the 2010 Order. A full list of affected Acts and Regulations is outlined in Annex B.

The approach used adheres to the [Macrory principles of regulatory enforcement](#), which provide context on how civil sanctions work. The Regulatory Enforcement and Sanctions Act 2008, which underpins the 2010 Order, was based on the Macrory principles.

The Macrory principles state that:

- A sanction should aim to change the behaviour of the offender
- A sanction should aim to eliminate any financial gain or benefit from non-compliance
- A sanction should be responsive and consider what is appropriate for the particular offender and the regulatory issue
- A sanction should be proportionate to the nature of the offence and the harm caused
- A sanction should aim to restore the harm caused by regulatory non-compliance, where appropriate
- A sanction should aim to deter future non-compliance
- Regulators should avoid perverse incentives that might influence the choice of sanctioning response (for example, regulators should not retain the revenue from Monetary Administrative Penalties or exercise any control over how that revenue should be spent).

## 1.4 Use of variable monetary penalties

Variable monetary penalties can be issued by the EA for serious offences, including:

- when there is evidence of negligence or mismanagement
- when there is an environmental impact
- to remove an identifiable financial gain or saving as a result of the breach
- where it is not in the public interest to prosecute

The maximum variable monetary penalty that may be issued for environmental offences under the 2010 Order is capped at £250,000. This cap level risks not being an effective deterrent, as it may often be cheaper for operators to pay the penalty (or several penalties) than to solve the underlying issue.

We expect that raising the cap would improve the effectiveness of variable monetary penalties as a deterrent. Variable monetary penalties provide an alternative to criminal prosecutions, which can be a lengthy and expensive process and are reserved for the most serious offences.

This change would enable the EA to impose more stringent financial penalties to support our environmental outcomes from improving water quality to halting species decline.

The proposed changes will affect the following broad sectors:

- Waste operations
- Water discharge activities

- Flood risk activities
- Nuclear
- Process industry activities, including:
  - Cement and Minerals
  - Chemicals
  - Combustion
  - Energy from Waste (EfW)
  - Food & Drink
  - Intensive agriculture (Pigs and Poultry)
  - Landfill
  - Metals
  - Oil and Gas
  - Paper and textiles
  - Refineries & Fuel

Improving the ability of the EA to impose financially based civil sanctions is an important step in improving the environment by holding offending companies to account for their actions. The EA follows the [Sentencing Council Guidelines](#) to calculate the appropriate level of penalty, which ensures that penalties are proportionate to the offence, and to an operator's financial situation and ability to pay.<sup>1</sup> This aligns the approach to calculating civil penalties with how the court calculates criminal sanctions. In addition, there is no limit on the size of the fine that the courts can impose.

## 1.5 Expanding the EPR

The EPR address waste management and pollution prevention and control. The environmental permitting regime applies to businesses and organisations that are involved with any of the following activities:<sup>2</sup>

- manufacturing
- power generation and other combustion processes
- storage, treatment, use and disposal of waste, including scrap metal
- discharges to surface water and groundwater
- radioactive substances
- activities using solvents (e.g., dry cleaning)
- mining and extractive industries
- flood risk activities
- pig and poultry farming

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<sup>1</sup> For more information on how the EA approaches civil sanctions, see [Environment Agency enforcement and sanctions policy - GOV.UK \(www.gov.uk\)](#)

<sup>2</sup> For more information on activities requiring Environmental Permits, see <https://www.gov.uk/guidance/check-if-you-need-an-environmental-permit>



The EPR are a core legal framework for the EA to enforce compliance with key regulations that govern industries that have the potential to pollute the environment.

Variable monetary penalties are currently available under the 2010 Order but not under the EPR. This means that monetary penalties cannot be imposed for the majority of EA investigations.

Introducing variable monetary penalties to the EPR would therefore allow the EA to impose variable monetary penalties for a wider range of regulation breaches, where such penalties are the most appropriate enforcement action.

The availability of variable monetary penalties in the EPR will enable regulators to respond to different levels of offending across all sectors in a more proportionate way. It fills the 'justice gap' between prosecution and warning. The level of penalty will take into account the environmental impact, culpability and the offender's ability to pay, and will be calculated using the [Sentencing Council Guidelines](#).

When a variable monetary penalty is calculated, the size and financial circumstances of the organisation, the type and seriousness of the offence and the specifics of the case are all taken into account. The penalty can also include an amount to cover any obvious financial benefit unlawfully gained by the offender.<sup>3</sup>

The EA follows the Guidelines of the Sentencing Council to assess suitable penalties for environmental offences. The calculation methodology ensures that penalties are proportionate to an operator's turnover and ability to pay.<sup>4</sup>

Historically most EPR investigations into environmental offending occur in the waste sector (where there are a broad range of company sizes subjected to investigations) and water industry sectors. Smaller numbers of investigations typically occur across other areas such as agriculture and process industry sectors.

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<sup>3</sup> The full enforcement and civil sanctions policy can be found here: [Environment Agency enforcement and sanctions policy - GOV.UK \(www.gov.uk\)](#)

<sup>4</sup> For more information on how the EA calculates variable monetary penalties, see [Annex 1: RES Act - the Environment Agency's approach to applying civil sanctions and accepting enforcement undertakings - GOV.UK \(www.gov.uk\)](#)

## 1.6 Proposed amendments

To improve the civil sanctions regime for the EA, we propose to:

- i. Raise the cap on variable monetary penalties within the Environmental Civil Sanctions (England) Order 2010 to £25 million, £250 million or unlimited (no cap).
- ii. Introduce variable monetary penalties into the EPR.

This will allow the EA to implement more proportionate sanctions for a wider range of environmental offences. Specific questions are outlined in Section 2 which will give you the opportunity to shape the proposed approach.

## 1.7 Audience

Anyone may respond to this consultation. Those who are likely to have an interest include:

- operators or individuals who carry environmental permits
- operators or individuals who engage in environmental activities that require compliance under the 2010 Order
- environmental Non-Governmental Organisations.

## 1.8 Responding to the consultation

This consultation starts on Tuesday, 4 April 2023 and closes on Monday 15 May 2023.

You can respond to the consultation questions using the online tool which can be found on Citizen Space at: <https://consult.defra.gov.uk/water-industry/environmental-civil-sanctions-consultation> Responses may also be sent to Defra by email or post. If responding via email or post, please state:

- Your name
- Your email address
- Your organisation
- The consultation title

Enquiries and responses should be directed to:

[VMP-EPR-amendments2023@defra.gov.uk](mailto:VMP-EPR-amendments2023@defra.gov.uk)

OR

Consultation on Strengthening Environmental Civil Sanctions  
Consultation Coordinator, Defra  
2nd Floor, Foss House, Kings Pool,  
1-2 Peasholme Green

York, YO1 7PX

If you would like to receive hard copies of the consultation documents, please contact [VMP-EPR-amendments2023@defra.gov.uk](mailto:VMP-EPR-amendments2023@defra.gov.uk)

You may find that not all questions in this consultation are relevant to you or your business. Where this is the case, you do not have to provide an answer and should select “N/A” from the available answers and write “N/A” in any free text answer boxes.

## 1.9 After the consultation

Members of the public may ask for a copy of the responses under the Freedom of Information (FOI) legislation. If you do not want your response – including your name, contact details and any other personal information – to be publicly available, please say so clearly in writing when you send your response to the consultation. Please note, if your computer automatically includes a confidentiality disclaimer this will not count as a confidentiality request. Please explain why you need to keep the details confidential. We will take your responses into account if someone asks for this information under the FOI legislation. However, because of the law, we cannot promise that we will always be able to keep those details confidential.

We will summarise all responses once the consultation window is complete. This summary will include a list of names of organisations that respond to the consultation, but not people’s personal names, addresses or other contact details.

This consultation is being held in line with the UK government’s Consultation Principles. **Please note that a consultation period of 6 weeks applies.** More information on the UK government’s Consultation Principles can be found at:

<https://www.gov.uk/government/publications/consultation-principles-guidance>

## 1.10 Next steps

The options in this consultation require changes to the 2010 Order and the EPR, which will require Parliamentary approval. The next steps are as follows:

- Public consultation on the options
- Government response to consultation is published
- Statutory Instruments laid in Parliament
- Implementation of the updated 2010 Order and EPR

# Part 2: Options and consultation questions

## 2.1 About you

**Q1: Would you like your responses to be treated as confidential? Yes/No**

**If you answered Yes to this question, please give your reason.**

**Q2: What is your name?**

**Q3: What is your email address?**

**Q4: Are you responding on behalf of an organisation or as an individual?**

**Q5: If you are responding on behalf of an organisation, what type of organisation do you represent? Water company, ENGO, ..., other (please specify)**

**Q6: What is the name of your organisation (if applicable)?**

**Q7: Do you give permission for your responses to be published as part of the consultation summary document? Yes/No**

**Q8: Where are you located? (Note that this consultation is for regulations that apply only in England).**

## 2.2 Options

This section sets out the options for the proposed changes to the Environmental Civil Sanctions (England) Order 2010 ('the 2010 Order') and the Environmental Permitting (England and Wales) Regulations 2016 ('EPR') and seeks your views on these changes.

### 2.2.1 Raising the cap on variable monetary penalties

The maximum monetary penalty that may be issued by the Environment Agency (EA) under the 2010 Order is currently capped at £250,000. This cap level means that it may be cheaper for an operator to pay the penalty (or several penalties) than to deal with the underlying issue and limits the effectiveness of these penalties.

We are proposing that this cap be raised or entirely removed to enable the EA to impose penalties that are more effective and better reflect the severity of the offence committed.

Penalties are always calculated proportionately to the offence and the circumstances of the offender. Penalties approaching the top of any range would only be appropriate in the most egregious and exceptional circumstances.

**Q1. To what extent do you agree or disagree that the cap on variable monetary penalties under the 2010 Order should be changed from the current cap of £250,000?**

- a. Strongly agree
- b. Agree
- c. Neither agree nor disagree
- d. Disagree
- e. Strongly disagree
- f. N/A

Please provide details to explain your answer. If this question is not applicable to you, please write N/A.

**Option 1: Remove the cap entirely i.e., no cap**

Removing the cap entirely would enable the EA to assess penalties to any level, in accordance with the guidelines of the Sentencing Council.<sup>5</sup> This means that operators will be penalised proportionately to the seriousness of the offence and their ability to pay. An unlimited cap allows each case to be considered on its individual circumstances in line with the Sentencing Council Guidelines, which ensure that penalties do not exceed an offender's ability to pay.

**Option 2: Increase the cap to £250 million**

We would expect a £250 million cap to provide a substantial deterrent effect against environmental offending. The cap demonstrates the significant societal costs associated with environmental offences.

This cap represents the maximum upper limit possible; however, the Sentencing Council Guidelines would still apply, and all penalties would remain proportionate to the individual circumstances of the operator and the offence.

**Option 3: Increase the cap to £25 million**

We would expect a cap of £25 million to provide a significant deterrent effect against environmental offending.

This cap represents the maximum upper limit possible; however, the Sentencing Council Guidelines would still apply, and all penalties would remain proportionate to the individual circumstances of the operator and the offence.

**Option 4: Retain the existing £250,000 cap**

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<sup>5</sup> The Sentencing Council Guidelines can be found here: [Environmental Offences Definitive Guideline \(sentencingcouncil.org.uk\)](https://www.sentencingcouncil.org.uk) and detailed guidance on how the EA calculates variable monetary penalties can be found here: [Annex 1: RES Act - the Environment Agency's approach to applying civil sanctions and accepting enforcement undertakings - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

While retaining the current penalty cap provides continuity, we consider this has not posed a sufficient deterrent against large or serious pollution offences that may warrant more significant penalties.

**Q2. Which option would you prefer to be taken on the variable monetary penalty cap?**

- a. Remove cap entirely (no cap)
- b. Raise the cap to £250 million
- c. Raise the cap to £25 million
- d. Leave the cap as it is at £250,000
- e. Raise the cap to another amount

If you responded that the cap should be raised to an alternative amount, please specify what you think this amount should be and why: [free text box]

## **2.2.2 Introducing variable monetary penalties into the EPR**

Currently variable monetary penalties are available under the 2010 Order but not under the EPR. The EPR are a core legal power for the EA to enforce compliance with key regulations that govern industries that have the potential to pollute the environment.

Introducing variable monetary penalties to the EPR would therefore allow the EA to impose variable monetary penalties for a wider range of regulation breaches, where such penalties are the most appropriate enforcement action. (See section 1.5 of this document for additional background).

We are proposing to introduce variable monetary penalties as a sanction available under the EPR.

### **Option 1: Introduce variable monetary penalties into EPR**

Introducing variable monetary penalties to the EPR would allow the EA to impose financial penalties for wider offences that breach the terms of an operator's permit.

## Option 2: Keep the current regime as it is with no amendments to the EPR

Under the current EPR regime, the EA can prosecute offenders and/or issue enforcement, suspension, revocation and remediation notices.<sup>6</sup> However, it is not able to issue financial penalties to operators for offences under the EPR and therefore criminal courts would remain the primary route for punishing serious environmental breaches.

### **Q3. To what extent do you agree or disagree that variable monetary penalties should be introduced into the EPR?**

- a. Strongly agree
- b. Agree
- c. Neither agree nor disagree
- d. Disagree
- e. Strongly disagree
- f. N/A

Please provide details to explain your answer. If this question is not applicable to you, please write N/A.

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<sup>6</sup> For detailed information on enforcement and offences, see <https://www.legislation.gov.uk/ukxi/2016/1154/part/4>

## Annex A: Glossary

**2010 Order** Environmental Civil Sanctions (England) Order 2010

**EA** Environment Agency

**EPR** Environmental Permitting (England and Wales) Regulations 2016

## Annex B: Legislation reliant on 2010 Order

An increased cap to variable monetary penalties within the 2010 order will also apply to the following legislation:

- Destructive Imported Animals Act 1932
- Pests Act 1954
- Weeds Act 1959
- Salmon and Freshwater Fisheries Act 1975
- Wildlife and Countryside Act 1981
- Salmon Act 1986
- Environmental Protection Act 1990
- Water Resources Act 1991
- Water Industry Act 1991
- Deer Act 1991
- Land Drainage Act 1991
- Protection of Badgers Act 1992
- Environment Act 1995
- Water Act 2003
- The Sludge (Use in Agriculture) Regulations 1989
- The Environmental Protection (Disposal of Polychlorinated Biphenyls and other Dangerous Substances) (England and Wales) Regulations 2000
- The Control of Pollution (Oil Storage) (England) Regulations 2001
- The Water Resources (Environmental Impact Assessment) (England and Wales) Regulations 2003
- The Hazardous Waste (England and Wales) Regulations 2005
- The Environmental Impact Assessment (Agriculture) (England) (No 2) Regulations 2006
- The Producer Responsibility Obligations (Packaging Waste) Regulations 2007
- The Transfrontier Shipment of Waste Regulations 2007
- The Nitrate Pollution Prevention Regulations 2015
- The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018