

COP26 & THE FUTURE OF ENVIRONMENTAL REGULATION

Welcome

COP26 & the future of environmental regulation

This webinar will begin at 16:30

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Meet the panel

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David Symons
Future Ready Innovation Leader
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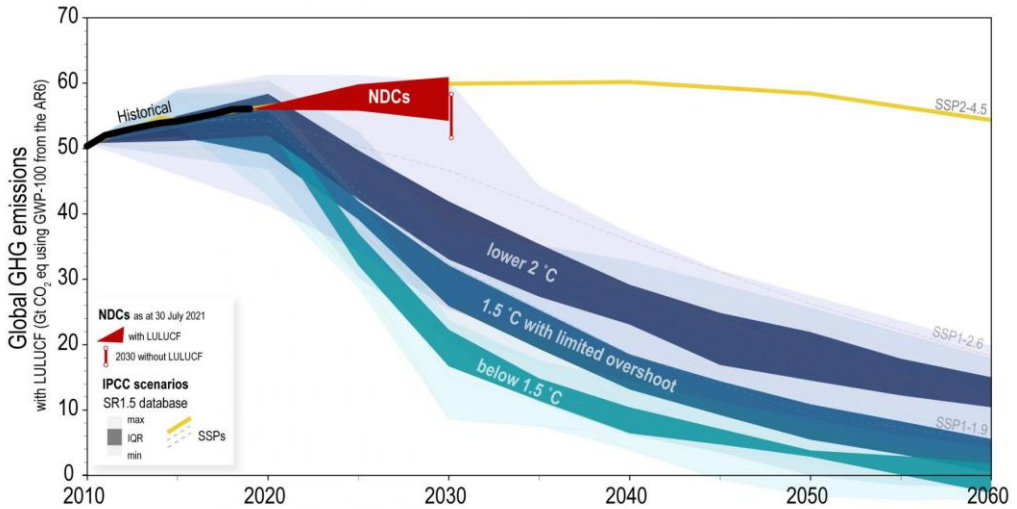
What the outcome means
for business

David Symons
WSP UK Director of Sustainability



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Before the conference



Source UNFCCC NDC synthesis report

The Glasgow Climate Pact

Countries to come back next year with beefed up NDCs.

Accelerating efforts to phase down (not Phase out) unabated coal and 'inefficient' fossil fuel subsidies

Paris Rule Book - Carbon markets to buy offsets slightly amended, but gaps remain

Rich countries must 'at least double' funds for adaptation.

A section on 'loss and damage' and a dialogue for this

Other Key decisions

Methane - 100 countries supporting the US / EU pledge to cut methane emissions by 30% by 2030

Coal – 23 countries phase out coal power

Technology breakthroughs - 40 countries including China and the US agree to collaborate to develop standards to grow the market for clean technologies

Finance - Major financial institutions commit to align private financial flows with net zero

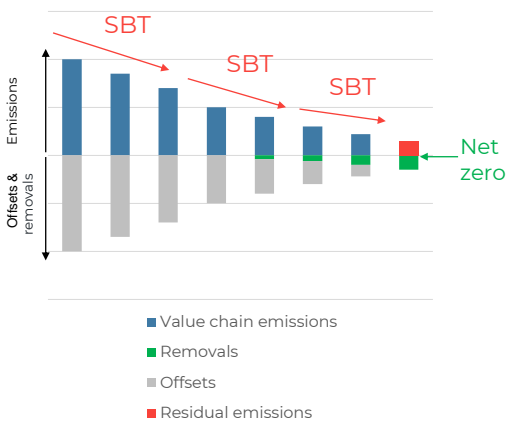
Trees - 110 countries backing the Glasgow Declaration on Deforestation

Cars – Phase out commitments for fossil fuelled cars and vans by 2035/40



A new standard for net zero by companies

SBTs vs Net Zero

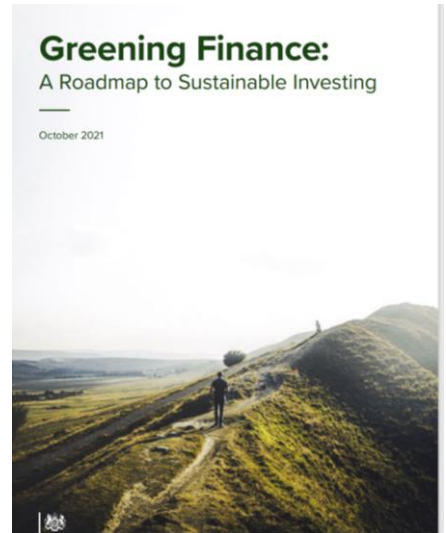


- Scope 1, 2 and 3
- Cutting emissions in line with 1.5oC
- Can only use offsets for less than 10%
- Support net zero outside 'formal' boundaries



UK Sustainable Disclosure Requirements

- 1300 UK Registered companies will have to report climate risks in line with TCFD.
 - Traded companies
 - Private companies with > 500 people and £500m turnover
 Financial years starting on / after 6 April 2022
- Mandatory climate transition plans for “asset owners, asset managers and listed companies” – from 2023
 - Chg reduction targets
 - Interim milestones
 - Actions the organisation will take

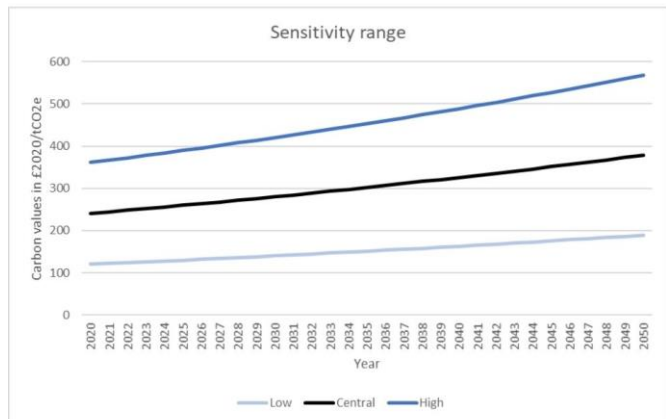


Updated carbon prices for government business cases

2018 prices

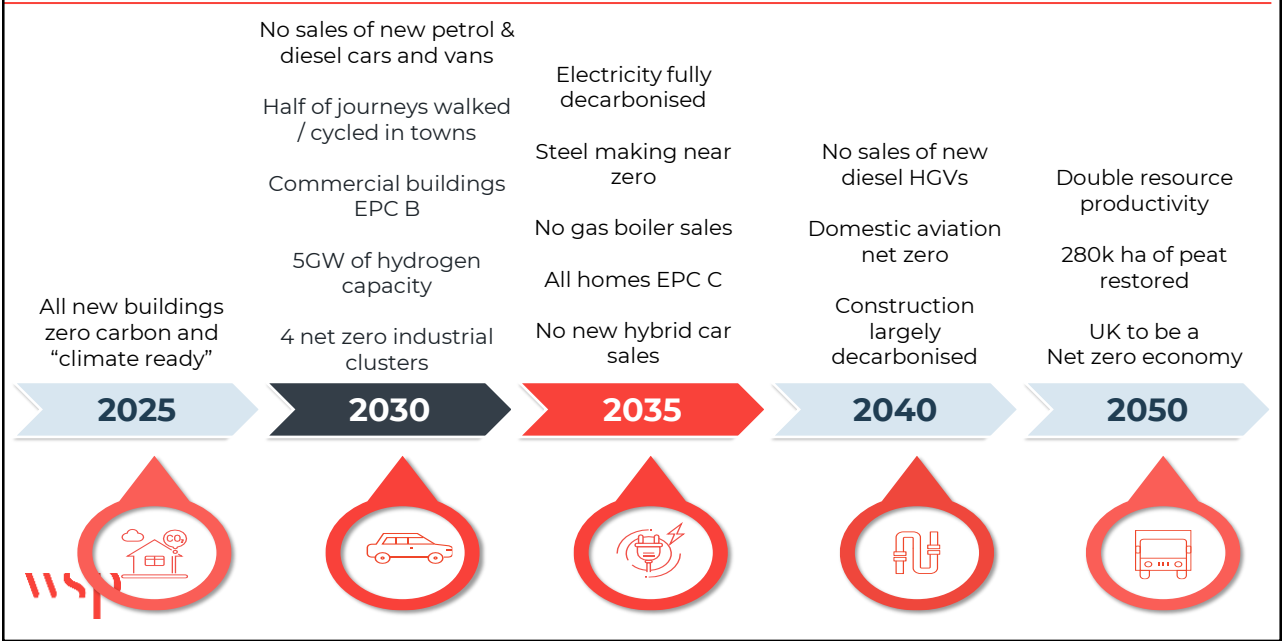
| Year | Low | Central | High |
|------|-------|---------|--------|
| 2018 | 2.33 | 12.76 | 25.51 |
| 2019 | 0.00 | 13.15 | 26.30 |
| 2020 | 0.00 | 13.84 | 27.69 |
| 2021 | 4.04 | 20.54 | 37.04 |
| 2022 | 8.08 | 27.24 | 46.40 |
| 2023 | 12.12 | 33.94 | 55.75 |
| 2024 | 16.17 | 40.64 | 65.11 |
| 2025 | 20.21 | 47.33 | 74.46 |
| 2026 | 24.25 | 54.03 | 83.82 |
| 2027 | 28.29 | 60.73 | 93.17 |
| 2028 | 32.33 | 67.43 | 102.53 |
| 2029 | 36.37 | 74.13 | 111.88 |
| 2030 | 40.41 | 80.83 | 121.24 |

Latest update



A strong net zero implementation plan

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In conclusion

1. 1.5°C is still just about alive
2. New requirements for business
3. The UK's net zero strategy has some clear timescales

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Environment Act 2021 Worth the wait?

Angus Evers
24 November 2021

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Facts and figures

1056 Days from publication of Draft Environment (Principles and Governance) Bill to Royal Assent

756 Days from first introduction of Environment Bill into Parliament to Royal Assent

278 Pages

149 Sections

21 Schedules

26 Years since last Environment Act



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Context and overview

- Post-Brexit “governance gap” – loss of:
 - EU Commission’s enforcement function and European Environment Agency’s monitoring function in respect of implementation of environmental law;
 - Environmental principles to guide policy-making and legislation (principles are not “retained EU law”).

An Act to make provision about targets, plans and policies for improving the natural environment; for statements and reports about environmental protection; for the Office for Environmental Protection; about waste and resource efficiency; about air quality; for the recall of products that fail to meet environmental standards; about water; about nature and biodiversity; for conservation covenants; about the regulation of chemicals; and for connected purposes.
[9th November 2021]

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Structure

| Subject matter | Relevant provisions |
|--|---|
| Governance (including targets, improvement plans, environmental principles, Office for Environmental Protection) | Parts 1-2 (Sections 1-49) and Schedules 1-3 |
| Waste and resource efficiency | Part 3 (Sections 50-71) and Schedules 4-10 |
| Air quality and environmental recall | Part 4 (Sections 72-77) and Schedules 11-12 |
| Water | Part 5 (Sections 78- 97) and Schedule 13 |
| Nature and biodiversity | Parts 6-7 (Sections 98-139) and Schedules 14-20 |
| Miscellaneous (including amendment of REACH legislation) | Part 8 (Sections 140-149) and Schedule 21 |

Governance – Targets and improvement plans

- Secretary of State must set long-term (>15 years) environmental targets for at least 1 matter within 4 ‘priority areas’ – air quality, water, biodiversity, resource efficiency and waste reduction – by 31/10/2022.
- Must also set by 31/10/2022:
 - Air quality target for annual mean level of PM_{2.5} in ambient air (may be long-term);
 - Species abundance target (to be achieved by 31/12/2030).
- Targets must be reviewed by 31/1/2023 and then within 5 years of previous review.
- Secretary of State to prepare environmental improvement plan for period of at least 15 years:
 - Defra’s 25 Year Environment Plan is the first such plan;
 - Annual reports;
 - Review by 31/1/2023 and then within 5 years of previous review;
 - Must set interim targets and renew plan on expiry.
- Secretary of State must make arrangements for obtaining data for measuring progress against targets and improvement plans.
- **Targets and improvement plans will influence future policy and regulation.**



Governance – Environmental principles

- Secretary of State must prepare policy statement on environmental principles:
 - Principle that environmental protection should be integrated into the making of policies;
 - Principle of preventative action to avert environmental damage;
 - Precautionary principle, so far as relating to the environment;
 - Principle that environmental damage should as a priority be rectified at source;
 - Polluter pays principle.
- Ministers (except MoD and HM Treasury) must “have due regard” to policy statement when making policy.
- Duty on Ministers to make statement about whether Bill provisions enacting environmental law would reduce level of environmental protection.
- Duty on Secretary of State to report to Parliament every 2 years on “developments in international environmental protection legislation which appear to the Secretary of State to be significant”.



The Office for Environmental Protection

- Principal objective = contribute to environmental protection and improvement of the natural environment.
- Functions:
 - Monitor and report on progress towards meeting environmental targets and improvement plans (annually);
 - Monitor and report on implementation of environmental law (discretionary);
 - Advise on changes to environmental law (on request of Minister);
 - Enforce against public authorities for failure to comply with environmental law:
 - Not taking proper lawful account of environmental law when exercising functions;
 - Unlawfully exercising or failing to exercise functions it may have under environmental law;
 - Any person (but not public authority) can complain to OEP;
 - Can investigate complaint if failure is 'serious';
 - Can issue information notices and decision notices to public authorities;
 - Can bring 'environmental review' proceedings in High Court and (in 'urgent' cases only) bring judicial review or statutory challenge proceedings and intervene in third party proceedings.
- Remit generally restricted to England, but NI Assembly can extend to NI.
- Secretary of State makes key appointments, can issue guidance on enforcement policy and allocates funding.
- **OEP may not seem directly relevant to private sector, but be aware of monitoring and advisory powers.**



Waste and resources

- New powers for 'relevant national authority' to:
 - Introduce additional producer responsibility obligations;
 - Make regulations requiring those involved in manufacturing, processing, distributing or supplying products or materials to meet, or contribute to, the disposal costs of those products;
 - Require manufacturers and producers to provide information about resource efficiency of their products;
 - Set resource efficiency standards;
 - Introduce deposit schemes;
 - Introduce charges for single use items (but only plastic items in NI);
 - Power to introduce electronic waste tracking;
 - Power to regulate import/export of waste or transit of waste for export.
- Sellers of carrier bags in England and NI may be required to register with administrator (and pay registration fee).
- New duty for waste collection authorities and commercial waste collectors to collect recyclable waste separately from other waste for recycling or composting. Prohibition on mixing dry recyclables with food and garden waste. Dry mixed recyclables must be collected in separate waste streams.
- Food waste to be collected at least weekly.
- Additional cost recovery powers for EA/NRW/SEPA in relation to performing functions under End-of-Life Vehicles Regulations and WEEE Regulations, and for EA/NRW in relation to performing waste enforcement functions.
- **Much of this has already been consulted on.**

Air quality and environmental recall

- Amendments to Local Air Quality Management Framework in Environment Act 1995:
 - Secretary of State required to review Air Quality Strategy at least every 5 years and report annually to Parliament on:
 - progress on delivering air quality objectives and standards (set out in the Strategy) in relation to England; and
 - steps Secretary of State has taken in that year to support meeting those objectives and standards;
 - Local authorities that have declared Air Quality Management Areas required to prepare action plans setting out how they will exercise their functions to ensure that air quality standards are achieved and maintained. Duty on all tiers of local government and neighbouring local authorities to co-operate.
- Local authorities given new power to impose civil penalties for the emission of smoke in smoke control areas in England.
- New powers for Secretary of State to make regulations making provision for recall of 'relevant products' (motor vehicles, engines or parts) that do not meet relevant environmental standards and to issue compulsory recall notices.
- **Air quality action plans will have implications for determination of planning applications in Air Quality Management Areas.**
- **Automotive sector needs to be aware of environmental recall provisions and any regulations made under them.**

Water

- New power for Secretary of State or Welsh Ministers to direct water undertakers to prepare and publish joint proposals for improving management and development of water resources.
- New duty on sewerage undertakers in England and Wales to prepare, publish and maintain drainage and sewerage management plans at least every 5 years.
- Increased powers for Ofwat to require water and sewerage undertakers to provide information for purpose of monitoring their performance.
- New power for Ofwat to modify conditions of water and sewerage undertakers' appointments.
- New power for Environment Agency to vary or revoke permanent water abstraction licences without compensation after 1/1/2028 to protect water environment from serious damage.

Water – Storm overflows

- New duties in relation to storm overflows from sewers.
- Secretary of State must:
 - prepare plan by 1/9/2022 for reducing discharges in England (and publish 3-yearly progress reports);
 - report by 1/9/2022 on actions needed to eliminate discharges from storm overflows.
- Sewerage undertakers must:
 - publish annual storm overflow reports;
 - publish information about discharges from storm overflows within 1 hour of them starting and ending;
 - continuously monitor water quality in watercourses upstream and downstream from storm overflows and sewage treatment works;
 - secure progressive reduction in adverse impacts of discharges from storm overflows.
- EA to publish annual report on operation of storm overflows.
- Duties on sewerage undertakers are enforceable by Secretary of State and Ofwat.
- **Could this be an area for some of the OEP's first enforcement activity?**

MPs vote to allow water companies to dump raw sewage into rivers and seas

[Comment](#)

Nature and biodiversity

- New general condition in all planning permissions and development consent orders granted in England, requiring biodiversity gain plan to be submitted and approved before development may lawfully commence.
- Secretary of State to establish 'biodiversity gain site register'.
- New duty on public authorities to enhance biodiversity when delivering their functions.
- Provisions for creation of Local Nature Recovery Strategies in England.
- New powers for Natural England to prepare and publish species conservation strategies and protected site strategies.
- New duty on local highway authorities to consult before felling street trees.
- Provisions for creation of conservation covenants by agreement between landowners and 'responsible bodies':
 - Local land charge;
 - Indefinite duration (freehold) or remainder of lease term (leasehold);
 - Original covenantor and successors in title bound by covenant, but can also enforce responsible body's obligations;
 - Breach of covenant is a breach of contract;
 - Can be modified or discharged by Upper Tribunal (Lands Chamber).
- New power for Secretary of State to amend Habitats Regulations (provided level of environmental protection is not reduced).
- New power for Secretary of State to make regulations prohibiting use in UK commercial activities of forest risk commodities produced in breach of local laws relating to prevention of conversion of forest to agricultural use.
- **Biodiversity net gain requirements will add complexity to new developments.**
- **Compliance with forest risk commodity regulations is likely to require supply chain due diligence.**

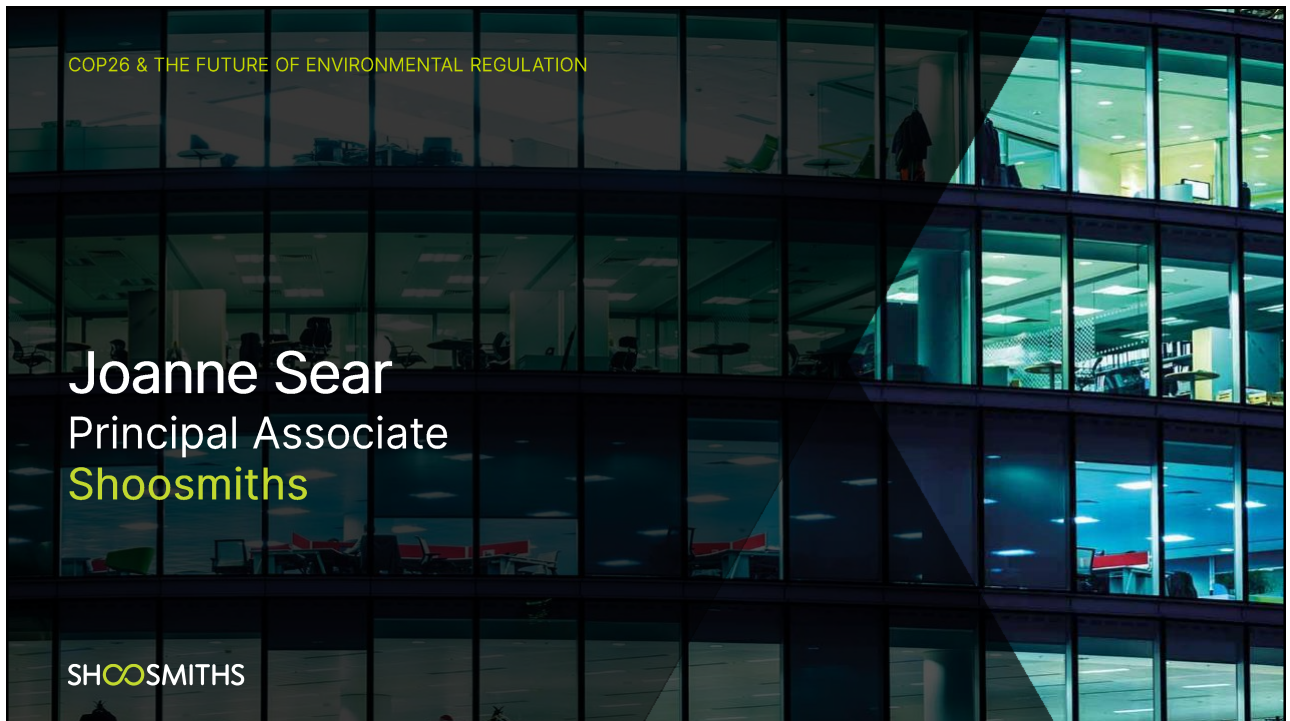
REACH

- Powers for Secretary of State and Devolved Administrations to amend certain parts of UK retained version of EU REACH Regulation by regulations, if consistent with aim and scope of REACH Regulation.
- 'Protected provisions' must not be amended by regulations, including Annexes.
- Must publish explanation of why regulations are consistent with aim and scope of REACH Regulation.
- Regulations are subject to affirmative resolution procedure.
- Secretary of State or a Devolved Administration may also amend REACH Enforcement Regulations 2008 if necessary or appropriate for, or in connection with, enforcement of the REACH Regulation (but maximum prison sentence cannot exceed 2 years).
- **Potential for divergence in approaches across the UK.**

► **REACH REGULATION (EC) No 1907/2006 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**
of 18 December 2006
concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC
(Text with EEA relevance)
(OJ L 396, 30.12.2006, p. 1)

Implementation

- REACH amendment powers (Section 140 and Schedule 21) in force 10/11/2021.
- First Commencement Regulations made 16/11/2021; in force 17/11/2021 – creation of OEP and related definitions (but no powers).
- Waste and resources provisions in force 9/1/2022.
- Other provisions require Commencement Regulations by Secretary of State / Welsh Ministers / Scottish Ministers / DAERANI



Joanne Sear
Principal Associate
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Sentencing trends in environment offences

Following the £90million fine imposed on Southern Water in July 2021

Joanne Sear

24 November 2021

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The Southern Water sentencing

- In July 2021, Southern Water Services Limited was fined a record £90 million for sewage discharge offences.
- Southern Water pleaded guilty to 51 counts of discharging untreated sewage into controlled coastal waters.
- Offences were committed at 17 separate sites, over a 6-year period from January 2010 to December 2015.
- Total period during which untreated sewage was discharged was 61,704 hours.
- Estimated total volume of untreated sewage across all sites is 16-21 billion litres.
- How did the court reach a figure of £90 million?

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The Environmental offences definitive guideline

- The Sentencing Guideline came into force on 1 July 2014.
- The Guideline covers sentencing for offences relating to:
 - Unauthorised or harmful deposit, treatment or disposal etc of waste
 - Illegal discharges to air, land and water
- There are separate guidelines for offences committed by organisations and those committed by individuals.
- Elements of the sentencing process have been put into 12 separate steps to ensure all relevant factors are considered.
- Fines are the most common sentences passed for environmental offences.

Application of the Guidelines in Southern Water

Culpability and Harm

- The court will first look at culpability and decide whether the actions were either:
 - Deliberate; Reckless; Negligent; or with Low/no culpability
- In Southern Water, 50 out of 51 offences fell into the “deliberate” category:
 - *“I am satisfied so that I am sure that each of counts 1-50 was committed deliberately, in that there was an intentional breach of, or flagrant disregard for, the law by the Defendant’s board of directors, and/or a deliberate failure by the board of directors to put in place and enforce such systems as could reasonably be expected in all the circumstances to avoid the commission of the offence”*
- Harm is split into 4 categories:
 - Major; Significant or Risk of Major; Limited or Risk of Significant; Risk of Limited Harm
- In Southern Water, the Judge concluded that the offences caused “Category 1” harm:
 - *“It is axiomatic that discharging hundreds of thousands of litres of untreated sewage into a body of water has a major adverse effect on both the water quality and its amenity value: On a hot day, who would not wish to swim in clean water off a beach in Kent? But who would venture into the sea if they knew that the Defendant had discharged a large amount of untreated sewage into the sea from a nearby works the previous day?”*

Application of the Guidelines in Southern Water

Turnover of the Offender

- The Guidelines provide a starting point and category range for a fine. They are structured by reference to the turnover of the offender.
- Southern Water was a “Large Company” because it had a turnover of more than £50 million.

- For a Deliberate Category 1 offence:

- Starting point is £1 million;
- Range is £450k to £3 million.

| Large Deliberate | Starting Point | Range |
|------------------|----------------|-----------------------|
| Category 1 | £1,000,000 | £450,000 – £3,000,000 |
| Category 2 | £500,000 | £180,000 – £1,250,000 |
| Category 3 | £180,000 | £100,000 – £450,000 |
| Category 4 | £100,000 | £55,000 – £250,000 |

- For “Very Large Organisations” (VLO), where turnover very greatly exceeded the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence.
- Southern Water was a VLO because it had a turnover of £0.88 billion (£880,000,000)
- This led to increase in starting point and range “*by a factor of 2.5*”. That gave a starting point of £2.5 million for each offence.

Application of the Guidelines in Southern Water

Aggravating and Mitigating factors

- Aggravating features will result in a higher penalty being applied.
- Southern Water aggravating factors:
 - Previous convictions;
 - Underreporting of spills;
 - Motivation for the offending (to increase income); and
 - Serious obstruction of the Environment Agency’s investigation.
- Mitigating features will result in a lower penalty being applied.
- Southern Water mitigating factors:
 - Remorse and determination to put matters right – new Chairman; and
 - Remedial steps – “*some significant steps have been taken, and significant financial expenditure has been incurred*”
- Appropriate fine for (almost) every offence - £6 million

Application of the Guidelines in Southern Water

Benefit from the offence

- The court should remove any economic benefit that the offender has derived through the commission of the offence including:
 - avoided costs
 - operating savings
 - any gain made as a direct result of the offence.
- Economic benefit can be estimated if it cannot be calculated.
- In Southern Water, the Defendant's benefit was estimated to be £36m:
 - *"... I accept the methodology that the Environment Agency has adopted when... they performed a calculation using the known volume of discharge at one site, scaled up and down according to the size of other sites and the known duration of leaks that occurred at those sites"*

Application of the Guidelines in Southern Water

Final Sentence

- The court imposed a separate penalty for each treatment site.
 - There were 17 treatment sites.
 - 16 sites merited a penalty of £6 million
 - 1 site merited a penalty of £3 million
 - This totalled £99 million
- The court added the economic benefit derived
 - £99 million + £36 million = £135 million
- The court reduced the fine by one third to take account of Southern Water's guilty plea
 - £90 million

Trends in environmental sentencing

ESG – Environmental, Social and Governance

- Corporate ESG credentials becoming increasingly important.
- Pressure from stakeholders for corporate entities to operate within the law and in accordance with higher moral and ethical standards.
- Mandate to legislature to create new offences.
- Mandate to courts to impose higher sentences.
- Southern Water - if a substantial fine *“results in large institutional investors taking a more active role in ensuring that the companies that they invest in comply with the law, then that is not inconsistent with the purposes of sentencing, which includes the reduction of crime.”*

Trends in environmental sentencing

Fines are getting bigger

- Thames Water fined £1m in 2016
- Thames Water fined £20m in 2017
- National retailer fined £3m in 2017
- Southern Water fined £90m in 2021
- First £100m fine...?

Trends in environmental sentencing

Back dated landfill tax

- Since 1 April 2018, landfill tax has been extended to cover waste disposed of at unauthorised sites.
- HMRC and the Environment Agency work closely together where an illegal deposit of waste is discovered.
- Landfill tax can be charged. Those involved could face a fine of up to 100% of the tax or criminal prosecution.
- These tax penalties will apply alongside any other penalties for environmental offences.

Trends in environmental sentencing

Increasing use of proceeds of crime applications

- Proceeds of Crime Act originally targeted at drug trafficking and money laundering. In addition to a penalty, the defendant is required to pay back the benefit obtained from the offence.
- Increasingly used in regulatory offences including environmental.
- The case law is expanding to cover more and more scenarios.
- *Ryder and Green v Environment Agency [2020] EWCA Crim 1110*
- The avoided costs of removing illegally stored waste could be the subject of a proceeds of crime order.
- The individuals ordered to satisfy a confiscation order for £276,004, being the estimated costs of removing the waste.

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