

‘Enforcement Undertakings’

– an opportunity for a good outcome from a bad situation



Our environment is precious, fragile and in difficulty, so every pollution event or instance of habitat damage is to be deeply regretted. The publication of new sentencing guidelines for environmental offences in 2014 has resulted in a big step up in the size financial penalties being applied by the courts.

There is no doubt that bigger penalties for environmental offences will deter those prepared to behave badly, and provide even greater focus on environmental protection for those striving to be good environmental actors. Even so mistakes, lapses and blind spot events will continue to occur.

Not all businesses operating under environmental regulations are aware that recent legislation has enabled environmental regulators to decide not to prosecute certain environmental offences, if the regulator feels able to accept ‘enforcement undertakings’ as an alternative.

Businesses have to proactively offer ‘enforcement undertakings’ which usually includes accepting that a problem has occurred, showing that the cause of the problem has been addressed, restoring any damage and often providing funding to an NGO to undertake further environmental improvement. If the package is accepted by the regulator not only does the company avoid the pain of a court case and potential criminal conviction, with all the implications that brings, it is also an opportunity to show that the company is responsible, trusted and working positively with community organisations to protect and enhance the environment.

Buglife is the national charity that conserves all invertebrate species; this includes a broad remit of work in relation to the conservation of freshwater life and activity all around the UK conserving wild bees and other pollinators. Both freshwater life and pollinators are frequent victims of pollution incidents and habitat damage. Buglife is open to discussions, with businesses that find themselves in the situation where they may be prosecuted for an environmental offence, about what work could be done to repair the specific damage and to provide additional environmental improvements as part of an ‘enforcement undertaking’. We are also prepared to consider if it is appropriate, given the nature of the incident and proposed undertakings, for Buglife to act as the nominated environmental NGO in the statutory undertaking.

What does Buglife do?

Buglife is the only organisation in Europe devoted to the conservation of all invertebrates. We're actively working to save Britain's rarest little animals, everything from bees to beetles, worms to woodlice and jumping spiders to jellyfish.

Invertebrates are vitally important to a healthy planet – humans and other life forms could not survive without them. The food we eat, the fish we catch, the birds we see, the flowers we smell and the hum of life we hear, simply would not exist without bugs. Invertebrates underpin life on earth and without them the world's ecosystems would collapse.

There are more than 40,000 invertebrate species in the UK, and many of these are declining and under threat, indeed our invertebrates are facing an extinction crisis.

Each invertebrate species plays a unique and important role in the web of life, although we don't always know how important its role is, and invertebrates have incredible life stories yet to be told; we literally don't know what we are losing.

Buglife's work is highly acclaimed winning the prestigious European Landowners 2016 Bee Award and evaluated as the best value for money conservation organisation in the UK in terms of achievement per pound spent by the Environment Funders Network.

Buglife's aim is to **halt the extinction of invertebrate species and to achieve sustainable populations of invertebrates**. We are working hard to achieve this through a range of approaches, including public engagement, promoting knowledge and taking practical action. Every year Buglife staff work on the delivery of about 25 significant projects, several of which will be in the £250K to £1M bracket.

Buglife has officers in all four UK countries and also undertakes work overseas. The charity's main priorities at this time are freshwater and pollinator conservation.

There is much more about Buglife on our website www.buglife.org.uk and in particular you may be interested in our Freshwater Strategy – in which we set out the actions that we and others will have to undertake to get rivers, streams and ponds into better condition for wildlife - and our Pollinator Manifesto that sets out the actions needed to reverse the declines in bees and other pollinators.

Buglife Freshwater Strategy

https://cdn.buglife.org.uk/2019/08/Freshwater-strategy-full-report_0.pdf

Buglife Pollinator Manifesto

https://cdn.buglife.org.uk/2019/07/Pollinator-manifesto-with-covers_1.pdf

What is an Enforcement Undertaking?

This is a legally binding voluntary agreement that is offered by an organisation that may have committed an offence and accepted by the regulator.

The aim of the undertaking is to remedy, within agreed timescales, all environmental impacts of the offence, all financial benefits that accrued from the offence, and all impact on others. Importantly, the undertaking must be offered by the offender early in the process.

If an Enforcement Undertaking is in place and is successfully enacted the original offence will not be prosecutable.

What makes an Enforcement Undertaking attractive to a regulator?

There is considerable flexibility for the regulator, both in terms of when an Enforcement Undertaking is considered to be an appropriate sanction and the content of any undertaking. Different agencies and individuals within those agencies are likely to take different approaches, but there are a number of factors that will make an offer more attractive to the regulator:

- Offered early – usually before the regulator has decided to prosecute and always before discussion starts about any Variable Monetary Penalty
- Details steps to ensure future compliance
- Has Director or Board level commitment
- Contains an appropriate restoration proposal
- Provides compensation to those affected and the environment
- Proposed actions are practicable and deliverable with a good prospects of securing a timely and satisfactory environmental outcome
- Offers of a total sum of money that is greater than the costs avoided or advantage gained by the non-compliance (usually with an additional ‘penalty charge’)
- Incorporates an environmental charity, able to convert the financial contribution into an environmental gain
- Parties to the undertaking that the regulator trusts to deliver
- Provides funds to cover any costs incurred by the regulator

The application should state clearly the reasons, period and other details of the compliance failure, and should detail the costs avoided or benefits accrued from the failure.

In some cases the regulator will expect a ‘penalty charge’ (the difference between the cost of the undertaking minus the benefit of the non-compliance) to be about 10% if the company self reports, but if the regulator had to notify the company first, they may expect a penalty charge of c.30%.

Most regulators will **not** consider an enforcement undertaking in situations where the incident is very serious (e.g. EA category 1 incidents), was deliberate or disgracefully negligent, involved deceit or fraud, or if the offered undertaking attempts to deny liability.

Which offences can be converted into Enforcement Undertakings?

The Environment Agency, Natural England, SEPA (Scottish Environmental Protection Agency) and NRW (Natural Resources Wales) are all able to accept undertakings for certain specified offences. Eligible offences relate to pollution, waste management, abstraction, migratory fish and recycling.

The offences for which the Environment Agency is able to accept Enforcement Undertakings are detailed here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/580982/LIT_9052.pdf

Further information on the EA approach is available here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/468315/LIT_5551.pdf

Examples of recent enforcement Undertakings accepted by the EA are set out here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546750/LIT_5789.pdf

Natural England guidance on enforcement is here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389649/enforcement-guidance.pdf

Recent Natural England enforcement undertakings are summarised here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/570747/enforcement-annual-report-2015-16.pdf

Enforcement Undertakings are also possible in Scotland and Wales, but the range of eligible offences is at the moment narrower than in England.

NRW guidance on enforcement is here: <https://naturalresources.wales/media/1142/guidance-on-enforcement-and-sanctions.doc> and eligible offences are set out here -

<https://naturalresources.wales/media/1137/guidance-on-enforcement-and-sanctions-appendix-4-examples-of-offences-and-options-for-our-enforcement-response.doc>

SEPA guidance on enforcement is here <https://www.sepa.org.uk/media/219242/enforcement-guidance.pdf>

SEPA powers arise from the Regulatory Reform (Scotland) Act 2014

<http://www.legislation.gov.uk/asp/2014/3/part/3/chapter/2/crossheading/enforcement-undertakings/enacted>

and the eligible offences are set out in The Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 <http://www.legislation.gov.uk/ssi/2015/383/made>

Changes to Sentencing for Environmental Offences

The new official Sentencing Guidelines for environmental offences was published in July 2014.

https://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf They have resulted in a step change in many of the penalties applied in the courts. Cases have included:

- a fine of £933K plus costs for a water company and its contractor convicted of polluting a waterway;
- a waste operator getting 16 weeks imprisonment for operating a facility with no permit;

- a company that allowed sewerage to pollute two beaches being fined £153K; and
- a waste-management company being fined £1 million plus £244K in costs for the illegal deposition and storage of waste.

In Conclusion

By acting quickly to take control of environmental non-compliance a company may be able to avoid the risk of prosecution, reputational harm, legal costs, higher penalties and raised insurance costs, while also building trust and providing environmental improvements.

The conservation of bees, mayflies and thousands of other species could be benefitted by action arising from Enforcement Undertaking, resulting in a healthier environment for all. Buglife is well placed to facilitate environmental repair and improvement and is ready to consider helping companies get the best outcome from a bad situation.

<https://www.valpak.co.uk/blog/every-cloud-has-a-silver-lining-solutions-for-companies-unaware-of-their-obligations-under-the-packaging-waste-regulations>