

Court of Appeal supports major increases in environmental fines for very large organisations

In the first case since publication of the new Sentencing Guidelines for environmental offences, the Court of Appeal has suggested that fines in the millions of pounds would be appropriate for serious environmental offences (and potentially in excess of £100 million in some circumstances) for very large organisations. The Court made a direct comparison with fines applied to financial services market regulation breaches, suggesting that the lower courts should apply a far tougher approach to environmental crime in the future.

The Facts

Thames Water Utilities Ltd (TWUL) had allowed an overflow of untreated sewage into a brook in the North Wessex Downs Area of Outstanding Natural Beauty, through failure to take adequate steps to unblock pumps. The overflow caused the death of significant numbers of invertebrates in the water, although the ecosystem recovered completely within 6 months. The Environment Agency prosecuted TWUL for discharging sewage without an Environmental Permit. Following conviction, TWUL was committed to the Crown Court for sentencing.

Crown Court Sentencing Approach using the new Sentencing Guidelines

The Crown Court used the new Sentencing Guidelines¹ for the first time to set a fine (the broad steps are set out in the table overleaf). The judge determined that TWUL had been negligent, given the history of pump failure and inaction, and that the harm was Category 3 (minor harm). Under the Guidelines, a negligent Category 3 offence committed by a "Large Organisation" (£50 million and above) should result in a fine of between £35,000 to £150,000 with a starting point for consideration of £60,000. However, for "Very Large Organisations" (VLO), the Guidelines state that the courts might need to go beyond these ranges to find a proportionate penalty. Given TWUL's

Key issues

- Thames Water was fined £250,000 for sewage pump breakdown and pollution of brook
- The Court of Appeal gave additional guidance on environmental fines for Very Large Organisations
- In serious cases, fines over £1m, and potentially in excess of £100m, could be expected
- This judgement is likely to lead to a tougher approach on sentencing for environmental crime.

¹ Environmental Offences – Definitive Guideline - Sentencing Council, in force from 1 July 2014

2014 turnover was £1.9billion, it would clearly be regarded as a VLO (although neither the Guidelines nor the Courts attempted to set a threshold).

The Crown Court judge approached sentencing by multiplying the range and starting point figures for a large organisation by 5, arriving at a starting point of £300,000. Given the guilty plea and other mitigating factors², she decided on a fine of **£250,000**, and stated that, in the absence of such mitigating factors, the fine would not have been less than **£500,000**.

Court of Appeal judgement and Additional Sentencing Principles

The Court of Appeal rejected the judge's "mechanistic" approach to multiplying fine levels for VLOs ([R v Thames Water Utilities Ltd \[2015\] EWCA Crim 960](#)). However, it considered that the fine ultimately set was lenient in light of similar levels of fines imposed on TWUL in recent years, and it "would have had no hesitation in upholding a very substantially higher fine". More importantly, the Court of Appeal then went on to establish some further principles for sentencing VLOs under the Guidelines. The key points were as follows:

- **Category 1 Serious Harm / Deliberate Action or Inaction:** The court should consider not only a company's turnover but also its profitability – a fine equalling a substantial proportion, up to 100%, of its pre-tax net profit for the relevant year might be appropriate, even if this results in fines **in excess of £100 million**. The court noted that this level of fine is imposed in the financial services markets for breaches of regulations.
- **Category 1 Serious Harm / Recklessness:** Similar considerations although recognition of lower level of culpability.
- **Lower categories of harm (Categories 2 to 4):** Lower but suitably proportionate fines should still be awarded, which might in appropriate cases be measured in **millions of pounds**.
- **Aggravating factors:** Offences involving negligence or repeat offending (e.g. repeated operational failures) suggest a lack of management attention and fines in **millions of pounds** might be appropriate.

Environmental Offences – Definitive Guideline

These new guidelines were put in place in July 2014 to strengthen environmental sentencing. They apply to illegal discharges to air, land and water, and certain waste offences. They involve the Courts taking a step-by-step approach to determining a level of fine commensurate with the harm caused, the conduct of the defendant and the nature of the organisation involved. For offences such as environmental permitting breaches which are subject to unlimited fines, the Guidelines establish ranges of appropriate fines and a starting point for consideration. The ranges vary depending on the size of organisation. The principal steps in setting sentences are as follows:

- Steps 1 / 2: Identify whether confiscation / compensation orders are appropriate
- Step 3: Determine the category / level of harm - ranging from Category 1 (most serious harm) to Category 4 (least serious harm / risk); and the culpability factor of the offender
- Step 4: Identify a starting point and range for a fine
- Step 5: Removal of economic benefit (i.e. ensure the offender does not benefit financially)
- Step 6: Ensure penalty is proportionate to means of offender
- Step 7, 8 and 9: Apply the standard principles including aggravating factors, and mitigating circumstances (including assistance to the prosecution and guilty pleas)
- Step 10: Consider ancillary orders, including e.g. requiring remediation

² A voluntary payment of £90,000 had been made to fund a National Trust community warden. Also, management was spending substantial sums to improve the company's infrastructure.



- **Mitigation:** A significant mitigation factor would be clear evidence from the CEO or Chairman that the main board was taking "effective steps to secure substantial overall improvement in the company's fulfilment of its environmental duties".

In conclusion, the Court noted that fines, in cases of negligence or greater fault, must be significant enough to send an appropriate message to directors and shareholders, and punish them. In case of repeat offenders, the fine should be "far higher and should rise to the level necessary to ensure that the directors and shareholders of the organisation take effective measures properly to reform themselves and ensure that they fulfil their environmental obligations."

Comment

This case sends a clear message to the largest organisations, and to sentencing courts, that sentences more akin to financial regulatory offences will be imposed for serious environmental offences. In particular, repeat offending, and offences due to failures to devote financial resources to operations which result in environmental harm, will lead to particularly high fines.

Authors

	
Nigel Howorth Partner Environment Group T: +44 20 7006 4076 E: nigel.howorth@cliffordchance.com	Michael Coxall Senior Professional Support Lawyer Environment Group T: +44 20 7006 4315 E: michael.coxall@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

© Clifford Chance 2015

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Jakarta* ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh ■ Rome ■ São Paulo ■ Seoul ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.