POLICY NOTE

THE ENVIRONMENTAL REGULATION (ENFORCEMENT MEASURES) (SCOTLAND) ORDER 2015

SSI 2015/xxxx

1. The above instrument is made by the Scottish Ministers in exercise of the powers conferred by sections 20 to 32, 53, 58(1), and 59 of the Regulatory Reform (Scotland) Act 2014 ("The Act") and section 107 of the Courts Reform (Scotland) Act 2014 and all other powers enabling them to do so. The instrument is subject to the affirmative procedure.

Policy Objectives

2. The Act's primary aim is to introduce various measures to improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment.

3. Part 3 of the Act provides a simpler legislative framework so that the Scottish Environment Protection Agency ("SEPA") can be more transparent, accountable, proportionate, consistent and targeted in carrying out its regulatory functions. This will enable SEPA to better identify, and focus most effort on, the most important environmental risks and harms, ensuring more effective and efficient protection of the environment and reducing the regulatory burden on business.

4. The Order provides SEPA with the power to impose fixed monetary penalties (FMPs) and variable monetary penalties (VMPs), and to accept enforcement undertakings to better tackle environmental non-compliance, to better protect communities and to help create a level playing field for business. These enforcement measures are designed to offer SEPA a more proportionate alternative set of tools for dealing with "relevant offences".

5. In particular, the Order enables SEPA to impose FMPs or VMPs where SEPA is satisfied on the balance of probabilities that the person has committed an offence which is a "relevant offence" for those purposes

6. There are a variety of penalties and undertakings that may be imposed or accepted under the Order where SEPA determines that an offence has been committed. The Order sets out how the penalties, undertakings and criminal proceedings interact, as required by the Act. The general policy aim is that when a decision is made by SEPA to use a particular enforcement measure for an offence, then criminal proceedings cannot be taken and SEPA cannot subsequently use another enforcement measure.

7. If criminal proceedings are taken for an offence, SEPA cannot subsequently use an enforcement measure. Where a different or ongoing offence is committed, however, criminal proceedings may be taken in respect of that separate offence. If more than one person is involved in the act or omission giving rise to the offence then criminal proceedings can be taken, or enforcement measures issued, against each person separately.

8. The measures will be supported by new enforcement guidance, which is required to be issued under the Order, and a revised enforcement policy from SEPA. They will also be underpinned by guidelines from the Lord Advocate issued in accordance with section 31 of the Act, which will ensure that the new enforcement measures are applied consistently and proportionately as part of the whole range of sanctions that are available (including prosecution).

Fixed Monetary Penalties

9. FMPs are primarily intended to be used for lower level offences, particularly those where the circumstances of the offence are relatively consistent (e.g. there is little scope for different levels of harm caused to be taken into account), there is little or no actual environmental impact and where a low level penalty is likely to be sufficient to change the offender's behaviour.

10. The Order sets the amount of an FMP for each "relevant offence" at £300, £600 or £1,000, as the case may be, in Schedule 1 and Schedule 4. The Order also provides for a late payment penalty of 40% which will be imposed if the penalty is not paid on time, to incentivise timeous payment. These penalty amounts, and the late payment penalty, were consulted on in 2014 and there was majority support for the three proposed penalty levels.

Variable Monetary Penalties

11. VMPs are intended for use in relation to offences where the circumstances of the offence are variable (e.g. the type and level of harm caused, the behaviour of the offender prior to and after the offence or whether a financial advantage has been gained by the offender as a result of the offence) and need to be taken into account in delivering a fair and proportionate sanction.

12. The Order sets the maximum amount of a VMP in Schedule 2 at either the maximum fine that may be imposed on summary conviction (for offences triable summarily (whether or not also triable on indictment) and punishable on summary conviction with a fine) for the relevant offence, or £40,000 (in any other case). The Order also provides for late payment interest of 8% per annum to apply if the penalty is not paid on time, to incentivise timeous payment.

13. Schedule 2 also enables SEPA to require a person who has been given a variable monetary penalty to pay the costs it has incurred in imposing the penalty. This is in line with the 'polluter pays' principle. Where someone has committed an offence and SEPA has imposed a variable penalty, then the policy objective is to ensure that the offender, rather than the public purse, contributes to the costs associated with the investigation.

14. Schedule 2 also provides that SEPA may accept a VMP undertaking. This allows a person to discharge criminal liability for a "relevant offence" voluntarily without a final penalty notice being imposed by SEPA. Such undertakings involve an person agreeing to take specified actions to restore the position to what it would have been if an offence had not been committed, to benefit the environment where harm has been caused or to ensure that no financial benefit arises from the commission of an offence, or all of the above.

15. If a person fails to comply with a VMP undertaking, the Order allows SEPA to impose a non-compliance penalty of 140% of the VMP amount which would have been imposed unless there are exceptional circumstances justifying a lower amount (paragraphs 14 to 16 of Schedule 2) to incentivise compliance with the undertaking. The proposed uplift of 140% was consulted on in 2014, and the majority of respondents considered that to be a sufficient penalty for non-compliance with a VMP undertaking.

Enforcement Undertakings

16. Schedule 3 provides that SEPA may accept an enforcement undertaking. These are voluntary undertakings to take certain types of action, for example to secure that an offence does not recur, or to restore, benefit or improve the environment.

17. Where SEPA accepts an undertaking, this allows a person to discharge criminal liability for a "relevant offence" voluntarily, unless the person subsequently fails to comply with the undertaking and SEPA issues a certificate of non-compliance.

Relevant Offences

18. Schedule 4 lists the offences which are to be considered "relevant offences" in relation to which SEPA may use fixed monetary penalties, variable monetary penalties (and related measures) and enforcement undertakings. It also sets out the amount of a fixed monetary penalty in relation to each offences.

Appeals

19. In response to stakeholder desire for an appeals route independent of the Scottish Ministers, the Order provides that appeals against enforcement measures are to the Scottish Land Court (SLC).

20. To provide swift and affordable access to justice for appellants, the Order allows the SLC to determine appeals without a formal hearing where appropriate or where both parties agree. This provision is designed to encourage a "light touch" appeals process which does not require the engagement of legal representation on either side and which, as a consequence, is both quicker and less costly to both appellants and SEPA. An applicant may still request a hearing, although the SLC is not obliged to grant one if it considers that it can justly determine the matter without a hearing. If granted, however, a daily fee applies to each hearing day. The Order exempts appeals under the Order from the fee to lodge an appeal usually applied by the SLC.

21. The Order also provides that expenses may not be awarded in relation to an appeal except in relation to any court fees paid, or where the court considers that a party has acted unreasonably. This is principally to ensure that potential appeals (particularly those from small businesses or sole traders) are not discouraged by appellants being held liable for expenses incurred by SEPA should they be unsuccessful in relation to an appeal.

Consultation

22. A public consultation paper, "Consultation on Proposals for an Integrated Framework of Environmental Regulation", was published prior to the development and introduction of the Bill for the Act in May 2012. This closed in August 2012, and non-confidential responses and an analysis are available on the Scottish Government website (Consultation Analysis) (Consultation Responses).

23. The design and intent of SEPA's new enforcement powers, including relevant offences, were also the subject of a separate consultation undertaken between July and October 2014. The consultation proposed listed "relevant offences" for the purposes of the enforcement measures and proposed amounts for FMPs. Non-confidential responses and an analysis of these responses, are available on the Scottish Government website. (Consultation Analysis) (Consultation Responses)

24. In addition, informal consultation with stakeholders (including judicial bodies, regulated businesses, trade bodies and non-governmental organisations) was undertaken throughout the Bill process, and continues to be undertaken in relation to the implementation of the Act.

Impact Assessments

25. An Equality Impact Assessment (EQIA) was carried out prior to introduction of the Regulatory Reform (Scotland) Bill. No equality impacts were identified. A copy of this is available on the Scottish Government website (EQIA).

Financial Effects

26. A Business and Regulatory Impact Assessment (BRIA) was carried out prior to introduction of the Regulatory Reform (Scotland) Bill. A copy of this is available on the Scottish Government website (BRIA).

27. In the BRIA, it was anticipated that appeals would be made to the Scottish Ministers. In this Order, appeals are to be made to the Scottish Land Court. Any costs to the Scottish Land Court, however, will be met from within existing budgets.

28. The objective of a fixed or variable monetary penalty is to have a financial effect on the person to whom the penalty has been imposed. Enforcement undertakings may have a similar effect. The only persons on whom this Order will impact are those who break the law and SEPA imposes a penalty as a result of their action or inaction. There are no other financial impacts arising from this Order that would fall on local Government, business or the Scottish Government.

29. This Order enables SEPA to use a broader range of enforcement action, and will allow SEPA to be more effective as a regulator. There will be no additional costs on SEPA's current costs of enforcement.

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Scottish Government
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