



Law Society
of Scotland

Consultation response

Consultation on the revised guidance on the use of
enforcement action

December 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Environmental Law Sub-committee welcomes the opportunity to respond to the SEPA's *Consultation on the revised guidance on the use of enforcement action*¹. We have the following comments to put forward for consideration.

Consultation questions

4. Are you satisfied the guidance clarifies how co-operation will be assessed?

Yes, although we consider that there may be a potential for 'double counting'. Within the VMP guidance, co-operation seems to be expected with zero weighting being attached (page 17) but another aspect of the guidance seems to give benefit for co-operating with SEPA.

We note the reference within the guidance to aggressive behaviour towards SEPA staff. Such behaviour in and of itself may constitute a criminal offence which would merit reporting to COPFS. Such behaviour therefore requires careful consideration in the context of weighting for VMPs. Abuse of SEPA's staff should not be tolerated and we have concerns that the sanctions are or may be conflated.

5. Do you agree with our approach to calculating weightings?

We consider the approach to calculating weightings to be appropriate. It appears that without taking account of financial benefit, the maximum total weighting of the Statutory Maximum of the VMP would be 62.5%. As this is a new regime, we consider that it would be appropriate to monitor this and carry out a review in two - three years' time.

¹ <https://consultation.sepa.org.uk/compliance-and-beyond/revised-guidance-on-enforcement-action/>

The technical and administrative category used in the previous consultation has been removed. Does this mean that VMPs will not be used for technical and administrative non-compliances?

6. Are you satisfied the process to determine a VMP is fair, proportionate and that all relevant factors have been covered?

Yes, it appears that the process is fair and proportionate, and that relevant factors have been covered.

We generally consider the categories set out in the guidance on intent and culpability are appropriate but would suggest that negligence is not the same as recklessness, therefore there should be a differentiation made between the two. Also, the second category of 'deliberate' seems to conflate it with a negligence standard of taking reasonable steps to put systems in place. Deliberate must mean simply that the offender intended to commit the offence.

Socio-economic impact seems to take SEPA's costs into account where there is already provision for costs recovery elsewhere in the regime: this seems to be double counting.

7. Are you content that financial benefit will be calculated fairly and that we will manage commercially sensitive documents appropriately?

We are broadly content that financial benefit will be calculated fairly but recognise that this will depend on the details in any particular case. We understand that SEPA currently use a range of methods to calculate financial benefit and suggest that it would be appropriate for greater detail to be provided in this regard in the guidance.

We consider that there would be merit in more detail being set out in the guidance as to how commercially sensitive documents will be managed by SEPA.

8. Do you agree our proposed process is addressing proportionality and consistency?

Consistency in this regime is important and will be a key concern for operators. We understand that internal governance measures will be in place in SEPA to support this. We suggest that the guidance materials would benefit from specifying the arrangements which will be in place to ensure consistency.

In relation to VMPs, it will be appropriate for the notice of intent to provide a detailed breakdown of how the proposed penalty amount is calculated.

9. Do you have any comments on the other changes highlighted in our Guidance on the use of enforcement action?

Aside from the updates to guidance in relation to VMPs, we generally welcome the added detail provided on enforcement undertakings.

In relation to VMPs, it is clear that considerable work has gone into considering how the arrangements will operate. We welcome the detailed nature of the proposed approach, while retaining simplicity.

It is important that there is clarity around the use of SEPA's enforcement powers and when matters will be reported to COPFS for prosecution. This is of particular importance as this is a new regime and it will be some time until there is a body of decisions from SEPA and the Scottish Land Court (appeals on VMPs) concerning the appropriate level of penalties to allow the system to bed down.

The Environmental Regulation (Enforcement Measures) (Scotland) Order 2015, regulation 4, concerns combination of sanctions and sets out a number of circumstances in which a VMP must not be imposed, for example where criminal proceedings have been commenced or the person has been given a warning by the procurator fiscal. We consider that it would not be appropriate for SEPA to levy a penalty where the matter has been reported to COPFS and a decision has been taken in their discretion as the Scottish prosecuting authority not to prosecute in the public interest. The most obvious example where prosecution is not going to arise will be in cases of insufficient evidence². If SEPA refer a case to COPFS, the decision not to prosecute should put proceedings at an end.

In relation to the aggravating and mitigating factors for VMPs, we suggest that further consideration should be given to 'regulatory compliance history' and the detail of the categories suggested. An example of 'excellent' compliance given in the guidance is "always follows advice and guidance" (page 13). However, given that guidance is not mandatory, this example might suggest that of a 'beyond compliance' standard. We consider it would be more appropriate to distinguish between those meeting their obligations (excellent compliance) and those going beyond these (beyond compliant).

We note that appeals against VMPs will be to the Scottish Land Court. This approach, as established by The Environmental Regulation (Enforcement Measures) (Scotland) Order 2015, appears consistent given the Court's existing broad remit which includes regulatory compliance with the agricultural subsidy regime among other matters. However, we note that this will involve the Land Court considering what are, in effect, criminal sanctions.

At present, there is inconsistency and fragmentation in the appeal mechanisms for environmental matters in Scotland, for example, abatement notices served under the Environmental Protection Act 1990 are considered by the Sheriff Court but planning appeals by the Scottish Ministers. We note that the Scottish Government recently consulted on the Future of the Land Court and the Lands Tribunal³. It is important that there is necessary expertise within the court to deal with environmental matters, particularly appeals. We would welcome action being taken to rationalise, in a consistent manner, how legal issues and appeals are determined across the regulatory frameworks affecting environmental issues.

² See paragraph 9 of the Lord Advocate's Guidelines to SEPA.

³ <https://www.gov.scot/publications/consultation-future-land-court-lands-tribunal/>



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