

LORD ADVOCATE'S GUIDELINES TO SEPA

USE OF ENFORCEMENT MEASURES UNDER THE REGULATORY REFORM (SCOTLAND) ACT 2014

- 1 Chapter 2 of Part 3 of the Regulatory Reform (Scotland) Act 2014 ("the Act") provides for the introduction of a range of enforcement measures that may be used by the Scottish Environment Protection Agency ("SEPA") in relation to "relevant offences".
- 2 Section 31(3) defines enforcement measures for these purposes as:
 - a. fixed monetary penalties (FMPs) (sections 20-22 of the Act);
 - b. variable monetary penalties (VMs) (sections 23-25 of the Act); or
 - c. enforcement undertakings (EUs) (section 27 of the Act).
- 3 "Relevant Offences" are specified in the Environmental Regulation (Enforcement Measures)(Scotland) Order 2015 ("the Order").
- 4 These enforcement measures complement existing measures which are available to SEPA. This guidance applies only to "enforcement measures", within the meaning of paragraph 2 above, and does not apply to such existing measures.
- 5 Section 31 of the Act enables the Lord Advocate to issue guidance to SEPA on the exercise of its functions relating to enforcement measures and provides that SEPA must comply with such guidance in exercising those functions.
- 6 The following guidance is issued by the Lord Advocate pursuant to section 31 of the Act and endorses SEPA's enforcement guidance upon which the Lord Advocate has been consulted. In particular the purpose of enforcement includes:
 - securing compliance with regulatory requirements designed to protect and improve the environment, bringing the activity under regulatory control and stopping offending;
 - removing financial benefits from illegal activity;
 - stopping harm or reducing the risk of harm to an acceptable level;
 - restoring or remediating the harm caused by regulatory non-compliance, where appropriate;
 - deterring future non-compliance and re-offending.
- 7 As with all criminal offences alleged to have been committed in Scotland, COPFS will prosecute where on consideration of all relevant information, there exists sufficient, admissible evidence and it is considered that it is in the public interest to do so. This guidance sets out the approach that should be taken by SEPA when considering whether to use an enforcement measure or report the matter to COPFS. It provides guidance to SEPA to ensure that the most significant offences and offenders are appropriately reported to COPFS for consideration of prosecution or other action.

GENERAL PRINCIPLES

- 8 SEPA will always undertake an appropriate investigation into a suspected offence, regardless of what the outcome might be, e.g. submission of a report to the Crown Office and Procurator Fiscal Service ("COPFS") or the use of an enforcement measure.
- 9 Where SEPA has reported a Relevant Offence to COPFS and COPFS considers that prosecutorial action is not possible or appropriate at that time, COPFS will notify SEPA. SEPA can then take a decision, which may involve consultation with the Crown, as to whether or not to use an enforcement measure and which, if any, enforcement measure to use.

REPORTING RELEVANT OFFENCES TO COPFS

- 10 Where SEPA is considering using an enforcement measure to deal with a Relevant Offence it must take into account whether, in light of the material factors listed in paragraph 11, the significance of the offending or the offender is such that the case should instead be reported by SEPA to COPFS for consideration of prosecution or other action.
- 11 The material factors include:
 - i. the level of criminality;
 - ii. any significant financial benefit to the offender(s) arising from the alleged offending;
 - iii. the extent and significance of any environmental harm; and
 - iv. any significant economic impact.and are described in more detail in paragraphs 13 to 23.
- 12 The order of the factors specified in paragraph 11 above does not reflect any particular hierarchy and the list is not exhaustive. There may be other relevant factors to consider in the circumstances of a particular case. SEPA must consider the indicators set out under each factor and come to a view as to the overall significance of the offending or the offender.

(i) Level of Criminality

- 13 In assessing the level of criminality, it will be relevant to consider the offending and compliance history of the offender(s).
- 14 This includes whether or not the offender(s) has(ve) previous convictions (in so far as these as known to SEPA) and, in particular, any that are directly analogous or which involve other Relevant Offences. It will be relevant to consider the age of any previous convictions.

- 15 The compliance history of the offender(s) includes any informal approaches by SEPA (including any advice given and the level of engagement by the offender(s)), previous enforcement measures accepted or imposed by SEPA and any matters previously reported to COPFS by SEPA, in respect of the offender(s). Any previous such action which concerned directly analogous or similar offending will be particularly relevant.
- 16 It will also be relevant to consider, as appropriate:
- a. whether or not SEPA representatives have previously been misled, obstructed or abused by the offender(s);
 - b. whether or not the offender(s) has(ve) consistently tried to avoid relevant environmental obligations;
 - c. the general background to the offending, including any indication that it forms part of a bigger picture with links to organised crime groups; and
 - d. whether or not the offending is by multiple offenders acting together.
- 17 In general, it will be relevant to consider whether or not, and the extent to which, there has been or is:
- a. continuing or persistent offending;
 - b. an escalation in offending;
 - c. an indication of criminal intent;
 - d. an indication of a wilful or reckless disregard for complying with relevant legal requirements;
 - e. offending over a prolonged period; or
 - f. the prospect of further investigation into associated criminality; by the offender(s), in respect of any Relevant Offences. If any one of the circumstances in (a) to (f) are satisfied, it will not necessarily lead to an assessment that the appropriate course of action is to report to COPFS. However, the greater the number of circumstances in (a) to (f) that apply, the greater the likelihood that reporting to COPFS will be the appropriate response.
- 18 If an investigation by SEPA finds evidence of offending which appears to form part of a criminal network and/or to have links to organised crime groups, then SEPA will not proceed by way of an enforcement measure without prior consultation with COPFS.

(ii) Significant Financial Benefit to the Offender(s)

- 19 SEPA must always bear in mind the importance of disrupting and deterring criminal activity which is solely or principally driven by the resultant financial benefit to the offender and must consider, in consultation with COPFS, whether or not the Proceeds of Crime legislation can be used appropriately in respect of any significant financial benefit made by the offender(s) in relation to any Relevant Offence.

- 20 Where evidence indicates that the offender has received significant financial benefit as a result of the alleged offending which cannot be addressed adequately by the use of an enforcement measure, there is a strong presumption in favour of reporting the alleged offending to COPFS for consideration of prosecution or other action.

(iii) Extent and Significance of any Environmental Harm

- 21 In assessing the extent and significance of any environmental harm, it will be relevant to consider the following:
- a. has the alleged offending caused environmental harm, or was it likely to?;
 - b. what was/is the extent and full impact of the environmental harm, or the potential environmental harm?;
 - c. what was/is the significance of the environmental harm in terms of the immediate environment where the offending took place, the wider environment, ecosystems, local communities etc.?; and
 - d. is there any likelihood of (further) future environmental harm?
- 22 Where significant environmental harm has been caused by, or was likely to arise as a result of, the alleged offending, SEPA shall report the alleged offending to COPFS, also taking into account, as appropriate, the other material factors listed and described in detail above and below.

(iv) Significant Economic Impact

- 23 Where there is, or there was the potential for, a significant economic impact arising from the alleged offending, e.g. on public service providers, the local community, local and other private businesses, on a national scale, also taking into account, as appropriate, the other material factors listed and described in detail above, SEPA shall report the alleged offending to COPFS with full details of the economic impact.

USE OF ENFORCEMENT MEASURES

- 24 In deciding on the use of an enforcement measure, SEPA must consider the wider context in which these they are used, namely that they form part of a hierarchy of intervention and enforcement measures. The ultimate sanction is prosecution and conviction in the criminal courts and any subsequent fine and/or other orders or period of imprisonment imposed by the court.
- 25 VMPs are likely to be used for Relevant Offences at the upper end of the scale of offending but which do not require to be reported to COPFS in terms of these Guidelines.

- 26 Where SEPA has decided that a Relevant Offence should not be reported to COPFS in terms of these Guidelines, SEPA may decide to use an enforcement measure.
- 27 Examples of Relevant Offences and offenders that may fall within this level of offending include:
 - a. Relevant Offences that are administrative in nature;
 - b. a relatively minor non-compliance issue constituting a Relevant Offence;
 - c. an individual or company that is generally known to be responsive to informal interventions or warnings by SEPA, highlighting minor non-compliance issues, and willing to take the necessary subsequent steps to ensure compliance;
 - d. an individual or company that does not display criminal intention, knowledge or attitude; or
 - e. an individual or company that does not appear to be wilful or reckless in respect of any relatively minor non-compliance with regulatory requirements that constitutes a Relevant Offence.
- 27 When using any enforcement measure, SEPA must always be careful to ensure that the specification of the Relevant Offence(s) is clear and precise. This is particularly important where there is evidence of a continuing offence: the dates specifying the period of offending must be carefully stated.
- 28 In deciding what enforcement measure to use SEPA should consider which is most appropriate to reflect the character and seriousness of the offence, to address any wider impact of the offending, and the likely deterrent effect.
- 29 It will be relevant to consider the attitude of the offender and any previous engagement SEPA may have had with the offender.
- 30 When considering whether to use an enforcement measure or not, SEPA may consult with COPFS in relation to the application of this guidance.

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