Response to SEPA consultation on determining the amount of a variable monetary penalty, November 2016

The UK Environmental Law Association (UKELA) is the UK's foremost membership organisation working to improve understanding and awareness of environmental law, and to make the law work for a better environment. As such, UKELA has a keen interest in ensuring the effectiveness of environmental legislation in Scotland, as in the rest of the UK.

UKELA attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors. Its members are involved in the practice, study or formulation of environmental law in Scotland, the UK and the European Union.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. Through its Scottish Law Working Party, UKELA has responded to consultations at several stages of the Better Environmental Regulation programme in Scotland, and welcomes this opportunity to contribute again.

UKELA makes the following comments on the proposals.

PRELIMINARY OBSERVATIONS

UKELA welcomes the consultation, but notes that it seeks responses to the methodology described in the consultation document, and regrets that the methodology was not set out in the form of a draft document, for comments,

containing guidance for both SEPA staff and regulated persons to refer to when published – in the same way as SEPA's enforcement guidance was consulted upon as a draft and thereafter finalised and published. UKELA recommends that, for reasons of transparency, the final methodology be set out in a guidance document to be drawn up, (ideally) consulted upon, and published.

As a substantive general comment, UKELA notes the complexity of commercial relationships, with the various separations and links between companies, on occasions set up consciously to make it hard to trace and to break the financial and accountability links within what are closely related businesses. This may make matters such as direct monetary gain, ability to pay and repeat offending difficult to establish in a legally sound way, as the formal picture may obscure the real one.

CONSULTATION QUESTIONS

Question 1 *- Do you agree that a VMP should be higher for those who obstruct, delay taking action or do not cooperate with SEPA?*

Yes – but SEPA will need to be prepared to gather and record objective evidence of such behaviour in order to defend the level of VMP in the event of an appeal.

Question 2 *– Is our approach to calculating financial benefit clear to you?*

Yes, broadly.

Question 3 *– Do you have any comments on how direct and indirect gain will be determined by us?*

Please note our general comment above about the potential difficulty of assessing the direct monetary gains from unlawful activity of companies that belong to multi-company structures.

The need to gather and record financial evidence may require extra training for SEPA's investigating officers.

Question 4 *– Do you have any comments on other ways to calculate Financial Benefit that you feel should be considered?*

No.

Question 5 *– Do you agree that we should generally consider the most significant impact or potential impact but that when there are multiple impacts - a more holistic approach is also appropriate?*

The question is not clear. In principle, all impacts should be considered and a cumulative score adopted. If there is only a single impact, then that is all that should be considered at this stage. If there is more than one impact, all impacts should be considered. There is a suggestion that if there is more than one impact, only the most significant impact will be considered, but such an approach has not been justified.

Question 6 *– Do these impact categories feel like the right ones for grouping environmental offences for which a VMP is being considered?*

Categories (a) and (c) seem fine. Category (b) is problematic. The consultation document cites situations where impacts "were mitigated or avoided" or "could not be assessed or identified". If mitigation or avoidance of impacts was effected through the actions of the offender, then the penalty should clearly be lower. Likewise, if impacts could not be identified or assessed as a result of the offender's actions, the penalty should be higher. Both of those circumstances would however be taken into account at Step 3. But if either of them come about through good fortune, e.g. because of weather conditions at the time of the offence, or an unexpected third party intervention, then it is arguable that there should be no reduction in the penalty, as implied by the 'lower' impact category.

Question 7 *– Do you think that the penalty ranges set out in* ***Table 1*** *are clear and linked sufficiently with the impacts?*

They are clear but they are not consistent. No justification is given for the fact that within Band A, for instance, level (a) is 3 times level (c), while in Band B, it is 4 times. Likewise, no justification is given for the fact that at levels (b) and (c), the upper penalty limit rises consistently from Band A up to Band D, then in Band E, it jumps by 140% at level (b) but only by 40% at level (c). Unless justified, the differences between penalty levels and bands should be consistent.

The link between the penalty ranges and the impacts is justified in section 3.5 (which it would have been helpful to put before this question, rather than after it).

Question 8 *– Do you agree that the main factors identified above are the correct ones to guide our decision-making?*

Yes, but SEPA already has an established system for assessing the significance of impacts in supporting guidance document WAT-SG-67 (used for assessments under the Water Framework Directive), and it might be sensible to employ that rather than re-inventing the wheel here. That system starts with the 'severity' of the impact, adding '(spatial) extent' to get 'scale', adding 'duration' to get 'magnitude', then adding 'importance of impacted factor' to end up with 'significance'. The terminology used here is slightly different, and could therefore be misleading for staff and operators who are used to applying WAT-SG-67. In particular, it is not clear that 'sensitivity of receptor' covers all the elements covered by 'importance of impacted factor' – which includes (for example) an element of rarity, not simply whether the impacted site is designated or not.

For the purposes of impact category (c), it needs to be made clearer whether a second identical failure (e.g. a minor delay in making a particular data return) is to be treated (on its own) as another minor delay in making a data return (resulting in the same penalty) or as a repeated failure (resulting in a higher penalty). Nor is it clear whether a responsible person committing the offence at one of several sites it operates will be treated as a repeat offender if it commits the same offence at

another of its sites. There is a risk that this 'compliance history' may also be taken into account at Step 3, leading to an element of double counting.

The term 'statutory risk' (used for example in the third paragraph of section 3.6) is not easily understood (except perhaps within SEPA), so should be avoided. It might be better to use the term 'administrative consequences' or 'implications for wider compliance' – as set out within section 3.6.4.

Finally, please note our general comment above about the potential difficulty of assessing repeat offending of companies that belong to multi-company structures.

Question 9 *– Do you support the proposal to use 3 x VMP levels in each Impact Band (Table 2 of Annex C refers) in terms of differentiating behaviours and changing them?*

Yes.

Question 10 *– Have we identified the right behavioural, regulatory and compliance factors for us to either maintain or increase the VMP level?*

Yes, but it might be helpful to identify more precisely the enforcement factors applied, e.g. 'intent of responsible person', 'foreseeability of non-compliance/harm' etc.

Any assessment of the intent, wilful disregard, recklessness, cooperativeness, attitude and general behaviour of a corporate body is inherently problematic, particularly in a company that belongs to a multi-company structure. Normally it would be based on the behaviour of its senior officers (or 'directing mind'), but if

junior staff are (e.g.) uncooperative and SEPA needs to go up the management chain to secure cooperation, it is not clear whether the extra time taken to secure that cooperation will be reflected in the level of the penalty or in the level of costs that are recovered by way of costs recovery notice.

Question 11 *– Do you agree that what we have proposed for determining the amount of a VMP is clear and proportionate?*

Please note our general comment above about the potential difficulty of assessing the ability to pay of companies that belong to multi-company structures.

Subject to this and the other comments above, yes.

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