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Dear Simon

SEPA's Draft Revised Enforcement Policy

The UK Environmental Law Association (UKELA) is the UK forum which aims to make the law work for a better environment and to improve understanding and awareness of environmental law. Its members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non lawyers and has a broad membership.

The UKELA Scots Law Working Party, which I convene, focuses on environmental law in Scotland. The Working Party has considered the above consultation paper and has the following comments (reference is to the question numbers raised in the consultation).

- 1 Yes, although given the work is ongoing there remains an element of uncertainty as to what impact it will have on enforcement policy. Given the current difficulties of identifying distributional environmental injustices, at present it may be that it would be easier to concentrate on (i) enforcement generally since that may have the effect of addressing some injustices (given that the environmental justice is focused at a level of generality on protecting human health); and (ii) the procedural dimension which would include providing additional information on enforcement activity to the public. This could be done, for example, by extending the use of the Scottish Pollution Release Inventory to cover a wider range of installations and providing information on enforcement activity extracted from the public register in relation to all the installations listed given there are no legal restrictions on how the information is made publicly available. However, in turn that depends on providing interpreted information about the installations' environmental performance, for example, not simply indicating how much of a particular substance was emitted to the air but rather whether its emissions to air complied with any emissions standards imposed. Enforcement action would thus become more meaningful and greater public confidence in SEPA could be engendered.

It would be worth clarifying that SEPA will not use enforcement action to achieve higher level, redistributive aspects of environmental justice.

- 2 SEPA's proposed approach fits the 'responsive regulation' model and is to be welcomed. In that sense it might be worth explicitly articulating that by themselves

the compliance and deterrence approaches are not adequate to explain what SEPA will do. In general SEPA will rely upon the compliance approach but will adopt a deterrence approach where it considers this necessary. The guidance referred to in para 3.1(b) of the consultation paper will be crucial here and we would welcome the opportunity to comment upon the draft document.

3. The qualification 'the level of action is dependent on any mitigating circumstances' seems to not go far enough. Mitigating circumstances are only one factor which should influence the level of action. Others should include the seriousness of the incident in terms of impact on the environment and human health, the extent to which the person has taken on board advice from SEPA, previous management record etc. There is also an argument that the second bullet point is already incorporated in the first or that it should be in order to simplify the list somewhat.

The reference to "where practical" in the sixth bullet point is very vague. It could be replaced with "Unless immediate action is necessary in order to protect the environment". It might also be noted that although relief from criminal proceedings will not be offered as a reward, it may affect the analysis of whether prosecution would be in the public interest.

In respect of the first bullet point of para 8, are there not 'contravention, improvement required' circumstances where strictly speaking there is non-compliance with legislation, but a formal warning letter is not justified?

The third bullet point of para.8 is a little unclear, especially the final sentence, which should be revisited.

In the fifth bullet point there could be clearer statement of when SEPA may be willing to propose the variation of permit conditions at its own initiative, and whether this might include tighter monitoring requirements as opposed to measures directed at actual emissions etc.

Also in the fifth bullet point of para 8, we would have expected suspension to only take place where there is a pressing *significant* risk.

In the sixth bullet point of para 8, and again at para 9, there is no statement of the circumstances that might warrant an immediate referral to the Procurator Fiscal. The policy should clarify that this will occur in the event of serious breaches only.

Generally speaking, from a regulated person's perspective sections 5 and 8 can be quite vague as to in what circumstances what steps will be taken. Where they can be made more specific without any loss in the ability to enforce effectively, this should be done.

4. We presume that the standard enforcement policy will apply to any new regulatory regime from its date of introduction. However, transitional arrangements may well be built into such a regime and it may be worth explaining those if they have any impact on enforcement. In addition, there should be no de facto enforcement exemptions for a specified time. Rather, SEPA should in general be seeking to ensure in advance that the relevant sector is prepared for the new regime assuming there is sufficient time available. It is also up to SEPA to lobby at European, UK or Scottish level as appropriate for realistic implementation timescales in the first place.
5. The threshold for action against unlicensed activities seems too high ("significant or chronic impacts") and does not exactly fit the promised "strong line" against

unlicensed activity (para.10). Prosecution should be considered against unlicensed activity where there is the risk of significant harm, not just where harm has resulted.

The policy would benefit from setting out examples of mitigating circumstances, where it may not be proportionate to refer to the Fiscal. The policy should be a document for the regulated as well as the regulator.

- 6 & 7 In respect of liability of directors etc, it may be that SEPA officers will require additional training since identifying responsible corporate officers may well involve a different skills set to identifying whether an incident has taken place. It may be necessary to examine the role of particular officers (eg in relation to the 'negligence' arm of the corporate officer liability provisions it would be necessary to identify what the duties of the officer(s) within the organisation was and whether they discharged those duties to a reasonable extent).

Clearly there are a range of statutory interdicts now available in the legislation (eg Pollution Prevention and Control (Scotland) Regulations 2000, reg 31). The biggest challenge lies first, in establishing that SEPA has the power to seek an interdict under the Environment Act 1995, s 37(1) to prevent ongoing unlicensed activities. As far as we are aware that issue remains untested (at least we are not aware of any reported cases on the use of the power). There is also the case of *Wemyss Coal Co v Buckhaven and Methil Magistrates* 1932 SC 201 which suggests that interdict cannot be sought where other remedies are provided for by statute. The language of s 37(1) of the 1995 Act is also very general – in contrast to the clear 'statutory interdict' provisions - and it may be that courts in Scotland would be unwilling to derive a power to obtain interdict from it.

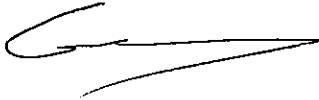
On the other hand, where an unlicensed activity is continuing, even if there are economic considerations at stake, it might be argued that they are outweighed by the illegal nature of the operation (ie it is proceeding without the necessary environmental law authorisations). It might be argued that there is a public interest in subjecting such activities to appropriate regulatory control (apart from the economic arguments that could be advanced indicating the unfair competitive advantage such operations might enjoy because of their failure to apply for a licence and comply with its conditions) to minimise their harmful potential.

- 8 In our answer to question 1 above we outlined how we believe enforcement information relating to specific businesses could be made publicly available in a more meaningful manner. Regarding the provision of more generalised enforcement information, there are a variety of possibilities that could be considered including: (i) linkage of current enforcement information to other data eg how many incidents are substantiated under each of the legislative regimes and how many of those incidents are classified as significant – that would enable a measure of enforcement activity per incident and/or significant incident to be provided; (ii) a further breakdown into incidents arising from unlicensed and licensed activities and specific numbers of enforcement activity relating to each (which might provide an indication of whether SEPA's focus on unlicensed activity, for example, was leading to a greater number of enforcement activities in that area); (iii) statistics on the use of works notices and other forms of preventive or remedial notices; and (iv) details of average fine levels for the convictions secured each year. Provision of some or all of the above information in the Annual Report would be more meaningful than the current somewhat isolated statistics on enforcement. They might provide a measure of whether enforcement activity was having an impact and also whether fine levels were becoming more appropriate and, if not, provide support for arguments for enhanced judicial training etc to address fine levels.

In addition, it is important to continue the policy of publicising convictions, but also enforcement action where there is justified public concern. We are not sure that the simple reporting policy set out in para.11 actually meets this need to reassure the public that infringements of the law are not being ignored.

Please do not hesitate to contact me if you wish to discuss any of the above or if you would like any further information about UKELA and the Scots Law Working Party. We would be keen to be represented on any future focus or working groups on this or other legal issues being considered by SEPA.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Gordon McCreath', with a long horizontal stroke extending to the right.

Gordon McCreath

Convenor - UKELA Scots Law Working Party