

Revised guidance on the use of enforcement action SEPA

Overview

<i>General Comments</i>

Detailed Response

Specific Comments

The first 3 questions relate to contact information

4	Are you satisfied the guidance clarifies how co-operation will be assessed?
<p>YES/NOT SURE/NO</p> <p>Section 4 of the “<i>Proposed Guidance on How to Determine a Variable Monetary Penalty</i>” provides details of each co-operation category (i.e. voluntary self-reporting, co-operation, non-cooperation and aggressive behaviour).</p> <p>Scottish Water would note that the guidance document does not describe each category in as much detail as the consultation document (pages 7 & 8). It would be beneficial if these more detailed explanations were included in the guidance document.</p> <p>From a Scottish Water perspective, the assessment of co-operation must take account of the regulatory frameworks under which we operate where we collectively prioritise issues for investment with SEPA, Scottish Government and other stakeholders. Both the scale of the asset base and the investment planning and prioritisation process means action may be planned for delivery, but this may require extensive engagement to agree actions.</p>	
5	Do you agree with our approach to calculating weightings?
<p>YES/NOT SURE/NO</p> <p>Scottish Water supports use of weightings that are calculated as a percentage of the statutory maximum penalty amount for a relevant offence and recognises that these will help ensure the VMP amount is reasonable and proportionate to the offence.</p> <p>We would welcome additional information to explain the approach taken by SEPA to calculate the weightings. In particular, it would be useful to understand the rationale for the step increases between categories in each factor. The final step increase into the most serious category is often inconsistent with the increases applied to the lower level categories.</p>	

6	Are you satisfied the process to determine a VMP is fair, proportionate and that all relevant factors have been covered?
<p>YES/NOT SURE/NO</p> <p>Scottish Water would welcome additional information on how the process for determining a VMP is fair and proportionate.</p> <p>The process for determining a VMP is reliant on the use of SEPA's professional judgement and discretion. Although the Enforcement Policy states that all enforcement decisions are made with the appropriate level of oversight within the organisation, it would be beneficial for the policy to also confirm that the decision-making process will be transparent and consistent across all regulatory regimes, geographical areas and over time.</p> <p>Scottish Water would welcome consideration of 'Response/action taken' as a separate mitigating factor that is considered in every assessment. Currently, the proposal indicates that SEPA will use its discretion and professional judgement to decide if actions taken to remedy the impact of an offence are sufficient to merit a reduction in the VMP. This approach does not actively incentivise an operator to rectify non-compliances or mitigate any harm.</p>	
7	Are you content that financial benefit will be calculated fairly and that we will manage commercially sensitive documents appropriately?
<p>YES/NOT SURE/NO</p> <p>The consultation documents do not provide details on how financial benefit will be calculated. We would also welcome details on how commercially sensitive information will be managed.</p> <p>We would also welcome more clarity on the assessment of financial benefit for organisations such as Scottish Water which is a publicly owned, and funded, body and does not seek to make financial gains from non-compliance. The process must consider the regulatory framework under which Scottish Water operates and must recognise the collective regulatory responsibilities between SEPA, Scottish Water and other stakeholders in agreeing investment priorities.</p>	
8	Do you agree our proposed process is addressing proportionality and consistency?
<p>YES/NOT SURE/NO</p> <p>Scottish Water agrees that the proposal to calculate weightings as a percentage of the maximum penalty amount will go some way to address proportionality.</p> <p>We would welcome clarity on how 'proportionality' and 'relevance' will be considered in the assessments of compliance and enforcement histories. Scottish Water has extensive compliance and enforcement histories across multiple regulatory regimes. It would be beneficial for the Enforcement Policy to document the measures that SEPA will take to ensure a disproportionate approach is not taken when determining the relevant weightings.</p>	

Consistency is partially addressed by setting out the category weightings for each factor in the guidance. However, it is not clear how consistency will be addressed when assessing the impact of an offence. Scottish Water would welcome clarity on how SEPA will ensure that the same offence is not assessed as medium impact in one part of Scotland and high or significant impact in another part of the country or across different years.

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

Scottish Water would welcome amendment of the guidance to confirm that the principles of beyond reasonable doubt and corroboration will be applied to every case to determine whether there is sufficient evidence before issuing a VMP. It is important that the guidance makes it clear that a lower burden of proof will not be applied.

The additional enforcement powers give SEPA much greater responsibility to take action against those committing offences. CAR Regulation 46 states: *If the commission by any person of an offence under these Regulations is due to the act or default of some other person, that other person may be charged with and convicted of the offence by virtue of this regulation whether or not proceedings for the offence are taken against the first mentioned person.*

Scottish Water would welcome confirmation in the guidance that SEPA would be able to consider use of the new enforcement measures against a third party, where their action has caused an offence under CAR.

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