

SEPA enforcement powers – a new landscape for construction sector

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THE Regulatory Reform (Scotland) Act 2014 and Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 granted SEPA additional powers from 1 June 2016 to issue fixed fines of up to £1000 in relation to suspected environmental offences, with powers to impose variable fines of up to £40,000 expected in late 2016.

SEPA has also been granted powers to enter into voluntary 'Enforcement Undertakings' with offenders in order to remedy non-compliance and prevent reoccurrence, with the added condition that some beneficial action be taken by the offender.

The list of offences to which these new measures apply is extensive and can be found within Schedule 4 of the 2015 Order.

These new powers are designed to bridge the so-called 'compliance gap' between warnings from SEPA and referral to the Crown Office and Procurator Fiscal Service, offering a 'middle ground' to promote compliance without the need for prosecution. This applies most readily to the construction sector who are under increasing scrutiny and pressure from the regulator.

In determining which of these new powers to exercise, SEPA will consider the offender's intent; the offender's previous history; the impact on the environment caused; and the deterrent effect desired.

This list is not exhaustive and every case will of course turn on its own particular facts and circumstances.

A brief summary of the new powers is provided below.

Fixed Monetary Penalties (FMP)

These financial penalties fall into three categories, reflecting the relative severity of the offences: £300, £600 and £1000.

Variable Monetary Penalties (VMP)

As the name suggests, these penalties are variable to a maximum of £40,000, or the maximum fine available on summary conviction, if this is lower.

In arriving at the penalty amount SEPA will consider: financial benefit to the offender; impact on the environment; and the behaviour of the offender and context of non-compliance.

Where SEPA decides to issue a VMP they must issue a 'notice of intent' that sets out the reasons for the decision. Once served, the offender may choose to make an offer to use their resources to the greater benefit of the environment in place of paying the penalty proposed.

If accepted by SEPA, this replaces the VMP. SEPA might impose a 'no for failure to comply with such a 'VMP undertaking' to a sum of up to 140% of the original VMP, to a maximum of £40,000.

Enforcement Undertakings (EU)

These voluntary undertakings can be proposed to SEPA prior to its knowledge of non-compliance, or reactively following upon SEPA being made aware of non-compliance.

These cannot be used in conjunction with other enforcement powers such as FMP, VMP or criminal prosecution unless the EU is breached. EU are accordingly intended for those who are normally broadly compliant and wish to demonstrate a proactive and conjoined approach to dealing with their non-compliance.

If SEPA accepts an EU proposal, the actions agreed become the terms of the undertaking, and the responsible person must comply with them.

Whilst SEPA is under no obligation to accept any proposal for an EU, it has been suggested in guidance that proposals ought to include: steps to prevent recurrence; the remediation of any environmental harm caused; the removal of any financial benefit to the offender; and steps which go beyond the minimum necessary to restore the position.

It is no exaggeration to state that the landscape of environmental enforcement could be changed irrevocably as a result of these reforms and it will be of concern to many within the construction sector that the already

significant powers of SEPA have been extended yet further.

Procedures by which representations may be made following FMP and VMP, together with formal appeal procedures, will be rolled out with each measure.

This will be of obvious interest to operators whom enforcement action falls upon given the potentially significant financial penalties which may be imposed.

Such submissions are time sensitive and require to be persuasive whilst supported by both the law and evidence in order to succeed.

There are also opportunities to be seized upon by tactically self-reporting and entering an EU in order to avoid FMP and VMP or a costly criminal prosecution. If properly constructed, and therefore more likely to be accepted by SEPA, EU afford operators a means to control the action taken following an incident and to promote a better working relationship with the regulator and positive public image.

Whilst SEPA becomes familiar with its new found powers and later develop the anticipated zeal for their use, it is important that expert legal advice is obtained immediately where any instances of non-compliance arise, even where SEPA is not yet aware of its occurrence.

BTO's team of expert solicitors can provide advice and assistance where any such environmental issue arises.

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