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By – E-mail

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**Comments by the Scottish Property Federation
Consultation on New Enforcement Measures for the Scottish Environment Protection
Agency and the Relevant Offences Order**

1. The Scottish Property Federation (SPF) is a voice for the property industry in Scotland. We include among our members; property investors and developers, landlords of commercial and residential property, and professional property consultants and advisers.
2. The SPF is happy for the Scottish Government to publish our comments and share our views with other public authorities.

General remarks

3. Generally, an integrated framework of environmental regulation is welcomed by SPF and is seen by some of our members as overdue. The similar Environmental Permitting Regime in England seems to be successful to date. If the detail which follows in terms of the integrated Scottish regime is given due consideration the integration of regulation is welcome. Businesses that are working to comply with environmental regulation should be treated proportionately and given support where required. As environmental legislation / regulation currently stand it is difficult for businesses to know operationally what they are required to do to comply with environmental regulation. This has been as a result of the piecemeal fashion which environmental legislation has been brought into force with overlapping regulatory / enforcement regimes.
4. SPF welcomes the general emphasis on greater flexibility, transparency and accountability of SEPA. Industry requires an understanding of the environmental framework if there is to be any confidence in both environmental regulation and enforcement. Members have reported experience of a problem of inconsistency in the operational responses of SEPA in relation to different offices and different industrial sectors. There is also variable technical quality in responses arising from resource constraints, particularly in key technical specialisms such as hydrology and hydrogeology.

Consultation Questions

Q1. Do you foresee any difficulties in adopting the single permissioning framework set out above?

5. Until the detail is published it is difficult to understand fully any difficulties that may arise. It will be vital to ensure that activities within the given sectors (waste, water, Pollution Prevention Control (PPC) and hazardous substances) are allocated to the correct tier in terms of the regulation hierarchy. Operational businesses should be made fully aware of the effect of the framework including the impact of their operation falling within a General Binding Rule. To meet these objectives there should be appropriate publicity and sufficient parliamentary scrutiny.

Q2. Do you agree that SEPA should adopt this proportionate approach to determining where an activity sits in the new permissioning hierarchy?

6. Yes.

Q3. Are there any problems in the current procedures for the 4 Main Regimes which could be addressed in the new single regulatory procedure?

7. Our members are of the view that the new integrated framework will be a welcome move towards simplifying environmental legislation in Scotland. There is a crossover between the regimes, e.g. PPC and waste. There must be cross referencing to enforcement within these areas. In addition to overlap between the different environmental regimes there is also the additional factor that some issues are covered by planning controls in addition to being tackled under the environmental regime. This creates a burdensome regulatory regime for businesses. An example of this is the Mining Waste Directive, (MWD) and the Waste Framework Directive (WFD) where the regulation of mining and extractive waste is concerned.

Q4. Are there any issues which you think SEPA should take into account when developing its approach to joined-up permits?

8. As noted above at paragraph 7 where there is overlap between not only different environmental regimes, e.g. Waste and PPC but also where there is overlap of regulation between different regulatory authorities, e.g. planning authority and SEPA.

Q5. Do you agree that there is merit in introducing corporate or accredited permits for environmental activities? If not, why not?

9. Our members consider that there may be merit in introducing corporate permits but the level of detail required to make such permits workable would have to be very well thought through. It could lead to a truly integrated regulatory framework for operations but the process for achieving such a permit should not be cumbersome and excessively costly negating any perceived benefits. We are aware that other jurisdictions have such corporate permits and these appear to be welcomed by the heavily regulated sectors. Until the detail is known more fully on this aspect it is difficult to determine whether this is something that would be beneficial to businesses that are heavily regulated in terms of environmental legislation.

Q6. Do you agree that SEPA should have the power to use fixed and discretionary direct financial penalties to address less significant offences? Do you think the amounts of £500 and £1,000 for fixed penalties and the cap of £40,000 for a discretionary penalty are set at the right level?

10. No. Our members have concerns that the discretionary cap of £40,000 is too high. This power to impose penalties should not be used as a way to increase revenue for SEPA in times where there are serious public sector cuts. There has to be a sufficient appeal process in place where businesses are able to appeal any decision where they are being faced with such a financial penalty.

Q7. Do you agree that SEPA should be given the power to accept enforcement undertakings in a greater range of circumstances? Do you agree that they should be limited to ensuring environmental restoration?

11. Yes. If the objective is to make amends for any environmental damage caused there is no reason why SEPA should not be given this power. There should be monitoring of how SEPA exercise their discretion in accepting or refusing such undertaking offered by a business / company / organisation. Consistency will be an important factor and there should be guidance issued on where such undertakings if brought into effect, are acceptable. SPF also agrees that any power offered to SEPA should be limited to exclude third party compensation. SEPA should be wary of becoming a regulator where third party undertakings are concerned.

Q8. Do you agree that SEPA should be able to require non-compliant operators to publicise the damage they have caused the action they are taking to put things right? Should this power also be available to the courts?

12. No. However, should such a power be given this should be to the court and even in such cases there should be a clear right of appeal / review before any such publicity is imposed upon an operator / business.

Q9. Do you think that the direct measures set out above should be applied to the 4 Main Regimes and to the other regimes set out in paragraph 3.5.21? Would it be useful for the direct measures to be available to SEPA in relation to other regulatory regimes for which it has responsibility?

13. Apart from enforcement undertakings, which members consider would be a useful tool across the board, SPF think that the other measures would be inequitable and potentially counter productive to the aims of better regulation and should therefore not be introduced.

Q10. Is there a need for any additional safeguards?

14. Our members think that there should be appeal/ rights of review given where any sanction is going to be given to ensure compliance with the ECHR.

Q11. Do you agree that the existing powers relating to remediation and compensation orders should be extended as set out above? Do you think that we should require the courts to have regard to financial benefit when setting fines?

15. Our members are confused by the rationale for the introduction of a new offence of knowingly causing significant harm to the environment. They struggle to see any gaps, which this new offence would fill and the introduction of a new offence would seem to run contrary to the aims of achieving a simpler, more streamlined system.
16. The contaminated land and environmental liability directive regimes already show how difficult it can be to show that harm to the environment is significant. Without the same detail of guidance on assessing this, a new offence would be impossible to prove and would not be used.
17. SPF is of the view that, in certain circumstances the option to require remediation is a useful tool. Members do have concerns however, that a duty to compensate third parties for their costs in remedying or mitigating harm could lead to difficult matters of proof. More detail on these proposals would be helpful and how they would be intended to work in practice. Our members would also like to understand more about how the financial benefit test would be framed. There may well be some initial benefit to non compliance but there could be significant costs if found guilty of an environmental offence. Is it the intention that there would be a detailed balancing exercise? Members are also concerned that it would be important for a clear standard of proof to be satisfied before a conclusion on financial benefit is reached. It is their view that regulators are seldom well equipped to assess such matters and operators must have the ability to challenge fairly their assessment, if it cannot be adequately justified.

Q12. Do you agree that SEPA should be able to recover the costs which it incurs in investigating and enforcing environmental legislation, up to the point at which it imposes a direct measure or refers a case to the Procurator Fiscal for prosecution?

18. No. It appears that the proposal as set out in paragraph 3.5.35 of the consultation is in relation to successful prosecutions rather than all reported cases to the Procurator Fiscal. Even if that is the case our members are of the view that this is not a welcome change. In which way would SEPA demonstrate the costs incurred? How would that be measured? In a time where there are public sector cuts this cannot be used as a revenue enhancement mechanism. We also note that there is detail given in paragraph 3.5.34 which refers to an appeal mechanism but we have some concerns relating to the appeal being to the Scottish Ministers and would suggest that such an appeal should be to the Sheriff court rather than the Scottish Ministers.

Q13. Do you agree that the new integrated permissioning framework, supported by a more strategic, flexible enforcement toolkit and a targeted approach to regulation, will provide more effective protection of the environment and human health?

19. Our members think that a number of the proposals will contribute positively to a more proportionate and effective protection of the environment and human health. They have noted that a lot more work requires to be done on the concepts and therefore assume

that the Scottish Government will consult again on more developed proposals before introduction.

20. Integration of permitting arrangements could introduce a lot of efficiencies but our members would like to see the detail of how this is to be implemented to ensure that a desire to have consistency does not lead to extra, disproportionate hurdles to obtaining or implementing a permit for a particular purpose. They have concerns that certain direct measure powers proposed, such as direct penalties and publicity orders, could be counter productive.
21. Members have also suggested that the key messages about how any improvements will be implemented should be clearly communicated in any final guidance document. There are many different "approaches" described in section 4 of the consultation document, the interrelationships between which need to be more clearly explained, and some rather confusing terminology has been used.
22. The SPF would be pleased to explain its comments in further detail at the Scottish Government's request.

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