



New Environmental Enforcement Framework

Friends of the Earth Scotland and the Environmental Law Centre Scotland joint response to SEPA and the Scottish Government’s consultation

3 October 2014

CONSULTATION QUESTIONS

Question 1 – SEPA’s Enforcement Approach

Are these the right aims to underpin SEPA’s enforcement approach?

Yes No

Question 4 - Non-Compliance Penalties (NCPs)

Do you consider that a penalty set at a 40% uplift is a sufficient penalty for non-compliance with an undertaking offered in respect of a VMP?

Yes No

A sliding scale may be required since a 40% uplift on a small amount may not represent any real incentive for compliance.

Question 5 – Enforcement Undertakings (EUs)

Do you agree SEPA should look more favourably on community-focussed EUs?

Yes No

We support the approach to Enforcement Undertakings and strongly agree that EU’s developed in consultation with affected communities should be encouraged and considered more favourably. However they should still be subject to the same rigorous standards of determination, in particular that the EU includes appropriate beneficial action over and above a return on compliance or restitution.

Question 6 – Court Powers

Do you support the approach to relevant offences to which these new court powers and requirements apply?

Yes No

We broadly support the approach outlined and the principle that the offences to come under the new court powers should be those which carry a risk of significant environmental harm, actual

environmental harm or serious wrong doing. We note the importance of establishing the polluter pays principle as the basis for the exercise of these powers.

To date SEPA has taken a cautious approach to court action on environmental offences, in general advancing only those cases with a very high chance of success. We are keen for SEPA to be less risk averse and to take a wider range of cases to court.

Question 7 – Vicarious Liability

Do you support the approach to relevant offences to which the vicarious liability requirements apply?

Yes No

Additional comments.

Question 8 – Administration

Do you have any further comments on the proposed administration of the new enforcement measures?

Yes No

Additional comments.

Question 9 – Safeguards

Do you agree that the proposed safeguards for the new enforcement measures address the concerns raised through the previous consultation?

Yes No

We support the broad grounds for appeal for the new enforcement measures, and agree that this means expert evidence may be required, therefore a specialist court or tribunal would be an appropriate place for such appeals to be heard.

We consider that the Scottish Land Court is a suitable option, at least initially, while the wider tribunals landscape in Scotland is taking shape. However, we wish to note that the Scottish Government has an outstanding 2011 manifesto commitment to consult on options for an environmental court or tribunal. More recently, during the passage of the Courts Reform (Scotland) Bill, the Justice Committee supported calls for an environmental tribunal, acknowledging that the Scottish system does not adequately provide for compliance with the Aarhus Convention. Therefore we support this move with the proviso that it does not in any way detract from the need for an examination of the benefits of a broader specialist environmental court or tribunal, which would logically include these and other environmental appeals in its jurisdiction. We urge the Scottish Government to fulfil its commitment to consult, particularly in light of the renewed ruling against Scotland, and the rest of the UK, for non-compliance at the 5th Meeting of the Parties to the Aarhus Convention this summer.

Further we note that the Scottish Land Court must be adequately funded to carry out its additional duties.