

Consultation on SEPA's revised enforcement policy and proposed guidance under the new environmental enforcement framework

Date: July 2015

Published by:

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SCOTTISH ENVIRONMENT PROTECTION AGENCY
SEPA'S REVISED ENFORCEMENT POLICY AND PROPOSED GUIDANCE UNDER THE
NEW ENVIRONMENTAL ENFORCEMENT FRAMEWORK

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**CONSULTATION ON SEPA'S REVISED ENFORCEMENT POLICY AND PROPOSED
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FOREWORD

We already seek to engage, encourage and inform those who are subject to environmental legislation, so as to secure compliance. Most operators in Scotland understand and comply with their environmental requirements. Where there is non-compliance our experience is that most of those we regulate respond to our advice and guidance. Many are also increasingly recognising the value of compliance and good environmental practice in delivering outcomes not just for the environment but for their business and the community they operate in. Poor performance and non-compliance puts the environment and communities at risk and undermines those businesses that already take their responsibilities seriously, so there will be circumstances where it is appropriate for us to take enforcement action against non-compliant operators in order to change their behaviour and bring them into compliance.

New enforcement measures; namely fixed and variable monetary penalties and enforcement undertakings; are being introduced by order under the Regulatory Reform (Scotland) Act 2014 which will bring benefits to Scotland's environment, communities and businesses. They will help ensure that we have the right tools to change the behaviour of those who continue to perform poorly or ignore their responsibilities. The new enforcement measures will help us to tackle non-compliance at an earlier stage and prevent the non-compliance from becoming persistent, remove the short-term financial benefit arising from non-compliance, and create a level playing field for business.

We take very seriously the responsibility that comes with the introduction of the new enforcement measures. We are consulting on two documents: our Enforcement Policy and our Enforcement Guidance. These provide transparency on the way in which we will make decisions on enforcement in the future and enable you to hold us to account for those decisions.

Alongside these documents we are also providing information on a number of other safeguards which will ensure that we use these new enforcement measures in a reasonable and proportionate way.

We understand that the new enforcement tools will allow us potentially to impose a significant financial penalty and to remove financial benefit gained from non-compliance. The proceeds of any monetary penalties imposed by us will not be retained by us and will be remitted to the Scottish Government. We are committed to regularly reviewing how effectively we have used these new enforcement measures and to feed any learning back into our approach. We are also committed to reviewing with Scottish Government and the Crown Office and Procurator Fiscal Service the implementation of the new enforcement measures after two years of use or before if that seems appropriate.

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These new tools are only one aspect of our broad ranging Better Environmental Regulation agenda. We are increasingly carrying out our work in a targeted manner, drawing on a broader range of interventions to deliver specific outcomes. We have an increasing focus on both prevention and supporting innovation to reduce environmental impacts in a way that contributes to sustainable economic growth and the well-being of people in Scotland. In this context, our enforcement action will increasingly form only one tool in a package of measures which we are deploying, often in partnership with others, to achieve specific outcomes for Scotland's environment, communities and the economy.



A handwritten signature in blue ink, which appears to be 'Terry A'Hearn'. The signature is stylized and written in a cursive-like font.

Terry A'Hearn
Chief Executive

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SUMMARY

The table below summarises the specific questions raised in relation to the documents contained in this consultation paper:

	Topic	Question
1	Enforcement Policy	Is the enforcement policy clear in setting out SEPA's high level approach to enforcement?
2	Enforcement Guidance	Do you find the guidance clear and understandable?
3	Enforcement Guidance	Are there any parts you particularly agree or disagree with in the guidance?
4	Enforcement Guidance	Is there anything missing that you would have expected the guidance to have covered?

We are seeking your views to ensure we have accountability and transparency in the programme. We want to get it right so that we can all benefit from a more flexible, risk-based, outcome-focused approach to enforcement.

HOW TO RESPOND

Respond to the consultation online at [Citizen Space](#)

You can respond by sending your views and comments on the proposals in this paper to the following address:

Wendy Thornton, Regulatory Reform Manager

SEPA

Clearwater House, Heriot Watt Research Park

Avenue North, Riccarton, Edinburgh

EH14 4AP

E-mail: Change@sepa.org.uk

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Responses should be submitted to us by 22 October 2015. Earlier responses would be welcome.

Handling Your Response

We would like to know if you are happy for your response to be made public.

If responding online, please complete the confidentiality questions where prompted. If responding by post, please complete and return the Respondent Information Form with your response.

If you ask for your response not to be published it will be regarded as confidential and treated accordingly.

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1. INTRODUCTION

1.1 Overview

The Regulatory Reform (Scotland) Act 2014 (**RR(S) Act**) has enabled the Scottish Ministers to give SEPA the power to impose fixed and variable monetary penalties and accept enforcement undertakings (**the enforcement measures**). The enforcement measures form part of the new environmental enforcement framework for Scotland that will enable more proportionate and flexible enforcement. This framework builds upon the strengths of our existing enforcement approach and working relationship with the Crown Office and Procurator Fiscal Service (COPFS). The new environmental enforcement framework has been developed jointly with Scottish Government and in partnership with COPFS. The new environmental enforcement framework will consist of:

- An Order, which is being made by Scottish Ministers under the RR(S) Act and will be laid in draft before the Scottish Parliament later this year.
- An updated SEPA enforcement policy.
- A statutory guidance document which we are required to prepare under the RR(S) Act. The guidance explains how we will use the new enforcement measures and our approach to enforcement more generally for relevant offences (**the enforcement guidance**). We must have regard to this guidance when exercising our functions.
- Guidelines from the Lord Advocate, which will be available later in the year. We must comply with any guidelines issued by the Lord Advocate in respect of our proposed use of the enforcement measures. Their purpose is to guide the separation of cases between those where there is a public interest in prosecution and those where it is appropriate for us to use the enforcement measures.

This consultation covers those elements of the enforcement framework which are required to be produced by SEPA. Therefore the consultation includes the draft updated SEPA enforcement policy and enforcement guidance. These are the main documents which will enable SEPA to be transparent and therefore held to account on our enforcement decision making.

This consultation includes an introduction to the documents on which we are consulting, links to the documents on which we are consulting and the questions to which we are asking you to respond. The second part of this consultation includes further information on other safeguards which SEPA will put in place. This information is being provided as useful background information and we are not consulting on any of the information provided in this second part.

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It is our intention to have a further consultation on the detail of how we intend to calculate the variable monetary penalty. This consultation will take place before we start to use the variable monetary penalty, as part of our phased implementation of these measures.

1.2 Previous Consultation and Conclusions

Stakeholder engagement has been essential in shaping the new environmental enforcement framework as part of the wider Better Environmental Regulation agenda. Stakeholder responses to the [SEPA Better Environmental Regulation consultation in 2010/11](#), and the [Scottish Government/SEPA consultation on Proposals for an Integrated Framework of Environmental Regulation \(2012\)](#) showed strong support for the general direction. There was, in particular, support for:

- SEPA having the power to use fixed and variable financial penalties to address less significant offences;
- a more strategic and flexible enforcement toolkit including enforcement undertakings;
- SEPA to recover the costs incurred in investigating, and enforcing environmental regulations.

Stakeholders also sought reassurance about the additional safeguards which would apply, including around internal governance arrangements.

More detail on the proposals was provided in 2014 through a joint Scottish Government/SEPA consultation on the [New Environmental Enforcement Framework](#). Again, there was strong support for the underlying aims of SEPA's proposed enforcement approach and the outlined proposals for the new measures.

The [responses to that consultation](#)¹ were published on 25 November 2014 and an [analysis of responses](#)² was published on 1 May 2015. Many of the responses sought clarification on:

- how SEPA intends to use the new enforcement measures;
- how the new measures will fit within SEPA's revised enforcement approach;
- the calculation of variable monetary penalties;
- the level and nature of community engagement expected as part of the enforcement undertaking process;
- the appeals process;
- the timetable for implementation.

This stakeholder engagement helped to shape the proposals for safeguards contained in the Order and in this current consultation.

¹ <http://www.gov.scot/Publications/2014/11/6499>

² <http://www.gov.scot/Publications/2015/05/7496>

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1.3 What Proposals Are We Consulting On Now?

In this consultation, we are seeking your views on the various safeguards that are proposed to provide appropriate checks and balances in relation to our new enforcement powers. This should ensure that the new environmental enforcement framework is implemented in a way that ensures proper transparency and accountability.

This is not a consultation on the Order. The Scottish Government intends to lay the Order in draft in Parliament later this year. Therefore, the Order will not be available at the start of the consultation. The enforcement guidance includes our current understanding of the content of the Order and some of the detail may change depending on the final content of the Order. The detail of the relevant offences to which the enforcement measures apply will form part of the Order: a [provisional list of offences](#) is provided for information but does not form part of this consultation.

We are seeking views in this consultation on:

- SEPA's revised enforcement policy;
- SEPA's enforcement guidance .

The enforcement guidance is the formal document which SEPA is required to produce under the RR(S) Act. The RR(S) Act requires us to publish guidance about the enforcement measures but also more generally how offences to which the Order will apply are enforced. We have therefore provided guidance on our existing enforcement tools and on how we will consider our full range of enforcement options in our decision making.

The approach to enforcement set out in our enforcement policy and enforcement guidance is an outcome focused approach to enforcement. It is about understanding the outcome that needs to be achieved and selecting the most appropriate enforcement action(s) to achieve the behaviour change required for that outcome. It requires a consideration of the most proportionate action to change behaviour taking account of the particular circumstances.

The enforcement guidance sets out a consistent and transparent approach to decision making on enforcement. It is not a document which details in a prescriptive way the enforcement action that we will take in particular circumstances. It is important to understand that this means that our response to a similar type of non-compliance by different people or in different circumstances could be treated by us differently. This reflects the position that our response is based on our judgement of the enforcement action required to change the behaviour of that particular person to achieve the required outcome.

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2. THE PROPOSALS

2.1 SEPA's approach to Compliance

We seek, wherever possible, to engage, encourage and inform those who are subject to environmental regulation, in order to secure compliance. This is currently, and will remain, at the core of our approach to securing compliance. It is our clear position that compliance with the regulatory obligations is the minimum expected from every organisation or individual who holds an environmental authorisation issued by us.

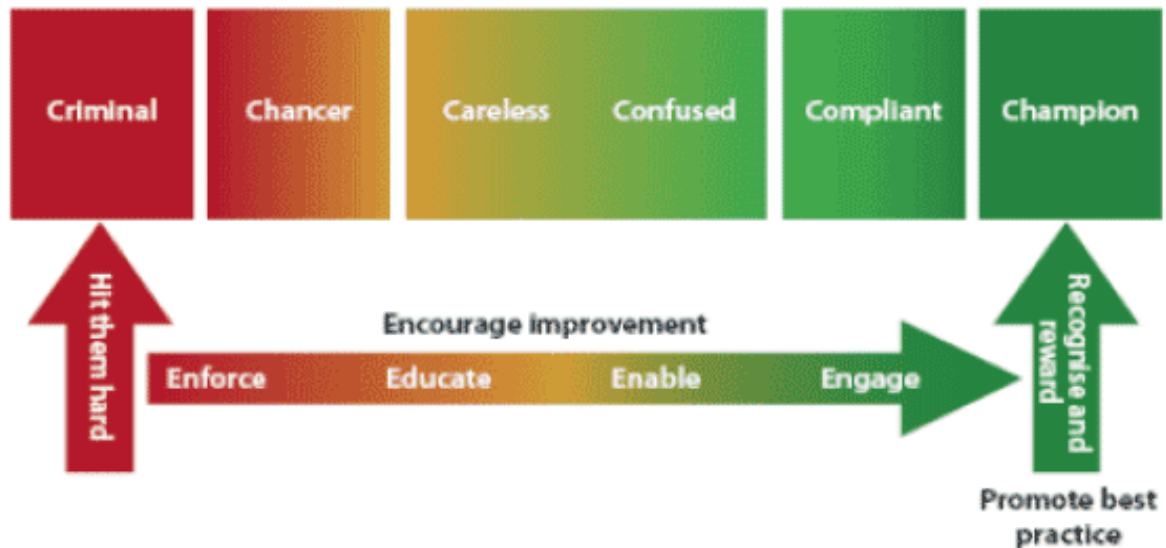
Our annual compliance results show that around 90% of sites are compliant with regulatory requirements. For these we will continue to engage, encourage and support environmental compliance and work with operators to improve environmental and operational outcomes.

Of the minority that are non-compliant, many of these sites have been so for a number of years. There are also sites that dip into non-compliance from time to time before becoming compliant again. Therefore, there are times when our engage, encourage and inform approach is not effective. Non-compliance with environmental regulation is not an option. It is a problem not only for our environment but also for affected communities and compliant businesses, and we have a responsibility to take more formal enforcement action where necessary.

Our approach to enforcement is based on seeking to understand why organisations and individuals are behaving or continuing to behave in a non-compliant way and then understanding the most effective approach to change that behaviour. We use the compliance spectrum below to illustrate our broad approach. While the compliance spectrum is a simplification of the behaviour of those that we regulate, it demonstrates the role of more formal enforcement action for the small percentage of organisations and individuals that continue to remain non-compliant. In the future early intervention by us before the behaviour becomes chronic or persistent will become a key part of our enforcement approach.

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Compliance and engagement spectrum



The enforcement measures are intended to plug the 'compliance gap' between criminal prosecution for the most serious cases, and the use of statutory notices or warnings for other cases. Some of the sites which remain non-compliant year after year will be cases where we have used statutory notices or final warning letters on a number of occasions to change behaviour but they have not worked. In some cases the behaviour and the blatant disregarding of regulatory interventions will be significant enough for us to submit a report to the Procurator Fiscal for consideration of prosecution, but not in all cases. The enforcement measures mean that for less significant cases we will be able to take proportionate and effective action, at an earlier stage, to change behaviour.

2.2 Transparency and Accountability

We understand and take seriously the responsibility that comes with the introduction of the new enforcement measures. This consultation is on our enforcement policy and enforcement guidance and these provide both transparency on the way in which we will make decisions on enforcement in the future and enable you to hold us to account for those decisions. Transparency is needed to inform you about enforcement activity and provide reassurance that non-compliance is being acted upon. Transparency is also needed to ensure that people know what consequences they face for non-compliance, and provide reassurance that enforcement actions are imposed fairly and consistently by SEPA. The Guidance document sets out a consistent and transparent approach to decision making on enforcement action. The enforcement policy and guidance document support transparency and accountability in terms of the [Scottish Regulators' Strategic Code of Practice](http://www.gov.scot/Resource/0046/00467429.pdf).³

³ <http://gov.scot/Resource/0046/00467429.pdf>

Part 1 - Documents we are consulting on: Enforcement policy and enforcement guidance

2.3 The enforcement policy

Our proposed [enforcement policy](#) provides a short, structured statement of our approach to enforcement at a high level. Its purpose is to ensure that SEPA staff, those that we regulate and other stakeholders are aware of the general intent and principles underpinning our approach to enforcement action. It is intentionally a high level policy document with the detail appearing in the enforcement guidance (see below). These two documents should be read together as a package.

The enforcement policy integrates an outcome-focused and evidence-based approach to formal enforcement. It is also based upon the principle of using the enforcement action that SEPA believes is most likely to achieve behaviour change to restore compliance, deter non-compliance and to ensure restoration and remediation of the environment. We will therefore take into account the particular nature of the non-compliance, the harm caused and the history of the responsible person in question, including any wider criminality, and are not restricted to taking the least formal enforcement action in the first instance. Taking a preventative approach and using the new enforcement measures to make effective, early interventions before the behaviour becomes chronic or persistent will become an important part of our enforcement approach.

Our approach to enforcement continues to be underpinned by the five principles of Better Regulation: proportionality, accountability, consistency, transparency and targeting, plus a sixth principle of taking a timely approach.

Question 1

Is the enforcement policy clear in setting out SEPA's high level approach to enforcement?

2.4 Guidance from SEPA on how the enforcement measures will be used

The legislation which gives us the power to use the new enforcement measures (the RR (S) Act and the Order) requires us to consult upon and to publish guidance on a number of things, including:

- in relation to offences where the enforcement measures are available; how those offences are enforced, the action which we may take to enforce them, and the sanctions (including criminal sanctions) which might apply;
- the circumstances in which we are likely to take any such action;
- our use of the enforcement measures;

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- where a fixed monetary penalty is likely to be imposed, where it may not be imposed, the different penalty amounts, rights to make representations and rights of appeal;
- where a variable monetary penalty is likely to be imposed, where it may not be imposed, what is likely to be taken into account in determining the amount of the penalty, rights to make representations and rights of appeal, and our use of non-compliance penalties.

Our proposed [enforcement guidance](#) has been developed to meet these requirements and to ensure that our approach to using the new tools and the old tools is clear, transparent and consistent.

The enforcement guidance is a formal document that meets the requirements of the RR(S) Act. However, this will not be the only guidance and support available to you. It is our intention to build up a number of case studies over time so you will be able to see how we use the enforcement measures in practice. We are also developing forms to support our use of monetary penalties and the enforcement undertaking, which will contain additional information. These will be important if you find yourself in a position where you receive a notice of intent or wish to offer us an enforcement undertaking.

The purpose of the enforcement guidance is therefore to make clear what enforcement action we can take, and under what circumstances different types of enforcement action might be appropriate. The Order will require us to have regard to the enforcement guidance when exercising our functions.

Question 2

Do you find the guidance clear and understandable?

The enforcement guidance sets out a consistent and transparent approach to decision making on enforcement. It is not a document which details in a prescriptive way the enforcement action that we will take in particular circumstances. We explain in the document the enforcement actions available to us, the enforcement outcomes we are seeking to achieve and the decision making process that we will follow. We also set out in detail each kind of enforcement action (including enforcement undertakings that can be offered) and the circumstances in which we will normally use these.

Question 3

Are there any parts you particularly agree or disagree with in the guidance?

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The enforcement guidance is a large document and is designed to be used electronically rather than as a printed document. There is therefore a degree of repetition in the document which is intentional. It is the intention to keep the enforcement guidance document under review and to ensure it develops as our own understanding of how we use the enforcement measures in practice develops.

Question 4

Is there anything missing that you would have expected the guidance to have covered?

Part 2 - Information on SEPA's approach to implementing the new enforcement measures

2.5 Suitable governance arrangements

Governance

We recognise the responsibility that comes with these new enforcement powers and are committed to ensuring that we have governance arrangements in place which provide sufficient oversight. In our evidence to the Rural Affairs, Climate Change and Environment Committee we committed to implementing the enforcement measures on a national basis with robust internal governance arrangements. We also committed to implementing governance arrangements to ensure that decisions are made consistently and at an appropriate level in the organisation.

Additional assurance was sought around internal governance arrangements in responses to the 2014 Joint Consultation. Some respondents said that the enforcement measures needed to be under appropriate management review, and that internal governance arrangements needed to be clearly set out in a totally transparent system. Other respondents suggested that: decisions about using the enforcement measures should not be made by site inspectors, that the scrutiny of use of FMPs should be at the same level as for VMPs and EUs, and that SEPA might create an internal board to review and govern the processes during implementation.

Decisions about the use of the enforcement measures:

- Will be made by the appropriate Unit Manager in SEPA – Unit Managers are managers who are most closely connected to the individual circumstances of a case.
- Will be overseen by SEPA's existing regional peer review groups, which consist of the senior managers in each of our three regions.
- Will be further overseen by a newly established national group, which will be chaired by an Executive Director.
- Will be reported to our senior management team, chaired by the CEO.

These arrangements will provide national oversight and ensure that a consistent approach is taken to the enforcement measures across Scotland. The arrangements will also ensure that decisions continue to be made at the most appropriate level in the organisation, with oversight from our senior management levels (including Executive Director).

There may be circumstances where the use of an FMP to achieve a particular outcome as part of a campaign highlighting an issue, such as failure to have a waste carrier's registration, could be pre-approved by the national group. This would mean that an FMP could be used in specified circumstances and not all the notices of intent would need to be individually overseen by the regional or national review group.

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Written Representations Stage

We think that it is very important that, after we have served a notice of intent, people have an opportunity to raise any concerns in writing. These written representations could, for example, be a challenge as to whether the notice should have been served at all, whether there is a defence available to the offence or in the case of the VMP, it could be seeking to challenge the level of the penalty proposed.

The legislation includes a formal stage in the process between serving a notice of intent and a final notice for the FMP or VMP when written representations can be made. The Order will provide that the written representations must be made within 28 days, and we then have to take them into account when reaching a decision as to whether to issue a final notice.

We believe that the written representations stage is an important stage in the process and acts as an informal preliminary appeal process before a final notice is served. We are committed to ensuring that any material representations made are considered by the national group (see above) who will provide oversight.

2.6 Arrangements for implementing the new enforcement measures

We are planning a phased implementation to allow close monitoring of the implementation of the FMP in particular. A phased implementation will also allow us to develop our understanding of how to most effectively use the enforcement measures.

This means:

- For FMPs, in the initial phase of implementation, we intend to establish a limited range of strategic outcome-based priorities, which may be appropriately targeted using these measures (see table below), and we will develop that range of priorities over time. We do not, therefore, propose to use them in cases that are outside of these priorities during the initial phase.
- For VMPs, we intend to use these measures from later in the year where our experience indicates they will be proportionate and effective to change behaviour.
- For enforcement undertakings, we may accept these from the outset as and when they are offered to us and where there are clear benefits in doing so rather than using another form of enforcement action.

The table below sets out some offences where the use of FMPs during the initial phase may help deliver strategic outcome-based priorities.

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Failure to comply with;	Offence(s)	Significance	FMP Level
Information notice	Section 71(3) of the Environmental Protection Act 1990 or Regulation 67(1)(e) of the Pollution Prevention and Control (Scotland) Regulations 2012 or Regulation 44(1)(k) of the Water Environment (Controlled Activities) (Scotland) Regulations 2011	SEPA requires data and other information to be submitted, within a specific timescale, which is used to assess the emission of substances from processes, verify the performance of processes as well as other purposes. In some circumstances, even where there is an obligation under licence/permit conditions to provide data and other information, in order to enable and support the responsible person in meeting that obligation we may require that specific data or information to be provided to us within a specific timescale.	£300
Licence/permit conditions in respect of the provision of data and reports	Section 33(6) of the Environmental Protection Act 1990 or Regulation 67(1)(b) of the Pollution Prevention and Control (Scotland) Regulations 2012 or Regulation 44(1)(d) of the Water Environment (Controlled Activities) (Scotland) Regulations 2011	SEPA often requires in licence/permit conditions a range of data and information to be submitted which is used to assess the quantities of substances released into the environment, or assess the performance of specific processes, or assess the impact of an environmental activity on the environment.	£600
Water environment: General Binding Rules	Regulation 44(1)(b) of the Water Environment (Controlled Activities) (Scotland) Regulations 2011	Widespread non-compliance with rules or requirements for very low risk activities which are capable of having a negative cumulative effect on the environment	£600
Producer responsibility: Registration obligations	Regulation 40(1)(a) of The Producer Responsibility Obligations (Packaging Waste) Regulations 2007	Avoiding the statutory framework by which the UK must meet the minimum recovery and recycling targets set by Europe undermines the efforts of compliant producers to meet those targets.	£600
Waste management: Duty of care requirements	Section 34(6) of the Environmental Protection Act 1990	Duty of care is fundamental to meeting Scotland's Zero Waste objectives, ensuring waste is properly handled from point of production to point of recovery/disposal.	£300
Waste management: Transporting controlled waste without registration	Section 1(1) of the Control of Pollution (Amendment) Act 1989	Waste must be properly described, segregated, stored securely, and passed only to someone who is authorised to take it, along with information which enables it to be handled without damage to the environment. Reaching Scotland's recycling targets will require effort on behalf of all waste producers to segregate wastes for recycling, and ensure onward protection of that material on all stages of its journey to reprocessors.	

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We are committed to training our officers on both the approach to compliance and enforcement, and the detail of the enforcement measures. Officers will be trained in a phased way in line with the phased implementation, which will give us the opportunity to assess and review the training in the light of experience. We will use a network of experienced officers to co-ordinate and support the implementation of the enforcement measures.

2.7 Publicity

The Order will require us to publish information about fixed monetary penalties, variable monetary penalties, non-compliance penalties and costs recovery notices issued by us and undertakings accepted by us. We have a strong commitment to being transparent in relation to the enforcement measures that we impose or, in the case of enforcement undertakings, accept.

The publication of information about how we have used the enforcement measures is important to ensure that we are an accountable regulator. We want it to be clear to stakeholders how often we have used our new powers, what sort of penalties we have used, how much our penalties are, and who our penalties have been imposed on.

We also want to be transparent about the types of undertaking which we have accepted as well as the person making the offer. We feel that by being transparent in this way we will encourage other operators to adopt the same approach and voluntarily come forward to address non-compliance in a way that has benefits for the environment and communities. We also expect that publication will ensure that stakeholders and communities hold us to account if we are not managing undertakings in a way that benefits the environment and communities affected by non-compliance.

We aim to proactively make information available to the public in relation to the enforcement measures used by us, and that information is likely to be made available to the public on our website.