

POLICY NOTE

THE ENVIRONMENTAL REGULATION (LIABILITY WHERE ACTIVITY CARRIED OUT BY ARRANGEMENT WITH ANOTHER) (SCOTLAND) ORDER 2014

SSI 2014/323

1. The above instrument is made in exercise of the powers conferred by section 39(6) of the Regulatory Reform (Scotland) Act 2014 (“the 2014 Act”). The instrument is subject to the negative procedure.

Policy Objectives

2. The 2014 Act’s primary aim is to introduce various measures to improve the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment.
3. Part 3 of the Act provides a simpler legislative framework so that SEPA can be more transparent, accountable, proportionate, consistent and targeted in carrying out its regulatory functions. This will enable SEPA to better identify, and focus most effort on, the most important environmental risks and harms, ensuring more effective and efficient protection of the environment and reducing the regulatory burden on business. As part of this framework the Act introduces new powers and offences to address environmental crime, including the introduction of new enforcement powers for SEPA, additional sentencing powers for the criminal court, and expanding the operation of vicarious liability for certain environmental offences.
4. As part of this, sections 38 and 39 introduce forms of vicarious liability in respect of “relevant offences”. Specifically:
 - **Section 38 – Vicarious Liability for certain offences by employees and agents**
Section 38 provides that where a person (“A”) commits a relevant offence while acting as the employee or agent of another person (“B”), B also commits the relevant offence and is liable to be proceeded against and punished accordingly.
 - **Section 39 – Liability where activity carried out by arrangement with another**
Section 39 provides that where, in the course of carrying on a regulated activity, a person (“A”) commits a relevant offence while carrying on that activity for another person (“B”), and B manages or controls the carrying on of the regulated activity, B also commits the relevant offence and is liable to be proceeded against.

5. The provision made in section 39 for vicarious liability where an activity is carried out by arrangement with another person cannot have any practical effect unless an activity is specified as a “regulated activity”. “Regulated activities” and this Order, are not relevant in relation to section 38.
6. Under section 17(3)(a), “regulated activities” means any environmental activities in respect of which regulations under section 18 of the 2014 Act make provision. Regulations under section 18 will, in due course, apply to a wide range of environmental activities.
7. Until regulations are made under section 18 in respect of environmental activities, provision needs to be made by Order under section 39(6)(b) to specify activities that are appropriate for the purposes of section 39.
8. Section 39(1) will only apply where a person commits a “relevant offence” while carrying on a “regulated activity”. This Order specifies the activities to which section 39 applies and as such, provides the context and boundaries for its operation. The section will, however, only have effect in circumstances where a “relevant offence” has been committed. The “relevant offences” to which section 39(1) will apply are set out in the Environmental Regulation (Relevant Offences) (Scotland) Order 2014.
9. For example, under this Order, the use of sludge on agricultural land, or the supply of sludge for such use, and the grazing of animals where sludge has been used on agricultural land, constitute a “regulated activity”. Contravention of any aspect of the Sludge (Use in Agriculture) Regulations 1989 (for instance, knowingly permitting the grazing of animals on agricultural land within three weeks of sludge having been used on that land) constitutes a “relevant offence”.
10. The activities which it is appropriate to specify as “regulated activities” are listed in the Order. The listed activities are core environmental activities which are regulated by SEPA and which may give rise to a relevant offence being committed. As required by section 36(7), only activities that are “environmental activities” within the meaning of section 17 of the Act have been specified.

Consultation

11. A public consultation paper, “Consultation on Proposals for an Integrated Framework of Environmental Regulation”, was published prior to the development and introduction of the Bill for the 2014 Act in May 2012. This closed in August 2012, and non-confidential responses and an analysis are available on the Scottish Government website ([Consultation Analysis](#)) ([Consultation Responses](#)).

12. The design and intent of SEPA's new enforcement powers and new court powers under the 2014 Act, including relevant offences, was also the subject of a separate consultation undertaken between July and October 2014. The consultation proposed listed "relevant offences" for the purposes of the above provisions from the 2014 Act. Non-confidential responses will be made available on the Scottish Government website. An analysis of these responses will also be published in due course.
13. In addition, informal consultation with stakeholders (including judicial bodies, regulated businesses, trade bodies and non-governmental organisations) was undertaken throughout the Bill process, and continues to be undertaken in relation to the implementation of the 2014 Act.

Impact Assessments

14. An Equality Impact Assessment (EQIA) was carried out prior to introduction of the Bill. No equality impacts were identified. A copy of this is available on the Scottish Government website ([EQIA](#)).

Financial Effects

15. A Business and Regulatory Impact Assessment (BRIA) was carried out prior to introduction of the Bill. A copy of this is available on the Scottish Government website ([BRIA](#)).

Environment and Forestry Directorate

Scottish Government

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