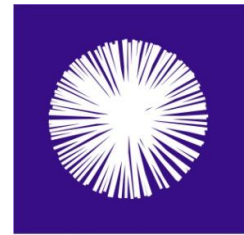


Consultation on Proposals for an Integrated Framework of Environmental Regulation



Scottish
Environment

LINK

Scottish Environment LINK response

August 2012

Scottish Environment LINK is the forum for Scotland's voluntary environment organisations, with over 30 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society.

Scottish Environment LINK welcomes the opportunity to comment on the proposals for an integrated framework of environmental regulation. We are broadly supportive of any steps that can be taken to integrate and streamline regulation provided that this does not happen at the expense of environmental protection. LINK would be extremely concerned by any move towards deregulation for the purpose of reducing administrative burden. It is critical that any new regulatory regime is adequately monitored and reviewed to assess how well it is protecting and improving Scotland's environment.

General comments

Section 2.1 – LINK is disappointed by the strong anthropocentric emphasis throughout the text in this section. While the environment does undoubtedly underpin the economy and human health and wellbeing, we would welcome explicit recognition of the intrinsic value of biodiversity and the natural environment. Furthermore, we remind Government of their commitment to the UK's shared framework for sustainable development¹ and believe that this term should be used instead of 'sustainable economic growth'.

Section 2.2.2 – This states that we need a regulator who "*takes an integrated approach to protecting public health, the environment and the services that the environment provides*". It must be clear that the approach is not only *integrated* but also *effective* in terms of environmental protection. Indeed, any regulatory approach must be judged on how well it delivers environmental outcomes.

We are extremely concerned that this section states the regulator should "*support the Scottish Government's overall purpose of increased and sustainable economic growth*". As mentioned above, we are already concerned by the use of 'sustainable economic growth' over 'sustainable development' and our concern is

¹ *One future – different paths: The UK's shared framework for sustainable development*
<http://www.defra.gov.uk/sustainable/government/documents/SDFramework.pdf>

deepened by the implication of *increased* economic growth. As an independent environmental regulator, SEPA's primary priority should be to protect and improve the environment as per their statutory obligations². While we acknowledge that SEPA may have to take account of social and economic policy, the pursuit of economic growth must not override environmental protection.

Consultation Questions

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

We are generally supportive of integrating the permissions of the 4 main regimes but we reiterate the importance of monitoring to assess whether any new permissioning structure is delivering that. The consultation document states that the outcomes sought from this legislative framework are: a single, proportionate and risk-based permissioning structure; a single consistent regulatory procedure; a flexible approach to permissioning; and a flexible and proportionate approach to enforcement. **We would like to see explicit mention of an overarching outcome of environmental protection.**

We have concerns about a proportionate risk-based approach in terms of how it will assess the cumulative impact of what are perceived to be low-risk activities. In our response to SEPA's consultation on Better Environmental Regulation³, we highlighted our concerns about this approach citing the example of agricultural diffuse pollution. Some farming activities that contribute to diffuse pollution could singularly be deemed low risk yet they can have a significant cumulative impact on water quality at a catchment scale. Potential cumulative impacts must be taken into account in any risk-based permissioning structure. The diffuse pollution example also points to potential difficulties in terms of raising awareness and ensuring that all operators are compliant with GBRs. Recent inspection work by SEPA has uncovered high rates of non-compliance with the diffuse pollution GBRs despite these rules being in existence for some years. Lessons must be learned to ensure that operators are fully aware of the regulations and to ensure that SEPA is equipped to detect and enforce cases of non-compliance.

We appreciate that standard rules permits would alleviate administrative burden on both the operator and SEPA but we are worried that these rules could be so general that they will not offer sufficient environmental protection. Despite the proposal that standard rules will be combined with site-specific conditions as necessary, we remain concerned that SEPA may not always be resourced to apply site-specific conditions to permits and be forced to resort to using the standard rules. LINK seeks clarification on what safeguards will be in place to ensure that site-specific permits are applied whenever necessary.

² e.g. Environment Act 1995; WEWS Act 2003

³ <http://www.scotlink.org/files/policy/ConsultationResponses/LINKBetterEnvReg0211.pdf>

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

We urge that any proportionate approach fully accounts for the cumulative environmental impacts of perceived low-risk activities. We agree that SEPA should retain the right to escalate or de-escalate risks as they can currently do in CAR. Clear criteria must be followed when deciding whether an activity warrants escalation or de-escalation, and environmental protection and improvement must be the primary considerations.

3. Are there any problems in the current procedures for the 4 main regimes which could be addressed in the new single regulatory procedure?

We believe that a lack of awareness of CAR remains among some sectors, particularly farming and other land manager communities. Therefore, significant effort would be needed to ensure that the requirements of any new regulatory framework are clearly and effectively communicated to all sectors. It is critical that all land managers and operators are made fully aware of what is required of them.

Effective links must be made between the development planning process and the authorisations for which SEPA is responsible. In its role as a statutory consultee, SEPA must engage fully in commenting on and informing planning proposals. Furthermore, SEPA should use its involvement in that process as an opportunity to highlight all other authorisations (e.g. CAR, waste management license etc) that an applicant will need.

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

It is proposed that joined-up permissions could include:

- A single permit covering a major, time-limited construction project e.g. a new bridge.
- A single permit covering the carrying out of various activities at a number of different sites.
- A single permit covering different activities at a single site.

This approach seems sensible. However, in a situation with multiple activities and different contractors, we question how SEPA would make clear who is ultimately responsible for each of the different aspects of the works. Furthermore, it is important that this approach would enable stakeholder consultees to readily identify which aspects of the permit are relevant to their area of interest and thus enable them to comment accordingly.

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

Although there may be some merit in accredited permits for operators who have robust environmental management systems, we are not fully convinced by this approach. Even if a company has a good track record of environmental safety, any activity that it proposes to carry out must be assessed on the basis of its level of risk and potential impacts on the environment, and site-specific conditions must be taken into account.

We are less clear about how the corporate permits would work in practice and we would welcome further details on this. It is not apparent how such permits would consider any site-specific issues when permissioning certain activities and this is something that concerns us.

6. 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?

We support SEPA having wider powers to apply fixed and discretionary financial penalties but we do not believe that the discretionary penalty should be capped at £40,000. There must be scope to apply a fine that would both act as a deterrent and adequately penalise those who have caused significant environmental harm. With businesses with large turnover, it is clear that £40,000 might not have the necessary impact. The Greenhouse Gas Emissions Trading Scheme Regulations⁴ enable penalties of 100 Euros per tonne of CO₂ emitted to be applied. This has resulted in operators receiving penalties well in excess of £40,000. We believe that there are benefits of such a system where the magnitude of fine is not capped and can be linked to the potential environmental impact of an activity.

The consultation document indicates that the penalties would go to Scottish Government or to a publicly administered environmental restoration fund. We are extremely supportive of the latter.

7. 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?

Enforcement undertakings would allow an operator to make reparation through restoration or environmental improvement when a non-compliance has occurred. The undertaking would become legally binding once accepted by SEPA and, as long as that undertaking is complied with, SEPA would not be able to report the offence to the Procurator Fiscal.

It is proposed that SEPA would use such undertakings “to enable legitimate operators to make amends where an offence has not led to significant environmental harm and has involved little or no blameworthy contact”. We

⁴ <http://www.legislation.gov.uk/ukxi/2005/925/made/data.pdf>

would support enforcement undertakings being used on this basis. However, we feel strongly that this must not become an alternative or default option to either SEPA pursuing financial penalties or pursuing through the courts where this is a more appropriate response.

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

Yes, we support the proposals relating to publicity orders on the basis that they can often prove a greater deterrent than a financial penalty due to fears over reputational risk. We believe that such orders should be an option not only for cases of non-compliance relating to criminal activity but also for cases of gross negligence. The most effective means of undertaking these orders must be considered, for example whether it would be better for the operator to do this or whether SEPA should take on the role to publicise and recover the costs.

9. 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?

We think that the proposed direct measures, including financial penalties and publicity orders, should be available for SEPA to apply across any of the regimes as is deemed necessary for environmental protection.

10. Is there a need for any additional safeguards?

We have no suggestions for further safeguards at this stage but agree that the proposed safeguards (e.g. a clear enforcement policy) would be beneficial. The consultation states that this enforcement policy will bring transparency and that SEPA will continue to report publicly on its overall enforcement activity. We welcome this intention but would point out that information on SEPA's overall enforcement activity is not readily available currently and we believe that this should be addressed.

11. 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?

Yes, we agree that powers relating to remediation and compensation orders should be extended. In line with the Nature Conservation (Scotland) Act 2004⁵, we agree that the courts should have regard to any financial benefits that have accrued as a result of the offence when setting fines. We do not believe that

⁵ s.46(1) "The court must, in determining the amount of any fine to be imposed on a person convicted of an offence under this Part, have regard in particular to any financial benefit which has accrued or is likely to accrue to the person in consequence of the offence".

this should be capped at £50,000 since it may be appropriate in some circumstances to recover costs in excess of that (please also refer to our response to Question 6).

12. 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?

Yes, we agree.

13. 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?

It cannot be said with any certainty whether the proposals for the new regulatory framework will bring more effective environmental protection. We appreciate that the proposals are based on sound principles and many seem entirely sensible. However, the only way to determine whether any new regime is more effective will be to monitor it against environmental outcomes.

LINK believes that, in order to secure effective environmental protection, there must be a system of penalties that adequately deter and punish offenders and a Scottish judicial system that fully supports SEPA by taking environmental crime seriously, imposing strong fines and ensuring full access to justice without prohibitive cost, in line with the Aarhus Convention.

This response is supported by:

- RSPB Scotland
- WWF Scotland
- Friends of the Earth Scotland
- Froglife
- Buglife
- Wildfowl & Wetlands Trust
- Scottish Wildlife Trust

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