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The Scottish Parliament
Edinburgh
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Our Ref: OME ID:4034
Your Ref:

11 October 2023

By email: netzero.committee@Parliament.Scot

Dear Edward,

Guiding Principles on the Environment and Environmental Governance

Thank you for your letter of 20th September 2023. Nicole has asked me to respond to you. Please see our responses to the points raised below.

1) Environmental Governance **a) Consultation response**

SEPA will submit a response to the Review of Effectiveness of Governance consultation. In that response SEPA will focus on commenting on the post-Brexit Environmental Governance arrangements, and in particular Environmental Standards Scotland. SEPA is providing the following in its consultation response:

(i) On Environmental Governance Post-Brexit:

Investigations

In terms of our experience to date in relation to ESS investigations/pre-investigations, we support Scottish Government's conclusion that the outcomes to date indicate that ESS' flexible approach to resolution is effective. For example, we consider that a decision of ESS to pause an investigation, but ensure ongoing monitoring of an issue, is an effective way to ensure resolution without the application of resources (both of ESS and the public authority) to the management of formal enforcement action: it allows resources to be applied to practical solutions.

Section 3.5 – The exclusion of individual cases from ESS's remit

We support Scottish Government's position that it remains appropriate that individual cases are excluded from ESS's remit and that it should remain the case that it is not ESS's role to act as a point of appeal for individual planning and consenting decisions.

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In our 2020 written submission to the Environment, Climate Change and Land Reform Committee on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill ([https://archive2021.parliament.scot/S5_Environment/General%20Documents/ECCLRCB003 - Continuity Bill - SEPA.pdf](https://archive2021.parliament.scot/S5_Environment/General%20Documents/ECCLRCB003_-_Continuity_Bill_-_SEPA.pdf)), we stated:

We welcome the proposed approach to replicate the approach of the Commission to using its discretionary power in a strategic way to focus and prioritise its enforcement efforts on the most important breaches of EU law.

We strongly agree with the proposed approach set out in Sections 23 (improvement report) and 28 (compliance notice) to restrict ESS from preparing an improvement report or issuing a compliance notice in respect of a failure to comply with environmental law arising out of any decision taken by a public authority in the exercise of its regulatory functions in relation to a particular person or case. For example, in SEPA's case, a decision on an application for a licence or a decision on regulatory enforcement in a specific case.

This seems to best replicate the strategic approach of the Commission. It has been extremely rare for the Commission to raise questions about an individual decision taken by SEPA. The approach of the Commission is always more systemic.

Our experience to date, as a public authority regulated by ESS, reinforces our initial views. We believe it continues to be appropriate for concerns with individual regulatory decisions to be dealt with through the variety of existing mechanisms and we strongly encourage the retention of sections 27(a) and 32(a) of the Continuity Act. We note ESS's Strategic Plan and its website makes clear that it not an appeal or complaints body for individual decisions taken by public authorities in the exercise of their regulatory functions in relation a particular person or case. ESS's website also makes clear that it does not normally take action until the relevant public authority has had the opportunity to respond to the person making the representation's concerns or that person has tried to resolve their concerns through other available mechanisms.

We believe ESS's role to be to focus on systemic issues (which we understand they may identify from any individual cases of which they become aware, as well as through other means) and on public authorities' compliance with environmental law in the exercise of their functions. And when ESS identifies systemic issues in relation to compliance with, or the effectiveness of environmental law or in how it is implemented or applied, for it to be able to take steps to secure compliance or improvements through the use of its various enforcement tools. This should avoid ineffective use of public resources, through duplication of activity and expertise in relation to resolution of individual cases, and should also avoid potential conflict and confusion.

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There is one caveat to our views above. From our experience to date, it is becoming clear that there is an apparently unintended consequence of ESS’s position that it will not normally take action until the relevant public authority has had the opportunity to respond to the person making the representation’s concerns or that person has tried to resolve their concerns through other available mechanisms. This is that SEPA is experiencing a significant increase in numbers of service level complaints (generally regarding individual issues) being made to it¹, and often those complaints state that if they are not satisfied by the complaint outcome, their next step will be to make a representation to ESS. As such, it appears that we are dealing with additional complaints that might not have been made before the advent of ESS, which complaints may be being made primarily for the purpose of having a representation considered by ESS. Whilst the report notes that there are concerns this could slow consideration of issues, and whilst SEPA accepts that it is entirely appropriate for third parties to hold SEPA to account and for SEPA to take all customer service complaints seriously, it should also be noted that this increase in numbers of complaints has resource implications for SEPA (and perhaps for other public authorities). We refer to our wider comments on resource implications below.

The Report considers that some friction is inevitable in the system, in order that ESS does not duplicate existing processes, but that this friction can be minimised by good communication between ESS and regulators and that in addition there may be opportunities for those raising concerns to engage with regulators and ESS about the nature of their concerns, which may help to identify at an earlier point if there is an issue for ESS to investigate within their remit. Section 3 of the report concludes that there may be potential for regulatory bodies and ESS to coordinate more effectively when issues relating to individual decisions are brought forward for attention, allowing the identification of any systematic issues for investigation without generating unnecessary appeals and complaints cases.

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¹ Figures for the numbers of service level complaints made to SEPA in recent years (April/March):

	Total complaints	Total increase/decrease
19/20	37	
20/21	15	59% decrease
21/22	23	53% increase
22/23	34	48% increase



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There is good, well established and appropriate liaison between ESS and SEPA however in our view this alone will not cut down on the additional complaints made by third parties to SEPA.

Resource implications

As the Scottish Government observes at section 3.4 of the Report, the arrangements put in place by the Continuity Act are designed for a domestic setting, and therefore have differences from the system of governance in the EU. In SEPA's experience to date, some of these differences have the result that public authorities are more involved in this new system of environmental governance than they were pre-Brexit (in particular, the approach being more localised and accessible to stakeholders, and cases generally moving through their stages more rapidly) and therefore there are implications for the resources of those public authorities.

SEPA flagged this risk when new environmental governance arrangements were in development. In our 2020 written submission to the Environment, Climate Change and Land Reform Committee on the UK Withdrawal from the European Union (Continuity) (Scotland) Bill (https://archive2021.parliament.scot/S5_Environment/General%20Documents/ECCLRCB003_-_Continuity_Bill_-_SEPA.pdf), with reference to the Financial Memorandum that accompanied the Bill, SEPA noted that the Financial Memorandum stated *that it is unlikely that there will be significant additional costs for public bodies like SEPA.*

It is our view that there will be some cost since we have not previously had to deal directly with the Commission. In the past the Scottish Government would prepare responses to the Commission based on information supplied by SEPA. SEPA never directly dealt with the Commission nor did this happen on a frequent basis.

In setting up the ESS one can envisage that SEPA may be required to assist ESS in relation to complaints about SEPA's application of environmental law – the criteria for which are currently unknown. We may also have to work with ESS in relation to the effectiveness of environmental law in areas which SEPA itself may not be prioritising. This is coming at a time of expected increased workload for SEPA in the light of the impact of Covid-19 and the leaving of the EU.

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In our response to ESS' consultation on its Draft Strategic Plan in 2022 (https://consult.gov.scot/environmental-standards-scotland/draft-strategic-plan/consultation/view_respondent?uuld=731474535) we said:

ESS' initial assessment is that a Business and Regulatory Impact Assessment (BRIA) is not required and that, in consideration of how ESS will undertake its purpose, which 'largely replaces the scrutiny functions previously carried out by the EU' it is therefore considered unlikely that ESS' Strategic Plan will impose new or additional costs on public sector organisations. We consider there will be additional costs on public sector organisations. As we said in our introduction to this response, the remit of ESS and its proposed methods of operating are in some respects different to, and wider than, the EU's scrutiny role. Based on SEPA's experience to date in terms of the resources being committed to collaborating with and responding to ESS, we consider it reasonable to conclude that there will be additional costs for SEPA arising from ESS' undertaking of its purpose, and we expect there will be similar additional costs for other public sector organisations.

Our ongoing experience is that responding to requests for information from ESS in relation to its investigation/pre-investigation work is time consuming in contrast to the Scottish Government and ESS expectations mentioned above. Depending on the extent of the request, collating a response will involve a process of gathering information from many different parts of SEPA and from many different staff at all levels of seniority. Thereafter, there will be work to be undertaken to respond to ESS' conclusions, for example in provision of regular updates where ESS has decided to monitor an issue on an ongoing basis, or in engaging in informal resolution and developing acceptable solutions. SEPA has not yet had any direct experience of ESS using its statutory enforcement powers but in such cases there would be significant resource implications. The additional, less direct, resource implications relate to increased complaints – see comments above.

SEPA also has a role in providing ESS with the benefit of our experience and our data in order to assist ESS in developing its own expertise and knowledge in relation to its monitoring and analysis work. SEPA considers it appropriate to do this: as Scottish Government notes (section 3.3) as a small body, ESS can never expect to develop and hold expertise on the full scope of environmental law. And as per comments above, duplication of effort should be avoided. This sharing of expertise and data is done through meetings and provision of information and uses resource.

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It is clear therefore that new environmental governance arrangements, namely the existence of ESS and its exercise of its functions, has imposed, and will continue to impose, additional costs on SEPA (and we envisage the same will be the case for other regulated public authorities). SEPA has not received any additional resource from Scottish Government to meet these additional costs and in the current resource constrained public sector environment, it is becoming increasingly difficult to absorb these costs. If SEPA is to continue to carry out its new roles in relation to ESS effectively, comply with ESS's requirements and continue to deal with increased numbers of service level complaints, there are implications for the carrying out of SEPA's other priority work.

(ii) On Access to Justice

Regarding the proposed recognition and inclusion of the human right to a healthy environment, SEPA is not making comments in response to environmental governance consultation, as it is making comments in response to the concurrent Scottish Government Human Rights consultation.

We note the Scottish Government states it continues to explore means to provide further expert support to prosecutors and the judiciary on environmental matters, such as through further training opportunities. SEPA liaises closely with the Crown Office's Wildlife & Environmental Crime Unit and there is a standing offer of training or other support on environmental matters. SEPA would welcome the opportunity to participate in the development or delivery of training of the judiciary on environmental matters.

(iii) On an Environmental Court

SEPA is neutral on whether an environmental court would enhance environmental governance.

SEPA has previously publicly commented on the variety of different judicial fora for hearing environmental cases and the importance of the judiciary having the chance to develop knowledge in these cases.

We refer in particular to the information SEPA provided to the Scottish Parliament's ECCLR Committee on the European Union Continuity (Scotland) Bill in 2020 https://archive2021.parliament.scot/S5_Environment/General%20Documents/ECCLRCB003_-_Continuity_Bill_-_SEPA.pdf. We referred to this again in our response to the consultation on the future of the Land Court and Lands Tribunal in October 2020, the relevant part of which we have copied below.

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In July 2020, SEPA submitted a written response to the call from ECCLR Committee for evidence on the environmental policy aspects of the Bill. SEPA commented on the proposal in the Bill that the Sheriff Court would be the appeals forum for appeals against proposed ‘compliance notices’. We commented that there may be a lack of proportionality in relation to the appeal forum for the compliance notice: whilst ESS can make a report to the Court of Session in relation to a public authority’s non-compliance with a compliance notice (or information notice), where a public authority wishes to challenge a compliance notice, this appeal is to the Sheriff Court. We noted that in SEPA cases these appeals may be complex consisting of a number of detailed submissions on environmental law and technical matters. The Courts may be required to weigh up between the technical evidence of different experts. We stated that in our view it is important that the judiciary have the chance to develop some expertise and knowledge in relation to these cases. And we noted that in relation to appeals against SEPA imposing a fixed or variable monetary penalty under the 2015 Order, this was the rationale behind the Scottish Land Court being selected to hear the appeals.

Following the appearance of our then Chief Executive at an ECCLR Committee evidence session on the Bill, we followed up with some clarification in writing regarding SEPA’s position on the appeal fora as follows:

“As previously stated in our evidence, it is important for the judiciary to have the chance to develop expertise and knowledge in relation to these cases. Therefore a further concern with the proposed appeal fora in the Bill is that they could dilute the ability of one appeal forum to develop the necessary expertise to hear cases of a potentially complex and technical nature, (a) because of the inconsistency in appeal fora for appeals against different notices, and (b) due to the potential inconsistency which may arise from different Sheriff Courts considering different appeals depending on the relevant jurisdiction. We simply made reference to the Land Court in our written evidence as a similar rationale was behind the choice of that court as the appeal forum in relation to appeals against SEPA imposing a fixed or variable monetary penalty under the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015.

We note that similar concerns have also been raised in the written evidence of the Law Society of Scotland (response ECCLR/CB/009) and the Faculty of Advocates (response ECCLR/CB/020). The Law Society comments that, at present, there is inconsistency and fragmentation in the appeal mechanisms for environmental matters, and that it is important that there is necessary expertise to deal with these matters. The Faculty of Advocates refers to the imbalance between the ESS’s remedy for enforcing an information notice in the Court of Session and a public authority’s remedy for challenging a compliance notice in the sheriff court, and comments that it is not immediately apparent why remedies would require to be sought in different fora. “

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We would also note that once other regimes are brought within the remit of the Environmental Authorisations (Scotland) Regulations, this will bring about an element of consistency for appeals against SEPA decisions in relation to those regimes, with the Scottish Ministers (Planning & Environmental Appeals Division (DPEA)) hearing all appeals against decisions made under those regulations, thereby removing the current circumstances whereby some appeals are heard by a Sheriff on summary application. This is of particular relevance for appeals against notices served under section 59 of the Environmental Protection Act 1990 requiring the removal of illegally deposited waste, which appeals are heard by a Sheriff. Such appeals are quite common.

b) How well governance arrangements currently support achievement of key policies

Governance arrangements, in the form of ESS, appear to be prioritising the key policy areas mentioned. ESS has undertaken an investigation into Air Quality (re NOX) and is undertaking investigations into all the other key policy areas mentioned. The AQ investigation saw the use of the full extent of ESS's powers on improvement reports used: their investigation resulted in an Improvement Report being submitted to the Scottish Parliament by ESS; a subsequent Improvement Plan was submitted to the Scottish Parliament by Scottish Government; this was then scrutinised by this Committee which recommended that the Scottish Parliament approve the Improvement Report but made numerous requests for further action. SEPA has provided responses to ESS and the Committee on air quality in Scotland and also worked with Scottish Government to implement the recommendations from both bodies.

2) Environmental Principles

Questions from NZ Committee

- 1) *Are you satisfied that the guidance will help the Scottish Government and other public bodies make sound decisions in relation to any matter under consideration that has environmental consequences?*

In our response to the consultation on the draft guidance in February 2022, we said that the guidance is clear as far as it goes, but it is high level and a detailed explanation on how public authorities will consider the principles would be helpful. Keeping the guidance as a “live document” with up-to-date examples added of how the principles are being used in practice as they occur would, in our view, also improve the guidance over time and keep it more on the radar of public authorities.

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We note that since the consultation, an example has been added to the Guidance at page 11. The example uses Local Development Plans and gives examples of the future application of the principles. These are still very high level: for example it states that the development plan includes policies on the expectations on proposals for development and goes on to state that the prevention principle will be relevant to the consideration of ensuring that environmental damage is avoided where practical. We also note that the example states that consideration of the principles should begin early in the assessment process, including the recording of considerations within the pre-screening and screening SEA templates. There is no detail as to how the principles would be applied.

We consider it would be of more practical assistance if an example of the recording of consideration of the principles in relation to a specific decision, was provided. Such an example would show how due regard has been given to the relevant guiding principles in a proportionate manner, and in particular how this duty was balanced with other duties and given consideration alongside other environmental considerations. It is appreciated there are no real examples yet, but a theoretical example could be provided. Real-life examples could be added over time.

- 2) *Looking at the wording of the guidance, can you envisage scenarios in which it could make a difference; for instance, where it would lead the Scottish Government or a public body to adopt a changed approach on a particular matter?*

In theory, the requirement for Scottish Government and Public Authorities to have regard to the guiding principles when making certain decisions could lead to them adopting a changed approach on a particular matter, but as stated above, the guidance is so high level that we find it difficult to envisage scenarios. As above, if even theoretical examples were provided as to how consideration of the guidance could have altered a decision, this would be useful.

Further to comments we made in our consultation response, we are still concerned that references to decision making at a couple of points could mistakenly be read as meaning that the principles and guidance apply to individual operational or regulatory decision making processes:

- At 4.6 – This paragraph could be misread by public authorities as meaning that occasionally individual regulatory and operational decisions under a policy will need separate consideration of the principles. Whilst we note that reference has been added to ‘Ministerial decisions’ in the second sentence, we think it would be clearer if the first sentence read: ‘In general, individual regulatory and operational decisions **by Ministers** under an established policy will not need separate consideration of the principles’.

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- At 5.1 – As this is the opening paragraph in section 5, it should be made clear that due regard has to be had to the guiding principles in decision making processes **on policies (Ministers) or the SEA process (others)**.

3) *Will the guidance ensure the Scottish Government and public bodies are required to adhere to the environmental principles to the same extent that governments and public bodies in the EU are required to adhere to the EU's environmental principles?*

No comment

4) *There is also now a [UK policy statement on environmental principles](#). It applies to the development of policy by UK Ministers including when developing policy relating to Scotland in reserved areas. It does not apply to Scotland where the policy does not relate to reserved areas. Do you have a view on whether there is complementarity between the Scottish guidance and the UK policy statement. If not, could this lead to any difficulties on the ground, for instance in relation to cross-border bodies?*

No comment

5) *Will the guidance help the Parliament, or members of the public, hold the Scottish Government and public bodies to account on their decision-making?*

As the guidance is so high level, we are not clear how much help it will give the Scottish Parliament or the public in holding Scottish Government and public bodies to account.

6) *Any other relevant views you may have on the guidance.*

The addition of information box 2 on page 21 on the role of Consultation Authorities in respect of the Guiding Principles is useful.

In that information box, we think that in the second paragraph, final sentence, the wording should be: 'The Continuity Act does **not** add to or alter the duties.....'

I trust this clarifies SEPA's position but should you wish to discuss the above matter further, please do not hesitate to contact Ask@sepa.org.uk.

Yours sincerely

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Head of Government Relations and Regulatory Strategy



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