

By email to: [REDACTED]

Copy by post to:

Customer Service  
SEPA  
Strathallan House  
Castle Business Park  
Stirling  
FK9 4TZ

3 October 2019

Dear Sirs,

This letter is a formal complaint from the Scottish Salmon Producers Organisation (SSPO) regarding the regulatory practices, standards and behaviours of SEPA which continue to impact detrimentally on Scottish Salmon farmers – members of the SSPO. It is our belief that SEPA continues to operate contrary to the principles set out in the Scottish Regulators' Strategic Code of Practice resulting in the reputational and financial detriment of our member companies.

Earlier this year, we complained in writing to Terry A'Hearn, SEPA's Chief Executive, about the failure of SEPA to process applications within the expected statutory timeframes, resulting in continuing delays in application determinations. A copy of that letter dated 30 May is attached. We also expressed, verbally and in writing to SEPA our concerns in relation to other actions undertaken by SEPA and the detrimental behaviours which our members experience from our environmental regulator.

We understand that some corrective actions were implemented following the submission of our previous complaint though we have not received anything in writing that either acknowledges or demonstrates progress towards addressing the issues raised.

Since 1 June, our member companies have reported a marked decline in regulatory performance relating to determination of applications. We also believe there has been an increase of poor regulatory practices across our own and SSPO member company interactions with SEPA.

This letter should therefore be considered a Stage 2 complaint under the SEPA Customer Complaints procedure.

We specifically advise of the following complaint areas and can supply evidence to support each point if required:

- Pre-application correspondence and delays;
- Continuing delays in application determinations;
- Inconsistent and incorrect interpretations of published SEPA guidance and statements;
- Introduction, publication and use of policies, procedures and guidance documentation without appropriate consultation with regulated businesses;

- Introduction, publication and use of policies, procedures, tools and guidance documentation without appropriate consultation, which are incomplete and insufficiently tested, resulting in delays, confusion, inconsistency and errors in decision making;
- Failure to provide inspection, compliance or audit reports within reasonable timeframes;
- Failure to respond within agreed timelines to medicine use authorisations;
- Failure to respond timeously to routine compliance related enquiries;
- Failures to correct errors in regulatory decision documentation issued to operators;
- Failure to correct 'false' benthic fails leading to misrepresentation of actual environmental performance; through
  - o continued use of a soft substrate condition control on hard substrate sites; and
  - o failing benthic survey due to known locational issues arising from model errors
- Continued lack of engagement with SSPO member companies and the SSPO in respect of completion of the revised licensing framework; and,
- Commencement of a major Environmental Quality Standard review, contrary to SEPA Executive direction, with insufficient regard to the consequences and impacts which may ensue on regulated businesses.

A common thread that runs through the above issues is the regulatory behaviour demonstrated by SEPA officials in interactions with our member companies. The wide range and scale of the issues experienced by our members points to a long-term failure of SEPA to discharge its duties in accordance with the Scottish Regulators' Strategic Code of Practice.

We are seeking a formal independent investigation of all aspects covered above and a detailed report of the findings.

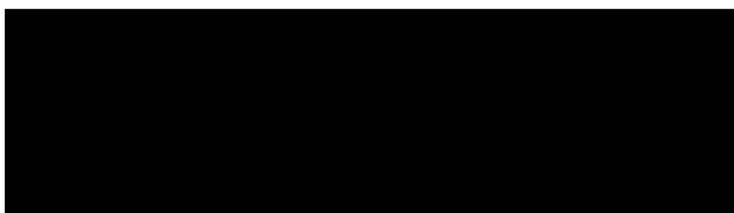
I am copying this letter to your Chief Executive as our earlier complaint was directed to him. As with my earlier Stage 1 complaint, I am copying this letter to Roseanna Cunningham, Cabinet Secretary for Environment, Climate Change and Land Reform and Fergus Ewing, Cabinet Secretary for the Rural Economy.

I look forward to your early response.

Yours sincerely,



Julie Hesketh-Laird  
Chief Executive



Our Ref: [REDACTED]

Your Ref:

If telephoning ask for: [REDACTED]

13 November 2019

Julie Hesketh-Laird  
CEO  
Scottish Salmon Producers Organisation  
83 Princes Street  
Edinburgh  
EH2 2ER

Also sent by email: [REDACTED]

Dear Julie

**Stage 2 Complaint Reference Number** [REDACTED]

Thank you for your letter and e-mail of 8 November 2019 outlining your agreement in principle to the proposed Terms of Reference for your Stage 2 complaint. In accordance with your suggestion, I have amended Term of Reference 1 to reflect your request.

I note your comments in respect of the reporting process and confirm this is the approach that SEPA will take on conclusion of our investigations, in that each complainant organisation will be sent an individual detailed letter and SSPO will receive an overall summary response.

If you feel it is appropriate, once the initial investigations are underway I am happy to keep you informed as to progress by regular contact. Peter Singleton is the Investigating Officer in this case and he may also contact you in the near future.

Please see below the amended Terms of Reference. Once you have agreed these, SEPA will carry out its investigation using these parameters-

1. No written response to SSPO's frontline resolution stage letter sent to Terry A' Hearn dated 30 May 2019 was received.
2. Pre application correspondence and delays.
3. Continuing delays in application determinations.
4. Inconsistent and incorrect interpretations of published SEPA guidance and statements.

Cont./

5. Introduction, publication and use of policies, procedure and guidance documentation without appropriate consultation with regulated businesses.
6. Introduction, publication and use of policies, procedures, tools and guidance documentation without appropriate consultation, which are incomplete and insufficiently tested, resulting in delays, confusion, inconsistency and errors in decision making.
7. Failure to provide inspection, compliance or audit reports within reasonable timeframes.
8. Failure to respond within agreed timelines to medicine use authorisations.
9. Failure to respond timeously to routine compliance related enquiries.
10. Failure to correct errors in regulatory decision documentation issued to operators.
11. Failure to correct 'false' benthic fails leading to misrepresentation of actual environmental performance through
  - continued use of a soft substrate condition control on hard substrate sites and
  - failing benthic survey due to known locational issues arising from model errors.
12. Continued lack of engagement with complainants' member companies and the complainant in respect of completion of the revised licensing framework.
13. Commencement of a major Environmental Quality Standard Review contrary to SEPA Executive direction, with insufficient regard to the consequences and impacts which may ensue on regulated businesses.
14. SEPA is failing to discharge its duties in accordance with the Scottish Regulators Strategic Code of Practice.

If you are not satisfied with how we have handled your complaint after the completion of the Stage 2 Investigation, you can appeal to the Scottish Public Services Ombudsman (SPSO). The SPSO investigates complaints about most public sector organisations in Scotland.

The Ombudsman can be contacted at:

<https://www.spsso.org.uk/contact-us>

Should you have any queries, please do not hesitate to contact me.

Yours sincerely



Iain Wright  
Senior Manager  
Resolution  
SEPA

Our Ref: [REDACTED]  
[REDACTED]  
[REDACTED]

Your Ref:

By e mail to [REDACTED]

If telephoning ask for:  
Iain Wright  
[REDACTED]

18 May 2020

Dear Julie,

### **COMPLAINTS HANDLING PROCEDURE – STAGE 2 INVESTIGATION - RESPONSE**

Further to recent communications, this letter is issued in response to a Stage 2 complaint submitted by you in a letter dated 3 October 2019.

Your initial letter of complaint was received by SEPA on 4 October 2019. As you are aware the timescale set by the Scottish Public Sector Ombudsman (SPSO) guidelines for completing a Stage 2 investigation is 20 working days. Due to mutual availability issues, we were unable to meet with your representatives within this timescale. Fortunately, through open communication and flexibility on the part of both of our organisations, you agreed to waive the time limit and Ian Buchanan and I met with Anne Anderson and Iain Berrill on 4 November 2019. This meeting was really useful in assisting SEPA understand the background which led to the complaint.

Even at this early stage it became apparent that this would be a wide ranging, significant complaint investigation for SEPA. From the outset, SEPA wanted to ensure it was a thorough, independent, balanced investigation which was transparent and proportionate and sought to examine all available evidence. To this end I formed an investigation team. Peter Singleton was the Investigating Officer assisted by Brian Roxburgh and David Smith. I acted as the complaint manager.

At this meeting SPSO kindly provided an evidence file which formed the basis of agreeing the Terms of Reference for the investigation with you. These Terms of Reference were outlined in correspondence on 8 November 2019, being agreed with you on 13 November 2019. During a further meeting on 17 December 2019 between Anne Anderson, Iain Berrill, Peter Singleton, and I, some further areas of concern were raised which were also investigated as detailed below.

It was important for the integrity of the investigation that all available evidence was gathered and all relevant people spoken to. This took some time, and I am aware you were kept updated on progress by face to face meetings in December 2019 and February 2020 and by e mail in February 2020. In accordance with your representatives' request, all relevant industry members were spoken to by end of December 2019. Following this, relevant SEPA staff were interviewed.

As you can appreciate, an investigation of this scale takes a significant amount of time to carry out effectively, however I am now in a position to provide SEPA's findings to you.



Chairman  
Bob Downes

Chief Executive  
Terry A'Hearn

#### SEPA Stirling Office

Strathallan House, Castle Business Park,  
Stirling FK9 4TZ  
tel 01786 457700 fax 01786 446885

[www.sepa.org.uk](http://www.sepa.org.uk) • customer enquiries 03000 99 66 99

## Context

The Regulatory Reform (Scotland) Act gave SEPA a statutory purpose. In short, the statutory purpose of SEPA is to protect and improve the environment (environmental success) in ways that, as far as possible, create health and well-being benefits (social success) and sustainable economic growth (economic success).

SEPA works hard every day to achieve our purpose, which is to protect and enhance Scotland's environment. Further to this, we are committed to achieving best practice in public service delivery.

The period covered by this investigation has been one of great change at SEPA where we have been working to develop a sector approach to regulation. As you are aware the Finfish Aquaculture Sector has been one of the first sectors where we have started to work in this way. This investigation has considered the specific terms of complaint agreed by you and I would ask you to note that, as is standard for a Customer Service Complaint Investigation, the team were directed to focus on the agreed terms of reference and were not asked to consider the wider reforms. Therefore it would not be appropriate to draw any broader conclusions

## Investigation Findings

The following findings relate to the 14 points agreed in our correspondence of 13 November 2019. If SEPA found that any one of the parties to the complaint's concerns on that point were justified, the point was assessed to be upheld in part. No evidence was provided by some of the parties to the complaint in respect of a number of points.

1. The complaint by SSPO and its members that SEPA did not reply to their letter of 30 May 2019 is upheld. It is my understanding that you have received an apology for this.
2. The complaint referring to pre application correspondence and delay is not upheld, no supporting evidence was uncovered during the investigation.
3. The complaint referring to continuing delays in application determinations is upheld; all seven companies provided clear evidence of examples where SEPA had exceeded applicable timescales.
4. The complaint referring to inconsistent and incorrect interpretations of published SEPA guidance and statements is upheld in part due to two instances, both referring to instances where SEPA guidance was out of step with computer modelling practice, caused by the implementation of improved tools and techniques.
5. The complaint referring to introduction, publication and use of policies, procedure and guidance documentation without appropriate consultation<sup>1</sup> with regulated businesses is upheld in part due to four instances, across three different companies. Although consultation was generally undertaken, there is evidence obtained during the investigation that in a few specific instances consultation on policy and procedural changes fell short of meeting best practice.

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<sup>1</sup> In this investigation SEPA has taken a broad interpretation of "consultation" covering both informal and formal dialogue and correspondence

6. The complaint referring to introduction, publication and use of policies, procedures, tools and guidance documentation without appropriate consultation, which are incomplete and insufficiently tested, resulting in delays, confusion, inconsistency and errors in decision making is upheld for all complainants. The complaint covers a period of significant policy and organisational change within SEPA. The investigation did uncover specific occasions where SEPA was inconsistent and made errors, but these were not systematic.
7. The complaint referring to failure to provide inspection, compliance or audit reports within reasonable timeframes is upheld in part with seven instances across four companies. SEPA failed to provide information in a timeous manner as requested by industry, e.g. for their commercial purposes such as auditing by buyers.
8. The complaint referring to failure to respond within agreed timelines to medicine use authorisations is not upheld. The only example provided was out with the timescale of this investigation.
9. The complaint referring to failure to respond timeously to routine compliance related enquiries is upheld in part in two instances. Both of these instances were related to queries about compliance assessment results.
10. The complaint referring to failure to correct errors in regulatory decision documentation issued to operators is upheld in part in one instance. This refers to a disputed inspection report released under an FOI request.
11. The complaint referring to failure to correct 'false' benthic analysis fails is upheld in part for four instances. Looking at these complaints as a whole it is clear that SEPA had not published clear, consistent national policy or guidance in relation to compliance assessment in some specific circumstances.
12. The complaint referring to continued lack of engagement with SSPO member companies and the complainant in respect of completion of the revised licensing framework is upheld in part in two instances. This is due, in part, to the means of engagement changing from an industry focused approach to a more stakeholder focused approach.
13. The complaint referring to commencement of a major Environmental Quality Standard Review contrary to SEPA Executive direction, with insufficient regard to the consequences and impacts which may ensue on regulated businesses is not upheld. This was the matter of previous complaint by SSPO which was reported upon as detailed in the SEPA letter to SSPO of 28 September 2017, following which time you had the right of appeal to the Scottish Public Sector Ombudsman (SPSO). No substantive further evidence has been provided on this issue during this investigation.

The Scottish Public Sector Ombudsman (SPSO) details a time limit of one year from becoming aware of an issue for a complainer to make a complaint. Issues raised relating to before September 2017 were not considered or investigated except where they added context to issues raised within the relevant period. Issues raised which could have been addressed through a separate appeals system were not considered or investigated.

SSPO submitted a Stage 2 complaint in 2017 and that was reported upon in a letter dated 28 September 2017. Given the nature of that complaint and its commonalities with part of the current complaint SEPA considered it that the relevant period for the investigation should be September 2017-October 2019. If new information had been shared then the relevant period would have been reconsidered.

14. In reference to the complaint of SEPA failing to discharge its duties in accordance with the Scottish Regulators Strategic Code of Practice (the Code) the complaint is not upheld. However, as described above, I accept that it is clear that there are a small number of areas where SEPA has fallen short of fully delivering the good practice set out within the Code.

In carrying out its powers and duties, SEPA requires to have regard to the Scottish Regulators' Strategic Code of Practice. The Code is made under section 5 of the Regulatory Reform (Scotland) Act. That section requires that SEPA must have regard to the Code (a) in determining any general policy or principles by reference to which the regulator exercises any regulatory functions to which the code applies, and (b) in exercising any such regulatory functions.

For the avoidance of doubt, SEPA denies any failure to comply with its duty under section 5 and denies any failure to discharge its duties in accordance with the Code.

Also for the avoidance of doubt, any point above which has been upheld and has found that SEPA has fallen short of fully delivering the good practice set out in the Code is not a finding that SEPA has failed to comply with its duty under the above legislation. SEPA's position is that it complied with its duties under the Code.

### **Other Concerns raised**

During the investigation, three other concerns were consistently raised by your members. These were compliance in relation to specific seabed types, 'low energy site policy' and communications.

Compliance in relation to specific seabed types. Concerns were raised in respect of the applicability of site specific compliance points for the edge of the AZE generated by Auto Depomod and the sampling of hard substrates which have implications for assessing site compliance. Due to SEPA not having published clear, consistent national policy or guidance on assessing compliance at such sites, SEPA staff were providing support on a site by site basis. Developing appropriate standards has been required for some time (as well as guidance) and is included in the Finfish Sector Plan.

Low Energy Sites. SEPA's policy has been and remains the right scale of site in the right location, based on the best evidence available. This evidence includes assessing the presence and sensitivity of conservation species as well as the collection of actual marine environmental data in conjunction with the use of modelled predictions.

Communications. The issue of communication was seen as a significant issue by industry members and SEPA staff alike. Whilst there are numerous examples of good practice and operational level good relationships, it is clear that there is a need to improve communication between SEPA and the industry at an organisational level to develop the consistency, amount and quality of communication. Areas for improvement include, but are not restricted to, poor turnaround times for licences, lack of timeous responses for routine regulatory information when requested through to poor consultation on the new regulatory framework.

All of this has led to deteriorating relationships between SEPA and the industry for a number of years, but more obviously since 2016/2017 as evidenced during this investigation.



Considering these findings a series of recommendations have been identified in four overarching areas.

## **Overarching Recommendations**

### **Scottish Regulators Strategic Code of Practice and Term of Reference 14**

- Consider how SEPA transparently and appropriately demonstrates compliance with the requirements of the Scottish Regulators' Strategic Code of Practice in relation to Marine Pen Fish Farming (MPFF) regulation.

### **Provision of Information**

- Consider SEPA's procedures in light of the findings in this report to ensure if necessary, appropriate and proportionate that regulated companies are aware of information released pertaining to their sites.

### **Licensing and review and Term of Reference 3, 4, 5, 6, 8 & 10**

- Consider how SEPA ensures timely determination of MPFF licence applications and ensures the Operator is informed of the progress of their application, including ensuring adequate skills and resources.
- Published documentation covering MPFF should be reviewed to ensure it is current and relevant.
- Ensure absolute clarity between SEPA and applicant on the suitability of MPFF models and tools before they are applied at each site.
- Explore the possibility of formalising a SEPA position on our involvement in trials of the development of new MPFF medicines.
- Ensure a consistent approach to biomass cuts implemented in response to MPFF benthic survey failures, including dialogue with the relevant company and any mitigation agreed.

### **Compliance and Term of Reference 5, 6, 7 & 9**

- When making any significant policy decisions and alterations covering MPFF regulation ensure appropriate, transparent and timely dialogue and consultation.
- Review the length of time SEPA allows for more extensive benthic surveys required under the new MPFF Regulatory Framework, and the subsequent report submission.

## **SEPA's Next Steps**

During the investigation of this complaint it has become apparent that there have been significant frustrations building between the industry and SEPA for some time.

I am sure you will appreciate that this has been a significant investigation for SEPA in terms of time and resource. I am also conscious that there has been a significant impact on time and resources from your members who assisted in the inquiry. The investigation has taken a targeted, proportionate review of our

regulatory practices and procedures during the timeframe of the complaint as well as examining our relationship with the industry.

It is acknowledged that there have emerged instances of both poor practice and also instances of good, positive practices on the part of all parties involved.

What has also become clear through the interviews with those involved, is that if communication had been better on both sides, many of the issues raised could have been addressed without the formality of the Customer Service Complaint process which would have been to the benefit of all involved.

I hope that all of the work which is ongoing and planned for the future improves our professional relationships. I also hope that together, both organisations reach a point where communication is such that issues are identified and dealt with at the earliest stage possible. Indeed, if in future you feel that your concerns can only be addressed by raising a complaint then I would encourage you to raise them with the SEPA Complaint Handling team at your earliest convenience to allow a prompt and full investigation to be undertaken.

The investigation findings have been submitted to SEPA's Chief Executive for his consideration. I have recommended that he makes early contact with you in order to progress the areas of recommendation set out above as the best outcome will be to have a mutually agreeable way forwards.

Following consideration of the contents of this letter and consultation with your members, it may be useful to meet with the investigation leads in order to discuss the matter. If that is the case the please let me know.

A reminder of the SEPA Complaints Process can be found at the end of this letter.

In the meantime, if you have any queries, please contact me. I can be reached at

Yours sincerely,

  
On behalf of SEPA

## What next?

If you are not satisfied with this response, an application can be made to the Scottish Public Services Ombudsman (SPSO) asking they consider your complaint against SEPA, using the link provided here:

<http://www.spsso.org.uk/contact-us>

Your unique reference number is [REDACTED]. Please quote this in any future contact with the SPSO or with SEPA about this Stage 2 complaint response.

## What happens when you have complained?

Our complaints process has two stages

### *Stage 1 - Frontline Resolution*

Frontline resolution aims to quickly resolve straightforward complaints that require little or no investigation. We aim to do this within five working days.

If for any reason we aren't able to resolve your complaint within five working days we will contact you to discuss the options. These may include an extension to the original timescale or, should the case be more complicated than we originally thought, undertaking a more detailed (Stage 2) investigation.

### *Stage 2 - Investigation*

The investigation stages deals with three types of complaint:

- cases that have not been resolved at Stage 1;
- cases that are complex in nature and or where it is immediately apparent that detailed investigation is required; or
- cases that involve members of senior management.
- 

When using Stage 2 we will:

- acknowledge receipt of your complaint within three working days;
- where appropriate, discuss your complaint with you to understand why you remain dissatisfied and what outcome you are looking for; and
- provide a full response within 20 working days.
- 

If the investigation is particularly complex and we need longer than 20 working days to resolve the problem we will agree a revised time limit and keep you updated on progress.

### *Stage 3 - Independent external review - Scottish Public Services Ombudsman*

If, having gone through our complaints procedure, you are still dissatisfied you can appeal to the Scottish Public Services Ombudsman (SPSO) at <http://www.spsso.org.uk/contact-us>.

The SPSO cannot normally look at:

- a complaint that has not completed our complaints procedure. You must have been informed of the outcome of your complaint, at stage 2, before raising it with the SPSO;
- events that happened, or that you became aware of, more than a year ago; or
- a matter that has been or is being considered in court.

Further details of our Complaints Handling Procedure can be found on our website at <http://sepa.org.uk/about-us/complaints-handling-procedure/>.