



## **Response to SEPA consultation on: Sector approach to regulation (Scotch Whisky, Landfill and Metals Sector Plans), April 2018**

The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Scots law working party.

UKELA makes the following comments on the proposed Scotch Whisky and Landfill Sector Plans (including only one comment specific to the Metals Sector Plan).

- 1. *We want to be a world class regulator, adopting innovative and novel approaches that help as many operators as possible to move beyond minimum legal standards and create economic and social success for Scotland from environmental excellence. Do you think these first three sector plans set the right level of ambition to achieve this goal?***

- 1.1 From a general perspective, UKELA welcomes SEPA's sectoral approach to regulation. However, UKELA considers that the 'level of ambition' is perhaps too great on the basis that how it will be achieved is not properly explained in the sector plans.**

All three sector plans contain a very similar introduction on p.5, and the following preliminary observations relate to the introduction in all three sector plans:

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- (a) The first paragraph asserts that SEPA “needs to radically change the way we work”. It refers to “the different sets of rules” (although the letter ‘s’ is missing) that SEPA has used in the past – which it continues to use – and asserts that this traditional approach “will not enable us to make the transformational changes needed to tackle today’s problems”. There is no explanation of why this is the case, or whether – and if so, how – SEPA intends to alter its current enforcement policy and regulatory approach.
- (b) UKELA considers that a rule-based approach to tackling “today’s problems”, such as climate change and over-use of natural resources, is possible. Limits can be set and simple rules enforced to control emissions of greenhouse gases and the over-use of resources. Indeed, SEPA already uses rules to control the over-abstraction of water and diffuse water pollution, which are two of “today’s problems”, but there is no explanation of why this approach cannot be extended to cover other problem areas.
- (c) The traditional, rule-based approach has the benefits of being measurable and transparent, facilitating SEPA’s accountability to the Scottish public. The new approach seems to be more about “partnership working” and interventions at senior management level, and is therefore less likely to engender the trust and support of the Scottish public. No doubt it makes sense for SEPA to engage with the sectors it regulates at trade body level, in order to encourage improved environmental performance, but this should not be at the expense of its role as a regulator. The public needs to be reassured that SEPA is no less likely to take enforcement action against operators in sectors that have committed to going ‘beyond compliance’.
- (d) The introduction (in the fifth paragraph) makes two statements that require clarification or correction. It says that operators “that demonstrate a commitment to good environmental performance and deliver solid outcomes will receive powerful support through guidance and advice”. UKELA considers that the benefits of good environmental performance will be reflected in a company’s bottom line and its

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public profile, and that no company should expect to be rewarded by SEPA. The suggestion that only the best operators will receive guidance and advice from SEPA is unhelpful: all operators need SEPA's guidance and advice to some extent.

It also says that operators “that demonstrate behaviour which leads to significant or chronic non-compliance can expect SEPA to use the most appropriate enforcement tools to bring them into compliance.” SEPA has appropriate enforcement tools for even the mildest non-compliance, and UKELA considers that they should be used accordingly. It should be clear that in cases of ‘significant or chronic non-compliance’, the enforcement tools that SEPA will use will be its toughest ones.

- (e) To summarise thus far: SEPA needs to make the case for this ‘radical’ change in approach and explain why it is necessary. Has it been pushed to do so by the Scottish Government? Is this about reducing costs? Has the traditional approach failed in any way? Is the traditional approach incompatible with SEPA's new statutory purpose? Whatever the reasons, SEPA needs to be clear about them.

If, on the other hand, the traditional approach is going to be retained, and ‘Beyond Compliance’ is an additional way of achieving environmental improvements, supplementing the traditional approach, this needs to be made clearer in the introduction. But if that is the case, the plans need to explain how SEPA will fund and resource the extra work required to bring about this change.

## 1.2 The following observations are specific to the Scotch Whisky Sector Plan (“SWSP”):

- (a) The final paragraph of the introduction says that many businesses in the sector are already moving “*in a beyond compliance direction*”, and that the plan will “*help drive beyond compliance activity*”. SEPA staff and indeed some readers may be very familiar with the term ‘beyond compliance’, but for readers who are not, the quoted phrases, left unpunctuated, are meaningless. If the term must be used as an adjective (as here, to describe a direction or a type of activity), then to improve

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understanding for all, please use a hyphen or quotation marks for this term: i.e. “*in a beyond-compliance direction*” or “*help drive ‘beyond compliance’ activity*” – in the same way as they are used in the phrase “*a ‘one planet’ sector*” on page 7. Please then use the punctuated term consistently.

- (b) The text on p.10 refers to five distinct whisky regions; the map on p.11 shows six. The word ‘licensed’ is mis-spelt in the map heading.

1.3 The following observations are specific to the Landfill Sector Plan (“LSP”):

- (a) Thus far, SEPA has failed in its endeavour to bring the sector into compliance with around 30% of sites failing their compliance assessment in 2016. Before the sector can hope to ‘move beyond compliance’, action is needed to address that, particularly in light of the fact that the new compliance assessment scheme (when it is brought into force), will result in more sites being deemed non-compliant.
- (b) The figures referred to in the LSP only take account of those sites which are permitted and that does not reflect the number of illegal sites which are wholly non-compliant with environmental legislation. The same may be true of the figures used for the Metals Sector Plant (“MSP”). Little is offered by way of a solution to the level of criminality in either the LSP or the MSP.

**2. Do you think that the plans set the right level of ambition for the sector?**

2.1 For the Scotch Whisky sector, which is achieving above-average compliance, yes.

2.2 The following observations are specific to the LSP:

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- (a) The comments at Q1 are of relevance. SEPA's focus for this sector, which (in terms of operational landfills) is achieving compliance levels well below average, needs to remain on bringing all operators into full compliance and on reducing the levels of criminality substantially before moving 'beyond compliance'. As such, the level of ambition is currently set too high.
  
- (b) The LSP fails to address the pertinent issue of the 2021 landfill ban which could have further significant effects on the ability of the sector to remain compliant. This needs to be properly addressed in the LSP once the specific guidance relating to the 2021 landfill ban has been put out to consultation and the responses analysed.

**3. *Do the plans contain the right actions to: (a) tackle non-compliance and (b) to help businesses go beyond compliance?***

**3.1 The following observations are specific to the SWSP:**

- (a) On p.17, please add 'poor plant maintenance' to the list of key issues contributing to non-compliance.
  
- (b) As stated at the top of p.17, compliance is 'non-negotiable', so all compliance failures should be addressed, not just significant ones, as stated in the final point. SEPA has appropriate enforcement tools for all levels of non-compliance. If a non-compliance is considered not worth correcting, then it should not be a requirement in the first place. UKELA therefore suggests deleting the word 'significant'.
  
- (c) On p.21, water is discussed. Consideration might be given to the idea of handling process water separately from cooling water, and using lower-quality water for cooling purposes – unless of course cooling water needs to be just as clean as the water used as an ingredient.

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- (d) On p.25, peat extraction is mentioned. Its impact on natural habitats should also be mentioned, and consideration might be given to setting a time-limit for the production of a peat strategy.

3.2 The following observations are specific to the LSP:

- (a) There is not sufficient or strong enough action set out in relation to how SEPA will deal with the current levels of non-compliance and criminality in the sector.
- (b) Some further differentiation between the very worst non-compliance and minor non-compliance by those endeavouring to work towards full compliance is required.
- (c) There is little acknowledgement of how sites which are forced to close early as a result of either continued non-compliance or the 2021 landfill ban will be managed as closed sites. Only following formal legal surrender of a licence or permit for landfill would an operator be in a position to 'diversify' or 're-use' a landfill site and such surrender is currently a long-term process.

**4. *Are there other opportunities that SEPA should be taking, or partners that we should be working with, that have not been referenced?***

4.1 The following observations are specific to the SWSP:

- (a) Section 2 says that "our staff will work with partners and facilitate liaison between them and the Scotch Whisky Sector...". To improve understanding of what is intended, it would be helpful to clarify who the 'partners' are.
- (b) On p.14, please include references to bonded warehouses also being covered by COMAH. It would be helpful to provide the number of COMAH sites too, and to

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refer to the Health & Safety Executive's shared regulatory responsibility for COMAH sites.

(c) In Figure 6, please spell out HSE and HMRC in full.

4.2 The following observations are specific to the LSP:

(a) SEPA could work more effectively with industry directly in this sector as well as with other industry groups. Wider engagement could provide better insight in the LSP.

(b) It would be beneficial to the sector for SEPA to work more effectively with Revenue Scotland, particularly to deal with the level of criminality in the sector. There is ability for Revenue Scotland to charge Scottish landfill tax in relation to illegal sites but that has not been done to date. Perhaps that could be addressed with better engagement on the location of such illegal sites via SEPA?

**5. Do you agree with the targets and priority actions for 2018-2019?**

5.1 The following observations are specific to the SWSP:

(a) Section 2 ("Our Vision") opens with five statements, all expressed in the present tense. Without any introductory clause, these can easily be read as statements of fact, as opposed to statements of aspiration. To make it clear that this is SEPA's vision for the future of the sector, as opposed to its current view of the sector – and, importantly, to indicate how long SEPA expects this vision to reach fruition – it would be helpful to add a line before the statements, such as: "*SEPA aspires to see the sector develop in such a way that, in [5/10/15] years, we will be able to say: ...*".

(b) On page 13 (environmental impacts), UKELA suggests the following changes:

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- References to greenhouse gas emissions from transport, in the first and third boxes, should also mention air pollution;
- Instead of 'impacts on river ecology', which is restricted to rivers, please refer to 'water pollution', to cover impacts on lochs and coastal waters too;
- In the third box, please include reference to the use of raw materials to make glass bottles;
- Instead of 'air quality impacts' (twice), please refer to 'air pollution';
- Instead of 'diffuse pollutions (*sic*) of rivers', in the last box, please refer to 'diffuse water pollution'.

(c) On p.26, it is not clear that the outcomes illustrated fully match SEPA's vision on p.7. UKELA considers that they should.

(d) On p.27, UKELA suggests combining the first and sixth bullet-points (on licence reviews), the second and final bullet-points (on data), and clarifying what is meant by '3<sup>rd</sup> cycle measures' in the penultimate bullet-point

## 5.2 The following observations are specific to the LSP:

(a) It would be useful to have some visibility of when SEPA intends to bring in its new compliance assessment scheme and when it intends to start using voluntary monetary penalties – both would help to target non-compliance.

(b) How does SEPA intend to fund and resource the measures required to bring the sector into full compliance?

(c) When does SEPA intend to start reviewing and revising existing licences and permits as such an exercise will take time and resource?

(d) When does SEPA intend to publish its guidance on the 2021 landfill ban for consultation?

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**6. Do you have any other comments?**

UKELA's view is that all of the above comments and those from other consultation respondees should be fully considered before the sector plans are finalised and published in July this year. Further work is required, particularly in relation to the LSP, in order for something to be published which is capable of being implemented by SEPA.

**7. If you have any additional questions regarding our consultations or would like someone to get back in touch, please provide your details.**

**Contact:**

Ian Cowan, Highland Environmental Law

On behalf of UKELA

[ian@highlaw.co.uk](mailto:ian@highlaw.co.uk)

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