



## Consultation on Proposals for Future Funding Arrangements for the Scottish Environment Protection Agency

### Feedback form

We welcome your views on this consultation until 4 January 2013. You can respond by:

- emailing the form to [funding@sepa.org.uk](mailto:funding@sepa.org.uk);
- printing this form and sending it to: Sustainable Funding Model Consultation, Scottish Environment Protection Agency, Corporate Office, Erskine Court, Castle Business Park, Stirling, FK 9 4TR.

If you have any queries about any aspect of this consultation, please email [funding@sepa.org.uk](mailto:funding@sepa.org.uk).

**If you are happy to provide your details, please do so here:**

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Unless you specifically request your response to be treated confidentially, responses may be made publicly available.

Respondents should be aware that SEPA is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made.

### Question 1

Do you agree with the proposed statutory purpose for SEPA?

Yes       No

Do you also agree that SEPA should be given a power to compile information in relation to all its functions?

Yes       No

Do you have any comments or suggestions in relation to this question?

The UK Environmental Law Association (UKELA) is the UK's foremost membership organisation working to improve understanding and awareness of environmental law, and to make the law work for a better environment. As such, UKELA has a keen interest in ensuring the effectiveness of environmental legislation in Scotland. Through its Scottish Law Working Party, UKELA commented in detail on last year's consultation on the proposed Integrated Framework of Environmental Regulation. The response is available at [www.ukela.org/scotslawwp](http://www.ukela.org/scotslawwp).

1 UKELA wishes first to make general comments on the conduct, presentation and publication of the present consultation.

1.1 This consultation, like last year's, is being conducted jointly by a 'partnership' of SEPA and the Scottish Ministers, but it is clear from the consultation document itself, from the publicity arrangements and from the feedback arrangements that SEPA is leading on this consultation on behalf of the partnership. UKELA considers that it is inappropriate for SEPA to conduct a consultation about its own statutory purpose and funding arrangements. SEPA is accountable to the Scottish Ministers, so when the very foundations of SEPA's existence, namely its statutory constitution under the Environment Act 1995 and the source of half its revenue, are under discussion, it should be Scottish Ministers who conduct and control the consultation with the public and other stakeholders. Although it is clearly important and necessary for SEPA to inform and advise Scottish Ministers about the continuing suitability of its existing functions and funding arrangements, and even about the development and implementation of new functions and funding arrangements, once SEPA has done that it then becomes the responsibility of the Scottish Ministers alone to propose any changes to SEPA's constitution and funding arrangements. The fact that SEPA is actually leading on proposals about these crucial matters demonstrates that SEPA's relationship with the Scottish Government has become too close. This is a matter of concern.

1.2 As stated above, UKELA is aware that last year's consultation on proposals for an integrated framework of environmental regulation was also presented jointly by the Scottish Ministers and SEPA, but there were critical differences in terms of subject matter, publicity arrangements and feedback arrangements. The proposals were about changes to the regulatory regimes that SEPA administers, as opposed to the statutory foundations of SEPA itself, so the fact that that consultation was jointly badged was of less concern, particularly as Scottish Ministers publicised the consultation in a press release and asked for feedback to be sent to them. In this case Scottish Ministers did not publicise the consultation at all, and feedback is to be sent straight to SEPA - regarding matters over which SEPA should, from a constitutional perspective, have no control at all, in UKELA's opinion.

1.3 UKELA is also particularly concerned that SEPA's publicity about the consultation, in the form of a press release dated 11 October 2012, made no mention at all of the fact that SEPA's statutory purpose was one of the subjects of the consultation. This is a remarkable oversight. The consultation also proposes the repeal or re-writing of 4 out of the 5 sections of the Environment Act 1995, SEPA's founding document, covering its general powers and duties, plus one further key section on cost/benefit assessment, yet this is not made clear in the publicity. The title of the consultation document does not mention any of these proposals. Even the foreword to the document, subscribed by SEPA's chairman and the Minister for Environment and Climate Change, says nothing about them. They are not mentioned at all until page 5 of the document. This is a matter of serious concern.

1.4 As if to underline the Scottish Minister's hands-off approach to this consultation, which (as stated above) they should be leading, the consultation did not appear on the Scottish Government website until 25 October, a full 2 weeks after the issue of SEPA's press release and the start of the consultation period on 11 October. This is unfortunate, given that the consultation period only lasted 12 weeks altogether - the minimum recommended.

1.5 Finally, in relation to the timing of this consultation, it is a matter of regret that it was not started much earlier. Certainly, as UKELA stated in its response to last year's consultation - which flagged up the prospect of a subsequent consultation on SEPA's statutory purpose - consultation about SEPA's constitution and purpose should have preceded any consultation about the regulatory regimes SEPA administers. To run this fundamentally crucial consultation about SEPA over the Christmas holiday period, effectively curtailing the basic minimum consultation period of 12 weeks to less than 11 weeks, is also regrettable.

2 The following comments relate to the questions asked above.

2.1 In relation to the proposed statutory purpose, UKELA supports almost everything that is proposed, except the reference to 'sustainable economic growth'. UKELA does not support the proposal to repeal or replace sections 31, 32, 33, 34 and 39 of the Environment Act 1995. UKELA urges the Scottish Government to consider including explicit reference to recognised environmental principles in any new legislation affecting SEPA. Further explanation follows.

2.2 UKELA agrees with the premise that SEPA's role has expanded since it was brought into existence by the Environment Act 1995, and that it is appropriate to reflect this in legislation. The protection and improvement of Scotland's environment is today widely recognised by the Scottish people as SEPA's primary purpose. If 'the sustainable management of natural resources' is included in SEPA's remit there is a risk of overlap with Scottish Natural Heritage, but this is inevitable given the very nature of environmental issues and is not a problem so long as the core responsibilities of each body remain distinct. UKELA supports the statutory requirement for SEPA to contribute to improving the health and well-being of the people of Scotland.

2.3 However, UKELA fundamentally rejects, as wrong in principle and profoundly inadvisable, the proposal to replace the provisions in section 31 of the 1995 Act relating to sustainable development with provisions referring to the current administration's objective of 'sustainable economic growth'. The principle of sustainable development has been recognised internationally since at least 1972, and it has a widely (if not universally) adopted meaning, spelt out by the Brundtland Commission in that year. By contrast, the concept of 'sustainable economic growth' has been developed by the Scottish Government over the last 5 years at most and, like most political mantras, is unlikely to last much beyond the lifetime of the current administration. It is therefore inappropriate to introduce such a transient political concept into legislation at all.

2.4 It is particularly inappropriate to do so in relation to SEPA, Scotland's environmental regulator. It would suggest that the balance that is currently required between environmental, social and economic factors - with primacy given to the environment and full consideration given to social and economic factors - is to be redressed in favour of economic growth. This is not what the Scottish public will expect from its environmental regulator. SEPA was entrusted by the UK Parliament originally - and since devolution implicitly by the Scottish Parliament - with responsibility, on behalf of Scotland's people, for protecting and improving their environment. Although not express in the Environment Act 1995 or in any other legislation, the protection and improvement of Scotland's environment is widely recognised today by the Scottish people as SEPA's overall purpose, probably as a result of public statements made by successive UK and Scottish administrations, and by SEPA itself, over the 16 years since it came into being, and not least as a result of SEPA's actions over that period. This primary responsibility is balanced by express duties, set out principally in sections 32 and 39, to have regard to other factors, notably social and economic factors. It is clear that these are matters that SEPA must not ignore, but it has always been equally clear that SEPA's primary responsibility is to the environment.

2.5 To alter the emphasis of SEPA's primary responsibility by introducing a reference to economic growth would risk undermining SEPA's culture and confidence as an effective regulator, and create uncertainty for all of Scotland's people as to what its primary responsibility would henceforth be.

2.6 The proposal that appears to be made in the consultation document, to delete any reference in SEPA's founding legislation to sustainable development, by replacing section 31 of the 1995 Act, seems both inappropriate and unnecessary. As stated above, sustainable development is a globally recognised principle with a 40-year pedigree, not just in the field of environmental regulation, but increasingly in governance and administration generally. To do away with this fundamental environmental principle in favour of a short-term political objective would seem wrong.

2.7 UKELA considers that section 31 should be left unchanged. Two administrations have exercised the power to give SEPA guidance in relation to sustainable development, most recently in 2005. Indeed section 31 appears to have been intended by Parliament as the means by which changing administrations give broad political guidance to SEPA. Scottish Ministers could use it to give SEPA statutory guidance in relation to sustainable economic growth, if they so wish. This would be much more acceptable than making sustainable economic growth part of SEPA's statutory purpose.

2.6 Rather than weakening the role of sustainable development in SEPA's governing legislation, the opportunity should be taken to strengthen and clarify the role of sustainable development and other environmental principles that are widely recognised throughout Europe, namely the 'polluter pays' principle, the prevention principle, the precautionary principle and the principles of public participation and intergenerational equity. Although SEPA is already obliged to have regard to such principles when implementing European Union law, incorporating them in domestic legislation would make this obligation more transparent, and increase the accessibility of the law for all concerned.

2.9 Like section 31 of the 1995 Act, sections 32 and 39 continue, in UKELA's opinion, to be fit for purpose, achieving the correct balance with SEPA's primary duty to protect and improve the environment. No justification is given for repealing these sections.

2.10 Most of section 34 has already been repealed, but it is not clear why the remainder that is still in force, i.e. subsection (2), is considered to be redundant. No justification is given in the consultation document for its repeal.

2.11 UKELA agrees that SEPA should have the power to compile information in relation to all its functions, but considers that SEPA already has sufficient powers to enable it to do this, whether under the 1995 Act or under subsequent primary legislation that has expanded SEPA's role, such as the Water Environment and Water Services (Scotland) Act 2003, the Flood Risk Management (Scotland) Act 2009 and the Reservoirs (Scotland) Act 2011. Any proposal to expand section 33 of the 1995 Act needs to be justified by more detailed specification of the powers SEPA needs but currently lacks.

2.12 In summary, UKELA considers that the only change that is needed to the 1995 Act is to introduce a single broad statutory purpose as stated in the paragraph beginning with the words "The proposal is ..." (in the middle of page 7 of the consultation document), subject to the replacement of the last 3 words of that paragraph ("sustainable economic growth") with the words "sustainable development".

2.13 UKELA also considers that without proper detailed justification for any changes, sections 31, 32, 33, 34 and 39 of the 1995 Act should be left as they are.

2.14 UKELA urges the Scottish Government to take this rare opportunity to re-consider expressing in Scottish legislation the full range of overarching environmental principles that already underpin environmental legislation throughout the European Union and beyond.

## Question 2

Do you agree that the existing safeguards in terms of accountability, cost control and efficiency are adequate?

Yes       No

Tell us if any other safeguards are required.

## Question 3

Do you agree that the principles, as set out in Table 1, are the right ones to inform the development of a new approach to funding?

Yes       No

If not, what other principles would you suggest should be considered?

UKELA supports the stated principles as a basis for SEPA's funding, subject to comments about environmental risk assessment in response to question 5 below.

However, the proposals, as currently presented in the consultation document, already fail the tests of simplicity and transparency. UKELA acknowledges that the consultation document seeks views on a wide range of possible funding options, which makes the whole document appear complicated, vague and difficult to understand. It is imperative that certain options are ruled out before the next stage of consultation, in order to clarify the overall package.

It would have been helpful for more detail to be included on some of the options in this document, so that a more informed view could be reached by stakeholders prior to ruling them in or out, but in the absence of that detail, and in the interests of making progress towards a new funding settlement, UKELA has ruled out certain options simply because there is insufficient information to be able to judge whether they can be implemented in practice at all, or at least without compromising SEPA's role as an independent environmental regulator.

#### **Question 4**

Do you agree with the use of environmental resources principle being factored into charges to regulated business?

Yes       No

Tell us whether this is a principle you could support and a link to charges is justified or if you have an alternative view?

More information is required about the methodology for costing the use of environmental resources. In order for this methodology to be successful, it will be imperative to establish a good baseline for valuing the services provided by Scotland's ecosystems. It is UKELA's opinion that we are currently nowhere near this position. In addition, the consultation document describes the emerging agenda around ecosystem services as "ensuring and maintaining a flow of goods and services from the environment for the benefit of humans and the economy." This definition seems to UKELA to put too much emphasis on the social and economic aspects of ecosystem services (i.e. the 'direct' benefits to people) and completely neglects to mention that the ecosystem services agenda should also identify potential risks to eco-receptors and address the significance of such risks (i.e. the 'non-direct' benefits, such as existence or aesthetic value). Indeed, this statement fails to reflect the integrated approach based on whole ecosystems that ecosystem services should provide, allowing sustainable decisions to be made in a commercial context by quantifying the non-monetary benefits of a healthy environment.

#### **Question 5**

Do you support a move to a risk-based approach to charging based upon the principles discussed above?

Yes       No

Tell us what you think and if you have particular views on the design of the environmental risk assessment.

Environmental risk assessment is obviously central to SEPA's determination of applications for authorisation, and needs to remain so. If it is introduced into the charging system for environmental licensing, there is a risk that, without stringent checks and balances, considerations relating to SEPA's finances might enter the environmental decision-making process. For instance, such a system might make it possible for any proposal at all to be authorised, no matter how great its environmental impact, provided that the operator pays enough. An applicant may simply even get the impression that this is possible. This must be avoided at all costs. SEPA's decision-making needs to remain free of such financial considerations.

The consultation recognises that developing a risk-based approach to charging as described in the document is a 'significant undertaking' and would have to be subject to further consultation. The resources required would be substantial and UKELA is concerned that this exercise would require a level of resources that SEPA does not have and would therefore be done at the expense of their core activities, with the unintended consequence of detrimental impact on the environment. UKELA does not agree that the development of an environmental risk assessment as described in the consultation document to inform a charging structure is key to reform.

However, if location is included as one of the factors in the environmental risk assessment, great care would be needed to ensure that the term 'sensitive location' takes account of different types of sensitivity. For instance, it is recognised that socially deprived populations often suffer from disproportionate levels of environmental degradation, in Scotland as elsewhere in the world. The principle of distributive environmental justice should be incorporated in any locational element of the risk assessment.

### Question 6

Do you think that SEPA should consider introducing a system for 'beyond compliance' incentivisation as part of its overall approach?

Yes       No

Tell us what you think and whether this should be via charges or a 'beyond compliance' framework.

UKELA considers that it will be more effective, in principle, to charge more for poor performance rather than to charge less for good performance. There is a risk that incentivising good performance through lower charges could compromise SEPA's effectiveness as an independent environmental regulator.

If introduced, however, any such system should be designed to ensure that it is flexible enough to respond quickly (i.e. in the middle of a charging period, if necessary) to changes in operator management or personnel which might lead to changes in environmental performance levels.

It is UKELA's opinion that 'beyond compliance' incentivisation is preferable to financial rewards for good performance.

### Question 7

Is the concept of an intervention charge for poor performance something you would wish to see introduced?

Yes       No

Tell us if this seems reasonable or not?

SEPA already has powers, e.g. under regulation 33(2)(a) of the Controlled Activities Regulations, to recover the costs of "any investigation to establish whether or not [an enforcement notice] is necessary, and if necessary, on whom it requires to be served". For some reason SEPA has not to date used these powers in any systematic way, but it is clear that the principle is already established.

### Question 8

Do you consider that SEPA should directly charge for time and resources spent in dealing with very poor performers?

Yes       No

Tell us what you think and what consequences there might be in introducing such a charge.

A. This approach is most consistent with the 'polluter pays' principle, so it is not clear why the consultation documents says it would be "used sparingly after other mechanisms had been exhausted". There may be a risk that it would encourage operators to conceal poor performance.

B. This approach could be applied equally to the fees for environmental licence applications.

**Question 9**

Do you have any views on the balance that should be struck between the total levels of income generated from the standing and variable charges?

No

**Question 10**

Would you support?

- A. Option 1.
- B. Option 2.
- C. Neither of the options.

Tell us which option you would support and, if neither, please suggest an alternative.

Option 2 is preferred in principle. However, care needs to be taken to ensure that the extra new cost of collecting standing charges from operators who currently pay no charge does not undermine the cost-effectiveness of the proposal. In order to avoid this extra collection cost, it might be worth considering incorporating such a standing charge into the application fee for such activities.

**Question 11**

Do you support the concept of facilitating voluntary agreements?

Yes       No

Tell us where the priorities for such agreements should be and what issues need to be considered.

In principle this could be a long-term aim, but UKELA considers that it is too early to introduce this more radical approach in Scotland. The other new approaches need to be explored and developed more fully first.

**Question 12**

Do you agree with the principles that would apply if value added services were to be introduced by SEPA?

Yes       No

Tell us if you agree with the concept of value added services and what principles should be applied?

In the absence of more detail about what "effective arrangements" exist to safeguard SEPA's role as an environmental regulator, UKELA considers that the risks of this central role being compromised are too great. SEPA already charges for access to datasets and perhaps the level of charges or what information can be accessed could be consulted on, but the other examples given suggest too much scope for conflict of interest.

This proposal would also undermine the competitiveness of the environmental consultancy market in Scotland.

**Question 13**

Would you support the introduction of voluntary agreements as described for major infrastructure or construction projects as a contribution to supporting economic development and environmental protection?

Yes       No

Do you have any comments or suggestions in relation to this question?

This would be a sensible way of addressing a long-standing problem that SEPA faces.

Thank you for responding to this consultation.