

ANNEX D – RESPONDENT’S INFORMATION FORM AND CONSULTATION QUESTIONNAIRE

Consultation on Scottish Regulators’ Strategic Code of Practice



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

Organisation Name

UK Environmental Law Association (UKELA)- Scottish Law Working Group

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

For and On Behalf of the UKELA Scottish Law Working Group:
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3. Permissions – I am responding as...

Individual

/

Group/Organisation

Please tick as

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick ONE of the following boxes

Please tick as appropriate

X Yes No

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

X Yes

No

Consultation on Scottish Regulators' Strategic Code of Practice

CONSULTATION QUESTIONS

Question 1 – Does the code clearly set out its purpose and policy intent?

Yes No

Please explain your view

The code goes some way to set out its purpose and policy intent, providing the context and focus for the code, however it could make this clearer and more user-friendly. Although the code's purpose is of course to guide named regulators, it will also serve as a source for the public and businesses.

This is addressed to some extent within paragraphs 4, 5 and 6 of the draft code, however it would be helpful to have a section specifically stating its purpose and intent to further tie this in to sections 4 and 5 of the Regulatory Reform (Scotland) Act 2014 (the "Act").

A key point that we highlight throughout this response is that the code fails to adequately focus on social or environmental issues and instead has strong focus on sustainable economic growth ("SEG"). For some regulators it will be inappropriate to focus on economic factors as it is not their sole or main concern. This is true for SEPA, but also for other regulators such as SNH, Food Standards Agency and others. Although section IV at paragraph 9 states that SEG shall not be prioritised and is only a factor, this remains a concern and is not adequately reflected within the substance of the code as presently drafted.

Proposed amendment(s):

- Insert 'Purpose and Policy Intent' section in the code.
- The above section must place more appropriate focus on key social and environment issues as opposed to just SEG.

Question 2 – Does the code clearly explain how regulators can support compliance and contribute to achieving sustainable economic growth?

Yes No

Please explain your answer

It is welcomed that there is a definition for SEG within the code and that it is consistent with the definition contained within the draft *Scottish Planning Policy: Sustainability & Planning*. We wonder whether this definition will begin to be consistently adopted in the future and applied to items such as the Marine Strategy papers.

Given the wide scope of the definition of SEG and the strategic nature of the code, it is helpful that much is left up to the individual regulators to achieve these objectives so they can be adopted in a tailored, sector-specific manner. It may however prove difficult to quantify if and how regulators are achieving SEG as no benchmarks presently exist.

We agree with the wording proposed at paragraph 9 that regulator-specific codes should apply to actual decision-making.

Proposed amendment(s):

- Develop system and/or further guidance to assist regulators in benchmarking.

Question 3 – Does the Code clearly set out the requirements to enable regulators to work in way that is transparent, accountable, proportionate, consistent and targeted only at cases where action is needed?

Yes No Partly

Please explain your view

The code details how regulators can communicate with those they regulate, implementation provisions and general guiding principles. However it must always be remembered that whilst it obviously makes sense for regulators to assist those who have to work with the rules, at some point the regulator may have to be the enforcer of rules against the wishes of the regulated bodies. There are limits on how helpful the regulator can be. This could also lead to issues where, for example a regulator advises a business at the outset but then later is required to take enforcement action against that business for failure to comply- can the business use that advice as a defence in any prosecution?

Proposed amendment(s):

- Provide guidance/statement acknowledging the regulators' limitations in assisting those it regulates given their enforcement role;
- Provide guidance/statement to make it clear the extent (if any) to which advice, assistance or guidance provided by the regulator has an impact on the legal position in terms of creating legitimate expectations, providing a "reasonable excuse" or showing "due diligence" in the event of prosecution where such factors act as a defence or if these issues will be left to the Courts to determine.

Question 4 – Should the Code more explicitly recognise the contribution that sustainable economic growth brings to local communities through the employment,

investment and spend associated with specific business developments (see paragraph 3)?

Yes No X

Please explain your answer.

The code does not cover regulators' responsibilities to communities at all. For example, only a very general statement at paragraph 2 and one sentence under paragraph 6 to say that the interests of communities should not be over-ridden.

Particularly from an environmental point of view, the contribution that SEG makes to a community through a specific business being present there may be of secondary consideration to the community compared to other issues like impact on quality of life (e.g. air quality issues, noise, dust etc.). In fact, in many cases local communities do not benefit at all economically from a business being present that could be having an environmental impact. This is further considered in our response below to question 10.

Proposed amendment(s):

- The code does not need to further explain its current general statement but instead needs to detail how this will work. It must address how to balance competing objectives including consideration of how to balance the needs of communities which could at times be at odds with business interests.
- The code needs to be explicit about how regulators are expected to interact with communities and individuals as well as with the businesses they regulate.

Question 5 – Are there any essential requirements which should be included in the Code and are currently absent?

Yes X No

If yes, please explain your answer.

Please refer to the above "Proposed amendment(s)" requirements which should be reflected in the code and in response to question 10. As previously noted, the most pressing concern is the focus on SEG with little mention of social (communities) or environment, especially given that the two main environmental regulators are covered by the Act and the code. For example, at paragraph 12 there is no mention of 'environment' and of 'community' only once.

Although it is clear from the Act that regulatory functions should be exercised in a way that contributes to SEG only to the extent that it is consistent with the exercise of those functions, we would have expected this to be reflected, or at the least to be mentioned, in the code. The Act

provides a clear caveat to the SEG duty and the ability for the Scottish Ministers to guide regulators as to how to best adopt this. There is clear scope for the code to further detail how regulators can best balance their regulatory functions with the new duty.

Further to the above, the emphasis on regulators to consider the impact of their activities on those who are regulated and stakeholders at paragraph 14 should not eclipse the other legal obligations they have, with regard to requirements in areas including climate change and renewables, but also equality, freedom of information (“Fol”), data protection etc. Moreover, key stakeholders are the general public and third parties, whose interests the various regulations have been created to serve. Such a development is in no way suggested (and Fol etc. is a protection against it), but we do not want to go back to the old days when aspects of regulation created a closed world where the interests of industry outweighed those of the public. A statement to this effect should be included within the code.

The code could benefit from further consideration in terms of enforcement and appeal provisions. At paragraph 20 it states that the regulator must *“Offer an independent, impartial and transparent appeals procedure. Regulators should clearly advertise ways to challenge or appeal against a regulatory decision. This should include the option to discuss and receive advice about decisions taken”* We query if there a risk that the last requirement will blur the line between discussing advice given (for example during a visit) and providing for an appeal which by definition shall be a separate process involving a different decision-maker? We consider that paragraph 2.3 of the UK Code better provides for this, specifying that if relevant, different officers should be involved.

Further, paragraph 2.2 (second point) in the UK Code would also be beneficial to include in the Scottish code which presently does not contain a similar provision. It states: *“This paragraph does not apply where the regulator can demonstrate that immediate enforcement action is required to prevent or respond to a serious breach or where providing such an opportunity would be likely to defeat the purpose of the proposed enforcement action.”*

Question 6 – Do you have additional case study examples of good practice which you would like to be included?

Yes No

If yes, please provide your case study below:

N/A

Question 7 – Do you think there would be difficulties in implementing and complying with the Code?

Yes No

Please explain your answer

We can foresee difficulties with the aspirations of regulatory bodies at a corporate level versus the approach taken by individual regulatory officers on the ground. For example, if a business wants to expand and such expansion will provide lots of new jobs and investment, there will be a lot of political will to allow the development to progress. However the business may struggle to meet regulatory standards such as the requirement to operate using the best available techniques (BATs) under the Pollution Prevention and Control (Scotland) Regulations 2012. This requires that the option chosen should be the best available to achieve a high level of protection of the environment taken as a whole. Difficulties such as this may lead to individual regulatory officers being perceived as obstructive and we query how situations like this be dealt with under the Code and if further guidance will be issued to assist.

While an attempt is made at paragraph 9 of the code to address the above difficulty, if the code is reflected in overarching policies and/or the principles of regulators, its content will naturally have knock on effect to the regulators' staff acting on the ground. It appears to be left up to individual regulators to determine how to best deal with this situation but could prove difficult for them to balance competing objectives such as this.

Under the section 'Risk and Evidence' at paragraph 15 it should be noted that in relation to the EU Habitats Directive the European Court has made it clear that a precautionary approach must be taken, which affects the approach to risk under this regime. Approaches taken and published under the code must reflect certain variances such as this and should be acknowledged in the code to help guide regulators. We query how this duty fits in with the regulators' reporting requirements.

Otherwise, as this code is at such a high level, it will be difficult to project further difficulties that regulators may face in implementing and complying with the code. It will not be until regulators issue their tailored guidance and policies with associated action that we will begin to understand how regulators interpret and apply the provisions of the code.

Question 8 – Do you agree with the proposed review process and timescales (as set out in Annex A)?

Yes No

Please explain your view

These are quite general and we have no specific comments.

Question 9 – Should the Code contain more specific monitoring and reporting requirements for regulators?

Yes No

Please explain your view

This is an umbrella document, the specifics should be set out in further guidance tailored to each regulator.

Question 10 – Do you have any other comments on the draft Code?

There are various specific paragraphs and wording which we consider should be amended/require further consideration before the code is finalised. These are as follows:

- At paragraph 6 it states that *“The Code also promotes an approach whereby regulators seek to understand those they regulate, including taking into account economic and business factors appropriately (for example, in terms of costs, processes and timescales). However, the latter does not mean that the interests of an individual business should over-ride the economic, social and environmental wellbeing of communities.”* We consider that if the above underlined caveat needs to be stated then perhaps the emphasis is wrong. The broad interests of the community (all spheres) should be considered and then if necessary, tempered by particular factors relating to one business.
- At paragraph 11 *“This Code should not be interpreted as a justification for noncompliance or a signal that regulators will tolerate that.”* We are little concerned that the drafters consider that this might be the case and such issues may arise.
- At paragraph 14 that regulators will *“also have appropriate governance and/or procedures in place to consider the relative merits of situations that are less clear cut...”* This appears to be general requirement and code does not guide the regulator to help make such appropriate assessments and/or judgements. While this is ultimately best left up to the regulator as they have the knowledge and expertise in this area, the code fails to adequately assist the regulators in how to best deal with and manage ‘regulatory function’ against sustainable economic growth’ when these two are at odds.
- Paragraph 15 notes that regulators *“must consider risk at every stage of their policy planning and decision making processes....”* It is

important to note that there may be statutory requirements which may alter this approach, for example, in relation to the EU Habitats Directive, the European Court has made it clear that a precautionary approach must be taken and this will affect the approach to risk.

- The fact that communication with citizens (not just the regulated bodies) is stressed throughout, for example at paragraph 20 is welcome.