

Partial Business and Regulatory Impact Assessment (BRIA)

TITLE OF PROPOSAL

Better Environmental Regulation: *Proposals for a new Integrated Framework of Environmental Regulation and Future Funding Arrangements for the Scottish Environment Protection Agency*

PURPOSE AND INTENDED EFFECT

Background

The Scottish Government and the Scottish Environment Protection Agency (SEPA) are working jointly to deliver better environmental regulation. The intention of this work is to ensure that the Scottish environment is protected and improved and that in doing so resources are most effectively deployed. A key consideration of the programme is to ensure any impacts on the regulated are proportionate and where possible, appropriate incentives to good environmental performance are provided. The proposals have drawn from good practice approaches on better regulation across the UK, Europe and wider and are built on the better regulation principles i.e. that regulation should be consistent, proportionate, transparent, accountable and targeted only at cases where action is needed.

Objective

This BRIA relates to proposals that will:

- Introduce a simpler, more consistent and risk based approach to SEPA's regulatory activities; these changes will allow regulatory resources to be targeted where they will add most value and deliver benefits to the regulated, the public and the environment.

- Introduce changes to SEPA's funding arrangements that will ensure a sustainable funding model for SEPA and which will support and facilitate the proposed changes to SEPA's regulatory activities.

Rationale for Government Intervention

The environment is a natural asset that must be protected for the benefit of future generations. It provides a range of resources and services the value of which is estimated to be between £21 billion and £24 billion per year. Scotland has 89% of the UK's total hydro capacity, 10% of Europe's capacity for wave power and 25% of Europe's wind and tidal resources. The environment makes a significant contribution to Scotland's sustainable economic growth. Therefore, activities which would otherwise damage the environment need to be controlled.

SEPA as the environmental regulation authority, implements and enforces environmental regulations, provides independent, authoritative information and advice and works in partnership with stakeholders to achieve positive outcomes.

Environmental regulation supports a number of National Outcomes in the Scottish Government's National Performance Framework: -

- We live in a Scotland that is the most attractive place for doing business in Europe
- We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others.
- We value and enjoy our built and natural environment and protect it and enhance it for future generations.
- We reduce the local and global environmental impact of our consumption and production.
- Our public services are high quality, continually improving, efficient and responsive to local people's needs.
- We live longer, healthier lives.
- We live our lives safe from crime, disorder and danger.

The main legislative regimes under which SEPA regulates are derived from European legislation that seeks to achieve certain environmental objectives and targets. The better environmental regulation programme is not about introducing new requirements but about enabling SEPA to take a more effective approach to regulation and how legislation is implemented; an approach that is more joined-up, proportionate and targeted. This will help protect the environment by allowing regulatory activity to be focussed on areas and activities that pose the greatest risk.

A key focus of the work is about environmental permissioning. The main regimes under which SEPA currently regulates all have different approaches to permissioning supported by different and complex procedures. The intention is to replace this with a simpler, unified, risk-based approach to permissioning supported by a single procedure. This builds on good practice in other countries such as Australia as well as practical experiences within Scotland, for example in the implementation of a risk based approach to permissioning under the Water Environment (Controlled Activities) (Scotland) Regulations 2011.

The proposed approaches to permissioning and enforcement will complement the major operational change that SEPA is seeking to implement to take a more flexible, targeted, outcome-based approach. Overall the proposals are beneficial to the environment through targeting regulatory activity where it can deliver the greatest impact. Regulated business will benefit from both reduced bureaucracy and more proportionate regulation, including new, more proportionate tools for enforcement.

As an organisation, SEPA is funded on the basis of grant in aid and charging income from regulated entities. Change is needed in the funding model to complement the delivery of the better environmental regulation proposals. Simplification will be a key component alongside the move to risk-based regulation, benefitting the environment, business and the regulator.

CONSULTATION

Within Government

Development of these proposals has been a joint activity between the Scottish Government and SEPA. It has also been collaborative within the Government through discussions between officers responsible for better regulation, justice, finance and across the environment portfolio, and through engagement with the UK Government and the other devolved administrations.

Public Consultation

The better environmental regulation programme has been running for a number of years and there have been a number of public consultations and reports. SEPA launched a public consultation in December 2010 ([SEPA Consultation](#)) on the high level principles of the proposals and received over 100 responses from a range of stakeholders. A progress report on the 2010 consultation was also published in March 2012 ([Progress Report](#)) and highlighted a number of examples of where better environmental regulation has been delivered. A joint Scottish Government – SEPA consultation “Consultation on Proposals for an Integrated Framework of Environmental Regulation” on more specific proposals was launched on 4 May 2012. More recently, a second joint Scottish Government – SEPA consultation “Consultation on Proposals for Future Funding Arrangements for the Scottish Environment Protection Agency” containing proposals for the changes to SEPA’s funding arrangements was launched on 11 October 2012.

Business

Over the last few years there has been extensive ongoing engagement from SEPA with business. This has included engagement with industry trade bodies as well as direct engagement with many individual companies. There was a strong and largely positive response from business to the SEPA consultation launched in 2010 ([Consultation Analysis](#)) to consultation findings). At that time several industry sectors offered to work with SEPA to develop the proposals further and development has been ongoing on that basis. SEPA has also been working with the Regulatory Review Group which helps the Government in its work to improve the regulatory environment for Scottish businesses.

OPTIONS: REGULATORY FRAMEWORK

Option 1 - No Regulation

The primary benefit of this option would be that the costs associated with environmental regulation would not be incurred, therefore reducing the need for SEPA to be funded through grant-in-aid or through charges to businesses.

This option is not, however, realistic. The environment is a natural asset which contributes significantly to Scotland's economy and society and needs to be protected for current and future generations. As noted above a majority of the regulations which SEPA enforces are based on European Union legislation and we have a statutory obligation to meet them.

There would be no implementation costs associated with this option, and there would be a saving to the Scottish Government and business through SEPA's costs reducing significantly. However, the knock-on financial and reputational costs associated with this option are likely to be considerable and would substantially outweigh any benefit. The resources and services provided by Scotland's environment are estimated to be worth between £21 billion and £24 billion a year and having no environmental regulator or regulation whatsoever would lead to the loss of some or all of this through, for example, falling tourism revenues or a reduction in the quality of water supplies used for agriculture or the whisky industry. The costs dealing with a radioactive leaks or hazardous chemical spills are unimaginable, in human, financial and environmental costs. In addition, failure to adequately adhere to EU legislation would also trigger infringement proceedings by the European Commission, potentially leading to penalties of up to €703,000 per day (or €256m per year) being imposed on Scotland.

Option 2 – Status Quo

Current arrangements have been in place for a number of years and could be continued. The current environmental regimes have grown on an iterative basis over

the years as new statutory requirements have been brought into place. This has introduced significant complexity and inconsistency for both SEPA and those it regulates.

The last few decades have seen the steady growth of regulations which control pollution. Over time, new demands created more regulation and alternative forms of control and improvement measures for wider environmental change (for example, trading systems, fiscal mechanisms, national partnership planning and cross agency collaboration). Over these decades, polluting sectors have come and gone with some remaining relatively stable. More novel challenges are now apparent such as rapid growth in parts of Scotland's energy sector, the changing nature of environmental crime and the requirements from national plans (such as Scotland's Zero Waste Plan, Climate Change Plan, River Basin Plan and Flood Risk Plan).

The drivers for developing renewable energy are increasing such as the Government's Low Carbon Economic Strategy and the value of the renewables services market which was approximately £8.8 billion in 2008/9. Reliance on low carbon technologies will increase and SEPA will need to find a new way to support these technologies during development whilst maintaining appropriate environmental controls. Traditional regulation, which places the burden of proof of compliance in advance of an activity becoming operational, may not support the transition to a low carbon economy nor encourage the uptake of novel or new technologies. Many of these technologies will cut across the existing legislative frameworks and develop at a pace which will not be facilitated by existing separate legislative regimes

Staying with the status quo would also be a loss as it would not allow the focussing of resource on the higher risk activities. This is likely to be detrimental to protecting and improving Scotland's environment. Maintenance of the status quo would also lead to unnecessary burden on the regulated given that a more risk based approach would target the level of action according to the level of risk imposed by the regulated activity.

Option 3 – introduce a risk based and integrated framework

Under this option a simpler, more consistent and risk based approach to permissioning would be implemented together with a more proportionate means of enforcement. This would be supported by major operational change within SEPA to deliver a more flexible, targeted and joined-up approach to regulation. Regulated business will benefit from greater proportionality, more joined-up permissions, simpler procedures, a more holistic approach from SEPA to tackling new environmental problems and promoting the use of new technologies

Overall, the proposals will be beneficial to the environment through targeting regulatory activity where it adds most value.

This is the recommended approach.

Sectors and groups affected by Regulatory Framework Option 3

A number of different sectors and groups will be affected by the introduction of a more risk-based approach and new permissioning and enforcement arrangements.

At a broad level, as part of better environmental regulation, SEPA will be seeking to work in partnership more with other regulators and partner agencies to target regulatory activity at particular problems. This will build on collaborative working to date. However, the greatest implications will be for those who fall under the current permissioning regimes. Current permissioning activity can vary from a member of the public holding a simple registration for a septic tank, a local authority holding a permit to carry out waste recycling activities to complex permitting and working arrangements around a major oil refinery.

Although SEPA does regulate some public sector activities it is anticipated that the biggest impact will be on regulated business. SEPA regulates a broad range of businesses in Scotland and currently has around 100,000 permissions in place. This includes major sectors like energy, agriculture, fish farming, the whisky industry, the

development sector, manufacturing, the water industry, chemicals, mining and the waste management sector.

Option 3 - Benefits

- More effective protection of Scotland's land, air, water and other natural resources.
- Maximise the effectiveness of public sector regulatory resources,
- Regulated business will benefit from simpler, more joined-up, consistent and proportionate regulation and a more level playing field.
- A fairer regulatory environment where costs of enforcement are recovered from those who cause environmental harm
- More freedom for SEPA to pursue environmental problems and work in new and novel ways to deal with those problems.
- A more flexible environmental regulator with a greater range of proportionate enforcement tools which can be used to strong effect to protect the environment

COSTS

The costs of implementation of these proposals would, in greater part be borne by SEPA in terms of creating simpler regulatory processes and systems. Costs of transposition will need to be assessed in the future, following to determine the most effective way of implementing the changes. Implementation will be phased over time and SEPA will engage with business on future implementation plans, discussing for example, sector priorities and the timing and nature of the move to more integrated permissions etc.

The aim of a risk based and integrated regulatory framework would be to increase proportionality of regulation therefore costs would be reassigned with low risk and compliant operators paying less compared to high risk or non compliant activities. The move away from court based sanctions to administrative penalties, fines and other enforcement mechanisms will result in reduced costs both for SEPA, regulated industry and the court system.

OPTIONS: FUNDING MODELS

In making changes to SEPA's funding arrangements, SEPA and the Scottish Government will build upon the strengths of the current model, which include a stable income base for SEPA and predictable charges for business; accountability, transparency and in-built safeguards to prevent unsustainable increases in charging levels.

Option 1: No Funding System

This option is not realistic. The environment is a natural asset which requires protection and which contributes significantly to Scotland's economy and society. As noted above a majority of the regulations which SEPA enforces are based on European Union legislation which Scotland has a statutory obligation to meet. Given the need for an environmental protection system, there is consequently a need to fund this system from a mixture of funding sources.

Option 2: Status Quo (Existing Funding Model)

Current arrangements have been in place for a number of years and could in theory be continued. However, staying with the status quo would not allow the focussing of regulatory resource on higher risk activities thereby limiting SEPA's potential for flexible working. This will not lead to the desired level of protection and improvement of Scotland's environment.

The existing charging schemes are also complex to understand and administer and provide little incentivisation for improving and maintaining environmental performance: generally operators undertaking the same activity pay the same regardless of their environmental performance. As schemes are designed in advance, based on expected levels of routine activity, they do not cope well with changes to priorities, new requirements or emerging issues. The management of 14 separate schemes, each with its own charging philosophy and predicated on individual permit regimes (e.g. waste, water, process industry etc.) mitigates against the sort of flexible, integrated and problem solving approach required to deal with the issues SEPA now faces. Additionally, the schemes tend to use planned activity as a proxy for environmental risk, when more direct measures would be more appropriate and effective.

The existing funding arrangements also provide little incentive for industry to develop sectoral or joint agreements with SEPA and do not provide for income to manage major infrastructural projects at an effective level. For these reasons, the status quo is not considered a viable option.

Option 3: Introduce a Risk Based Charging and Integrated Financial Model

We consider that Grant in Aid funding will always be an important part of the SEPA funding profile as it enables SEPA to finance activities (such as research, flood risk, planning and management and advice and support to Government) where funding should, in principle, not come from charging schemes. There is no change proposed to the level of SEPA's income to be provided through Grant in Aid.

The proposed funding model is for Grant in Aid plus a flexible risk based charging scheme, plus one or a combination of financial mechanisms.

This (Option 3) is the recommended approach.

Sectors and Groups Affected by Funding Option 3

It is anticipated that the biggest impact will be on regulated business. SEPA regulates a broad range of businesses in Scotland including major sectors like energy, agriculture, fish farming, the whisky industry, the development sector, manufacturing, the water industry, chemicals, mining and the waste management industries.

Benefits

The new funding arrangements will underpin SEPA's new risk-based and integrated approach and hence will enable the benefits of this approach (as outlined on page 8 above) to be achieved. Additionally, under the new funding arrangements poor performers will be more effectively targeted and face higher charges, reducing the burden of subsidy that flows from better performers and encouraging compliance.

Costs

The overall balance of costs will be broadly neutral, where higher risk and poorer performance operators will pay more and low risk and well performing operators will

pay less. Once revised risk and harm assessments are in place, there is likely to be a shift in the distribution of costs associated with the new risk assessment arrangements. It is not possible to be specific about the extent or degree of redistribution of costs at this stage of the development of proposals as the new risk and harm assessments have still to be developed. This work will be done in consultation with regulated operators.

Although detailed costs for business cannot be estimated until the new risk and harm assessments have been developed, it should be stressed that the proposals are not about increasing the amount of money SEPA raises overall in mandatory charges. We have discussed potential implications with business as part of the development of this BRIA and are undertaking further modelling work which will be reflected in the final BRIA.

Broad sectoral benefits and costs for specific potential components of Option 3 are outlined in Annex 1.

SCOTTISH FIRMS IMPACT TEST

The proposals for the regulatory framework and funding will have a significantly positive effect for those operators who are compliant and have a good environmental track record. These operators will see reduced regulatory burden, simplified and improved interactions with SEPA and a fairer commercial environment where poor performers pay more and are not subsidised by responsible operators. Poor or unlawful operators however, will see increased regulatory burden, increased costs and the application of powerful and effective enforcement tools. This is a benefit to the environment overall.

The actual costs of these changes cannot be modelled at this time so the potential impact on Scottish businesses was assessed on the basis of the principles presented above and how these might impact on specific sectors. We have discussed potential implications with business as part of the development of this BRIA and are undertaking further modelling work. This will, supported by this and the wider consultation, be reflected in the final BRIA.

A selection of 6 businesses ranging in activity, size and sector were consulted on the proposals and questioned to assess the impacts of the proposals. In general the responses were positive as regards the proposals with regulated industry pleased to see a more proportionate and fairer regulatory regime. However some concerns were raised as to how risk would be calculated and how fair and transparent non criminal sanctions would be.

Key issues raised included:

1. How would risk be determined? There was general agreement that complexity, inherent hazard, scale and previous performance should be assessed but concern that the inclusion of a location factor may be unfair to some rural operators.
2. Streamlining charges and administrative procedures was generally welcomed with benefits seen for both large and small operators. Although a simpler regime was welcomed this in itself would not necessarily make it easier for operators to comply.
3. The idea of non court based and more proportionate sanctions was welcomed, but again with concerns raised about how these would be applied, transparency and inclusion of appeal to an independent authority.
4. The concept of charging based on performance was well received and seen as an incentive to comply particularly where SEPA might grant an “accreditation or approval” rating where this could be used to commercial advantage.

In response to these concerns SEPA will continue to work with industry to generate the risk assessment system to be used for charging and develop more detailed proposals on the integrated permission system. There will be further opportunities for regulated industry to comment as part of our ongoing programme of engagement. A full analysis of responses to the May consultation will be published later this year.

COMPETITION ASSESSMENT

In considering the impact that this policy may have on competition between firms we have carried out a competition assessment filter using the following questions. The explanation for each response is included in the table below.

Question	Response
Will the proposal directly limit the number or range of suppliers? e.g. will it award exclusive rights to a supplier or create closed procurement or licensing programmes?	No, there would be no limit to the number or range of businesses as a result of the Bill.
Will the proposal indirectly limit the number or range of suppliers? e.g. will it raise costs to smaller entrants relative to larger existing suppliers?	The delivery of an effective environmental protection system for Scotland supported by a sustainable funding model for SEPA should allow all businesses that depend on the environment to compete on a level playing field. However, as part of the detailed development of these proposals we will need to consider the possible impact on smaller businesses who may be brought into a new charging scheme.
Will the proposal limit the ability of suppliers to compete? e.g. will it reduce the channels suppliers can use or geographic area they can operate in?	No, it would not limit in any way the range of businesses and suppliers. The proposals will promote competitiveness by reducing burdens and ensuring environmental regulations are proportionate and that Scotland's environmental protection system is fairly and effectively funded.

<p>Will the proposal reduce suppliers' incentives to compete vigorously? e.g. will it encourage or enable the exchange of information on prices, costs, sales or outputs between suppliers?</p>	<p>No, overall the better environmental regulation proposals should help enhance competition within sectors by ensuring that there is a regulatory level playing field and that 'freeloaders' who fail to meet their environmental obligations are more effectively targeted. Companies that rely on the environment as a source of value to their business will see benefits arising from a reduction in burdens and a clear commitment to tackling poor performers and illegal activities.</p>
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LEGAL AID IMPACT TEST

It is not envisaged that there will be any greater demand placed on the legal system by this proposal since regulated businesses/organisations will be the primary subject of the legislative changes and new enforcement measures will be predominantly non-court based, with appeals to the Scottish Ministers rather than to the courts. Accordingly, it is not considered that there will be any effect on individuals' right of access to justice through availability of legal aid or possible expenditure from the legal aid fund. Confirmation from Justice colleagues that they agree with these assumptions is being sought and will be included in the final BRIA.

ENFORCEMENT, SANCTIONS AND MONITORING

This whole approach is about how SEPA best delivers enforcement, sanctions such as fines or enforcement undertakings, and support compliance under existing environmental legislation which SEPA uses to deter non-compliance. The aim of these changes is to bring forward a more joined-up and flexible range of sanctions to reflect the more joined-up framework for permissioning and to provide a balance to the more proportionate, risk-based approach which SEPA will take.

IMPLEMENTATION AND DELIVERY PLAN

The BRIA is an iterative evolving process. Implementation and delivery plan will be undertaken at a later stage in the process.

SUMMARY AND RECOMMENDATION

The recommended actions are Regulatory Framework Option 3 and Funding Model Option 3 e.g. the introduction of a risk based approach supported by risk based funding elements. Further consultation will be required to support any detailed proposals that follow.

DECLARATION AND PUBLICATION

I have read the impacts assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

Paul Wheelhouse
Minister for Environment and Climate Change

Contact Name: Neil Watt

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Annex 1

The Scottish Government and SEPA have worked jointly to consider the broad impact of the preferred funding option and this is outlined below.

Charging Schemes: Flexible Risk Based Charging Scheme

Key aspects of the new model will include the creation of a simpler charging process that is more transparent, accountable and fairer which clearly relates charges to risk.

Sectors or Groups Affected	Licensees (any organisation/individual with a permit or licence)
Benefits	Strengthens the polluter pays principle and relates charges to the risk and harm relating to the activity. Fairer mechanism of charging while providing significant efficiency savings from ensuring an easier, simpler and more transparent system to manage.
Costs	There is no net change in operational costs. Businesses with a greater level of risk will pay a higher charge and those with lower risks will pay a smaller charge.

Charging Schemes: Poor Performance Charges

The intervention charge is a financial mechanism that extends risk based charging whereby an escalating charge is applied for poor performance. The objective of the charge is to ensure that the resource typically applied to the poorer performing organisations is recovered fairly from these organisations through the higher charge.

Sectors or Groups Affected	Licensees (any organisation/individual with a permit or licence) that are considered as poor performers.
Benefits	Supports polluter-pays and is fairer and proportionate because good performers will not subsidise poor performers.
Costs	Poor performers will pay a higher charge than good performers with the exact amounts depending on the actual level of performance and the details of the scheme introduced.

Charging Schemes: Proposed Introduction of a 'Use of Environment Charge'

Under the preferred risk based charging option, business charges will incorporate a 'standing charge' and a variable component, reflecting respectively the broad 'use of environment charge' for both low and high risk activities and a variable charge for higher risk and impact activities.

The principle is that any licensee or permit holder is using or impacting on the environment and as a consequence the charging should reflect the requisite use of the environment. As a rule of thumb it is anticipated that 10% of the charge applied will relate to the use of environment (on a sliding scale) initially, with the exact level to be set in future based on further evidence gathered and the ongoing development of risk assessments.

Note that this is not a new charge per se, but the redistribution of existing business charges so the net financial impact should be zero or low.

Sectors or Groups Affected	Licensees (any organisation/individual with a permit or licence)
Benefits	Introduces the concept of all businesses that have an impact on the environment and regulated via environmental protection laws make a contribution to the costs of protecting the environment
Costs	Introduces the broad principle that those businesses covered by environmental regulation and using the environment pay a modest fee to support the overall environmental protection system

Other Charging Schemes

There are further mechanisms that can be incorporated into the charging schemes and overall funding model to support a more balanced sustainable system for the future. Those considered are:

Possible Mechanism	Charging for Value Added Services Specialist services (which do not replicate that available from the private sector and meet the overall objectives of SEPA and Scottish Government) e.g. validation services
Sectors or Groups Affected	Applicants, Developers, Planners, Research organisations, other public bodies, Licensees where there is a specific driver.
Benefits	Utilises SEPA's knowledge, experience and expertise. Promotes best practice in organisations that wish to improve
Costs	Charges are based on service provided on a voluntary basis

Possible Mechanism	Charging for Major Projects Specific charging for large scale infrastructure projects with limited potential or current permission or charges to reflect the resource required in regulatory costs that could not otherwise be recovered through charging schemes. Overlaps with environmental charges above
Sectors or Groups Affected	Large Scale Developers, Contractors, Suppliers, Government Agencies, Local Authorities,
Benefits	This will allow SEPA to commit sufficient resources to support these key developments at the earliest stages of development; to minimise their environmental impact and other regulatory and planning costs and effort. Should result in more effective identification and resolution of impacts associated with major developments
Costs	Ring fencing of existing funding for government agency projects and specific charging for non-government agency projects. Could introduce costs to developers not currently being incurred (on a voluntary basis).

Possible Mechanism	Voluntary Agreements Sectoral or business group schemes to reduce administrative burdens while achieving regulatory objectives through voluntary based agreements.
Sectors or Groups Affected	Licensees (any organisation/individual with a permit or licence) and where there is a high volume of similar low risk based permit or licenses.
Benefits	Allows flexibility in the targeting of higher risk scenarios while reducing the administrative burdens on low risk scenarios.
Costs	No net increase in charges as adopted via a voluntary approach.

Possible Mechanism	Positive Incentives Mechanism within a charging scheme to promote and reward high performance (rather than punish poor performance)
Sectors or Groups Affected	Licensees (any organisation/individual with a permit or licence) High performance sectors, representative bodies and trade associations.
Benefits	Incentivises and rewards high performance, applicable to high risk activities
Costs	No net increase in overall amount raised via charging.