

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

May 2013

Analysis of Responses



Introduction

The Scottish Environment Protection Agency (SEPA) and the Scottish Government have been working together on a package of measures to take forward our agenda for better environmental regulation. Modernising SEPA's existing funding arrangements by creating a new risk-based funding model is required, as part of this package, to ensure the funding approach facilitates the broader changes required. Engagement with stakeholders has been a key part of developing our approach and is ongoing. This report provides the results of the consultation we launched in October 2012¹ [The future funding arrangements for the Scottish Environment Protection Agency](http://www.sepa.org.uk/about_us/consultations/idoc.ashx?docid=180c576b-f640-4db2-9ab2-6ce7359c88ac&version=-1). This consultation builds on previous proposals set out in the 2010/11² better environmental regulation consultation and the further joint SEPA-Scottish Government consultation in May 2012 on proposals for an Integrated Framework for Environmental Protection³.

What did the consultation cover?

The consultation was open from the 11th of October 2012 until the 4th of January 2013. The key proposals upon which views were sought relate to the following areas:

- A new statutory purpose for SEPA.
- Adjustments to SEPA's future funding arrangements, including:
- Integration of the current charging schemes into one framework.
- Developing a charging scheme that is based on risk and operator performance.
- Building on the polluter pays principle by bringing in a charge that relates to the impact on the environment from the use of environmental resources and provides a fairer basis for the charges

Overall response

A total of twenty three responses were received, as listed in Appendix 1. These came from a diverse group including private individuals, academia, non-governmental organisations, business and the public sector. In addition to the written consultation SEPA held a total of twenty meetings with stakeholders, particularly with trade associations and other representative bodies, to help ensure understanding of the proposals so that responses were as informed and effective as possible. It is estimated that around thirty trade bodies and a hundred stakeholders attended.

¹ http://www.sepa.org.uk/about_us/consultations/idoc.ashx?docid=180c576b-f640-4db2-9ab2-6ce7359c88ac&version=-1

² http://www.sepa.org.uk/about_us/consultations/idoc.ashx?docid=1effdde6-6b9d-4792-9f2a-aac3dc3adf41&version=-1

³ <http://www.scotland.gov.uk/Publications/2012/05/6822>

Summary findings

The consultation document asked 13 questions about various options for consideration in the proposed funding regime. An in-depth analysis has been undertaken of the responses and the summary findings for each question are contained in this report.

The support for specific aspects of the proposals was qualified largely by requests for further information, specific operational delivery issues and actual levels of charging:

- 1A.** 62% agreed with the proposed statutory purpose for SEPA. 33% disagreed.
- 1B.** 81 % agreed that SEPA should be given a power to compile information in relation to all its functions. 19% disagreed.
- 2.** 76% agreed that the existing safeguards in terms of accountability, cost control and efficiency are adequate. 24% disagreed or expressed concerns.
- 3.** 70% agreed that the principles set out in Table 1 are the right ones to inform the development of a new approach to funding. 20% disagreed.
- 4.** 55% agreed with the use of the environmental resources principle being factored into charges to regulated business. 35% disagreed or expressed concerns.
- 5.** 75% supported a risk based approach to charging based upon the proposed principles. 25% disagreed.
- 6.** 50% agreed that SEPA should consider introducing a system for 'beyond compliance' incentivisation as part of its overall approach. 35% disagreed.
- 7.** 90% agreed with the concept of introducing an intervention charge for poor performance. 5% disagreed.
- 8.** 85% considered that SEPA should directly charge for time and resources spent in dealing with very poor performers. 10% disagreed.
- 9.** 70% of respondents put forward their views in regard to the balance that should be struck between the total level of income generated from the standing and variable charges.

10. 60% supported option 2. 15% supported option 1 and 15% suggested an alternative model.
11. 40% supported the concept of facilitating voluntary agreements. 55% disagreed with this concept.
12. 38% agreed with the principles that would apply if value added services were to be introduced by SEPA. 52% disagreed with the proposed principles.
13. 63% supported the introduction of voluntary agreements as described for major infrastructure or construction projects. 26% disagreed.

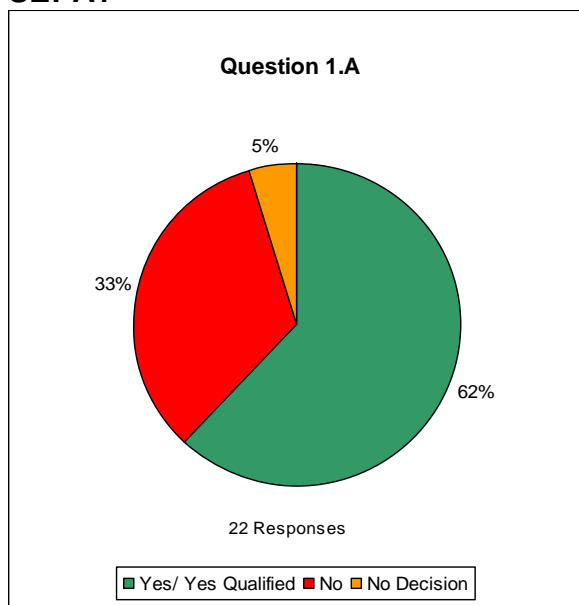
Assessment of responses

Responses were classified based on whether the 'yes' or 'no' box was ticked to the question and the responses we received were categorised as shown below.

Response category	Definition
Y	Yes box ticked with either no comment or else support expressed.
Yq	Yes box ticked but qualified in some way.
N	No.
No decision	Neither box ticked with respondents highlighting why they had not come to a decision.
No comment	No response.

Comments were extracted to allow the identification of common views, key issues and insights. We sometimes found that a respondent made a comment under one question but that this was more relevant to another. In this instance we made sure that it was considered under the relevant question. A summary has been provided below for each question, including a chart showing the response categories (i.e. support or otherwise), some text on the reasons for support, any caveats, concerns or reasons against a proposal and questions and requests for more information. Where more than one questions was asked we have split the summarised responses into A and B. The 'Yes' and 'Yes qualified' responses were amalgamated to give an overview of the overall level of support, or otherwise, for each question. The pie charts shown against each question below exclude the 'No comments' but, for transparency, pie charts which include the proportion of 'No comments' are shown in Appendix 2

Question 1(A) - Do you agree with the proposed statutory purpose for SEPA?



There was majority support for the proposed statutory purpose. There were a range of concerns, suggestions and requests for additional information in relation to the proposed changes.

The majority of respondents (62%) broadly welcomed the proposed statutory changes. Several were particularly positive about building in the sustainable management of natural resources into SEPA's remit.

However, three main areas of concern were raised. Firstly, the proposal to replace the provisions in section 31 of the 1995 Act relating to 'sustainable development' with provisions referring to the term 'sustainable economic growth'. It was felt that such a move would result in a blurring of the line between regulation and economic policy.

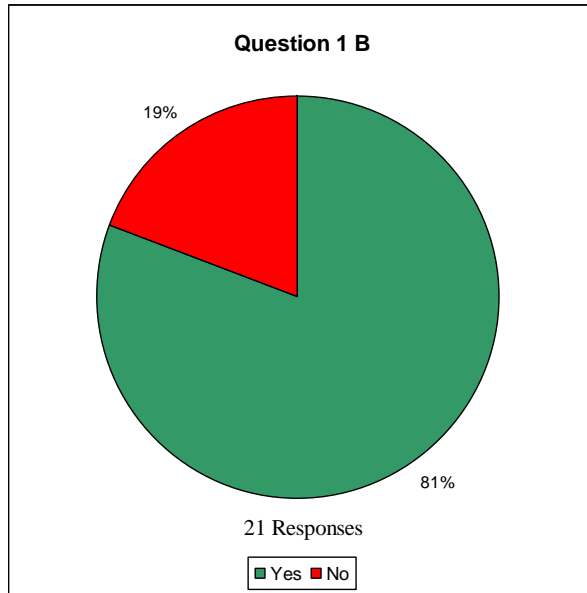
Secondly, some expressed concern about the proposed widening of SEPA's responsibilities. It was felt that there was the potential for overlap and inefficient duplication between different public sector bodies e.g. with Scottish National Heritage.

Finally, several respondents felt there was insufficient justification behind the proposed changes to various sections of the 1995 Act. Further details/consultations into the reasoning behind the changes would be welcomed.

There was a split in opinion regarding increasing SEPA's scope within areas of health and welfare, with some respondents worried about such a move and

others responding in favour. Respondents made clear that the underlying themes in existing legislation should be carried forward into any newly created legislation. Going forward, additional consultation and collaboration was sought to ensure that concerns expressed are dealt with.

Question 1(B) - Do you also agree that SEPA should be given a power to compile information in relation to all its functions?



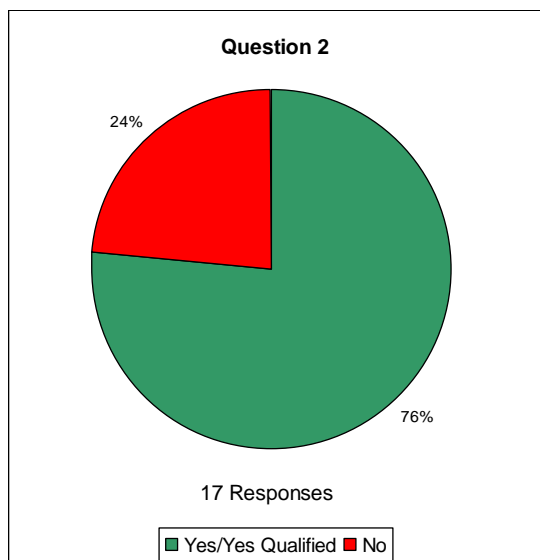
There was very strong support (81%) for SEPA being given a power to compile information in relation to all its functions.

Some of those in agreement do so on the condition that such a power would be subject to appropriate checks and balances eg. cost benefit analysis. A number of operators sought reassurance that any additional costs associated with new data collection powers will come out of the Grant-in-Aid budget and not come from regulated operators.

Those in disagreement with this proposal were of the view that SEPA already has the required powers needed to perform this task effectively. They would like to see any additional power consulted on separately.

One respondent noted their preference for SEPA compiling information on the general health of the environment and improvement trends, rather than just focusing on end-of-pipe pollution.

Question 2 - Do you agree that the existing safeguards in terms of accountability, cost control and efficiency are adequate?



There was strong agreement with the existing levels of safeguards in terms of accountability, cost control and efficiency. Some respondents suggested some enhancements.

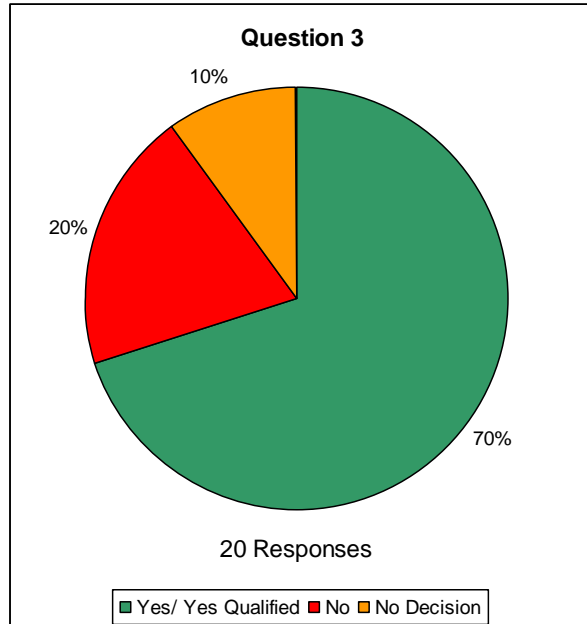
A number of regulated operators were supportive of SEPA's efficiency savings and correspondingly, the below inflation charge increases in recent years. Going forward, private operators would appreciate advance notice of any fee increases. Emphasis was also placed on the importance of not increasing stakeholders' fees to compensate for any possible reductions in GiA funding. Several respondents want to see the link between regulatory effort and charging being preserved. One respondent would like to see any charging increases being subject to parliamentary approval.

Some felt that the current levels of accountability needed to be improved. There was a view amongst some respondents that in the past, operators have not been able to obtain a clear view in a number of areas e.g. what their subsistence charges are spent on. In order to improve this situation they would like to see the link between SEPA's income (whether Grant-in-Aid or subsistence charges) and its expenditure being made publicly available at a sector level. Some also consider that this information should be made available to individual operators on request, for their individual subsistence charges. One respondent suggested a move towards direct election of board members in order to enhance SEPA's level of accountability.

A number of respondents would like to see more of a focus on conciliatory and educational strategies rather than just charging when damage is done.

A minority of respondents reported inconsistency in the service they have received.

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?



Subject to further detail and additional levels of clarity on implementation there was strong support (70%) for the principles set out in Table 1.

While many respondents strongly support the move to a risk based charging scheme, there was concern raised by some regarding the definition of risk – i.e. 'mitigated' or 'inherent'. Of those that raised this specific concern, the majority emphasised their preference for 'mitigated' risk. These respondents expressed their belief that this would appropriately incentive operators to guard against environmental harm. Several respondents did not agree that the risk-based approach to charging outlined in the table is in line with the polluter pays principle.

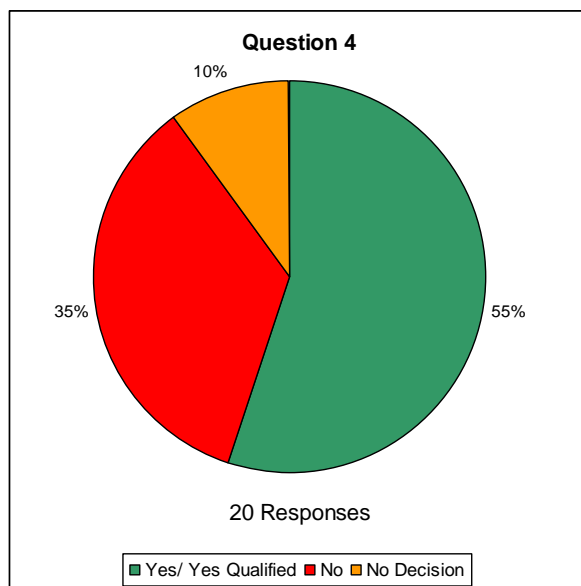
Many respondents who were in agreement also put forward amendments that they would make to Table 1:

- Several would like to see an additional principle placed under the headings of either 'fair' or 'proportionate' - the principle of direct cost-recovery. Stating that any charging model must be founded on the premise of direct cost-recovery.
- One respondent would like the simple and proportionate principle being based around understanding the requirements of the business that SEPA regulates.

- One respondent would like to see accountable, transparency and fairness coming above the aim of being flexible and targeted. That is, Principle 3 should be Principle 2.
- One respondent disagrees with principle 5 (simple and proportionate) in that they would not like to see SEPA receive payment in respect of fines. Stating that the costs of investigation should be kept separate from the penalty.
- One respondent would like to see additional emphasis placed on operator performance.

Further information and clarity was sought with regard to how these changes would affect charges going forward – the definition of poor performance was regularly cited as a specific area where further clarification is required.

Question 4 - Do you agree with the use of environmental resources principle being factored into charges to regulated business?



There was majority support for this proposal. The predominant concern expressed related to the definition of the environmental resources principle.

Many respondents noted that all businesses and industries depend in some way on the use of environmental resources and therefore believe it entirely appropriate for this to be reflected in the charging regime.

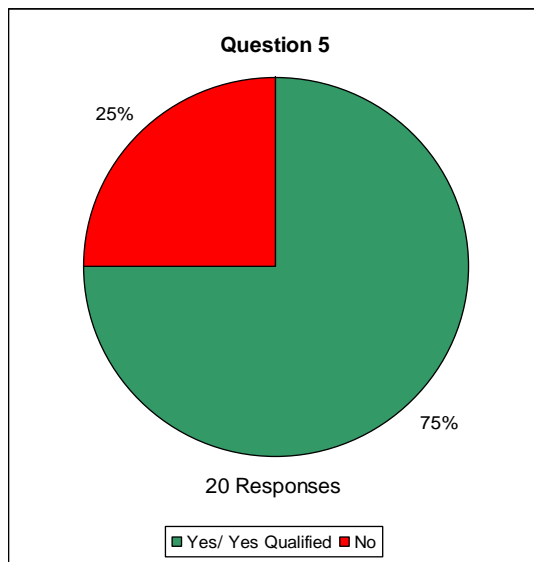
Some respondents strongly reject this charging approach, believing that it is not a development of the “polluter pays principle”. One respondent expressed a view that it is an environmental resource tax. However, they would support an ecosystems approach to managing resources if any forthcoming proposals achieved that.

In terms of process a number of respondents felt that emerging concepts such as environmental value and ecosystem services are far too immature to build into a charging scheme and point out that without further clarity in this area they cannot agree with the proposals. One respondent foresees a danger that implementation of this policy could require SEPA to make judgements on the relative impact of business practices on the environment and point out that it should not be the role of the regulator to provide this function. Two respondents highlighted a specific concern that resource intensive industries may automatically be penalised for an unavoidable intensity of resource use.

There was concern expressed by one respondent that this could disproportionately affect certain businesses, without fully taking into account of the ecosystem services which they may otherwise provide. Farming was given as an example. One respondent stressed that they would not like to see charges introduced for general advice as it might increase associated costs of non-compliance at a later stage in site development. Concerns about possible double regulation were also raised.

It was felt by some that too much emphasis is being placed on the social and economic aspects of ecosystem services (i.e. the 'direct' benefits to people), without mentioning that the ecosystem services agenda should also identify potential risks to eco-receptors and address the significance of such risks.

Question 5 - Do you support a move to a risk-based approach to charging based upon the principles discussed?



There was very strong support, in principle, for a risk based approach to charging. Those in disagreement voiced particular concerns surrounding the definition of risk.

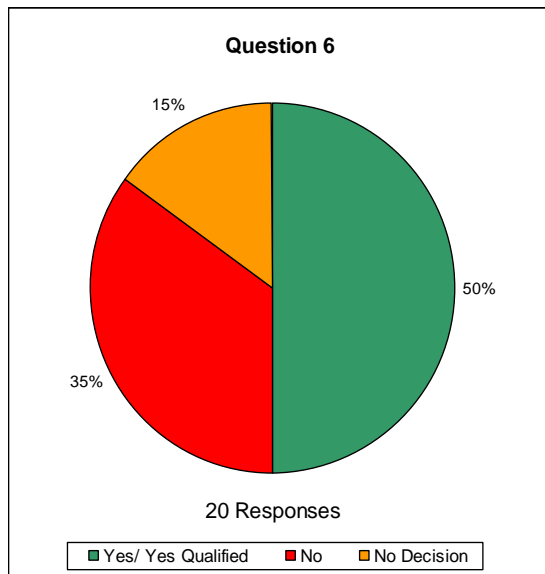
Of those in disagreement with the risk based approach to charging, a number felt strongly that the proposed changes represent an unjustifiable move away from the polluter pays principle. Any form of cross-subsidy was viewed to be inconsistent with this principle.

Other respondents were concerned about the possibility of considerations relating to SEPA's finances entering 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.

Finally, given the level of complexity associated with creating a risk based charging model, some respondents question SEPA's ability to resource such a commitment.

Some operators requested further information – specifically in relation to how this new risk based regime would affect charges. Several businesses stress that they would not like to see additional financial burdens placed on them. Clarity was sought in regard to the definition of "large scale" and "high hazard".

Question 6 - Do you think that SEPA should consider introducing a system for 'beyond compliance' incentivisation as part of its overall approach? Tell us what you think and whether this should be via charges or a 'beyond compliance' framework.



While there was majority support for recognising good performance, there was a split of opinion as to whether this should be taken into account via charges or the beyond compliance framework.

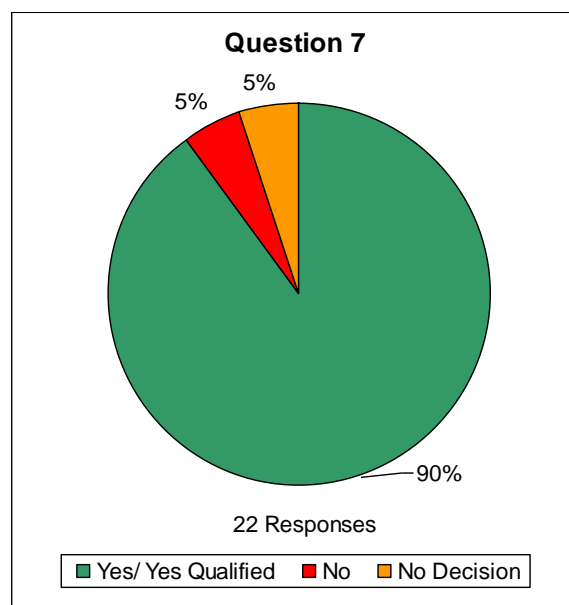
There was a strong level of support for recognising good performance. Much emphasis was placed on charging more for poor performance rather than charging less for good performance. There was a preference amongst a number of respondents that if implemented the 'beyond compliance' charging system would calculate operator performance over a number of years, possibly on a sliding scale.

A number of stakeholders in disagreement with the 'beyond compliance' proposals were concerned about the potential for regulatory creep. There was also a view expressed by some, that going beyond compliance could be construed as gold plating and would therefore be inconsistent with the Scottish Government's policy on better regulation. One respondent felt that the proposed 'beyond compliance' framework would allow SEPA to reduce its cost base, by unjustifiably reducing its regulatory effort.

It was noted by several respondents that a 'beyond compliance' system could impose greater administrative burdens on SEPA. For example, by switching on or switching off particular provisions in relevant permits for operators who are performing well. There was a worry that this could result in a diversion of resources from SEPA's core business areas.

Finally, information as to how this would affect charges was requested.

Question 7 - Is the concept of an intervention charge for poor performance something you would wish to see introduced?



There was overwhelming support for the concept of an intervention charge, with 90% of respondents agreeing with this approach in principle.

The majority of respondents who were in favour of this principle seek further information and consultation on the specifics i.e. categorisation, definition, appeals process, proportionality, mechanics of monetary collection and how the financial circumstances of the affected firm would affect charging outcomes.

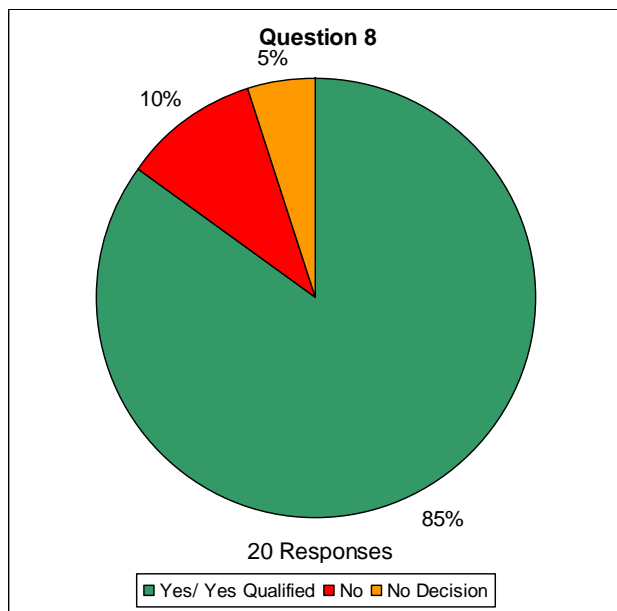
A number of respondents pointed out that if poor performance is related to financial restraints of the affected firm then perhaps an addition charge may be of no effective use. Some operators highlighted the importance of them being made aware of the choices available to them with regards to assistance

to rectify poor performance. Preference was expressed for an independent appeals procedure in instances of disputed assessments.

One respondent felt that SEPA already has powers under regulation 33(2) (a) of the Controlled Activities Regulations⁴, 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". They therefore feel that this principle is already established.

A small number of respondents stressed the importance of providing confirming evidence to prove that the 300% levy is consistent with the required level of additional regulatory effort.

Question 8 - Do you consider that SEPA should directly charge for time and resources spent in dealing with very poor performers?



There was very strong support (85%) for direct cost recovery from poor performers.

It was viewed by the majority of respondents that this approach is in line with the polluter pays principle and is therefore a just and equitable charging mechanism. There was general agreement that SEPA should be able to make an intervention charge and/or charge directly for time and resources, spent dealing with poor performers or persistent problem operators. It was viewed as essential that there is maximum clarity and transparency around how this would be done i.e. categorisation of poor performance. It was felt by a large number of respondents that the revenues raised should be sufficient to cover the whole costs of intervention, including investigation, mitigation and remediation – in line with the polluter pays principle.

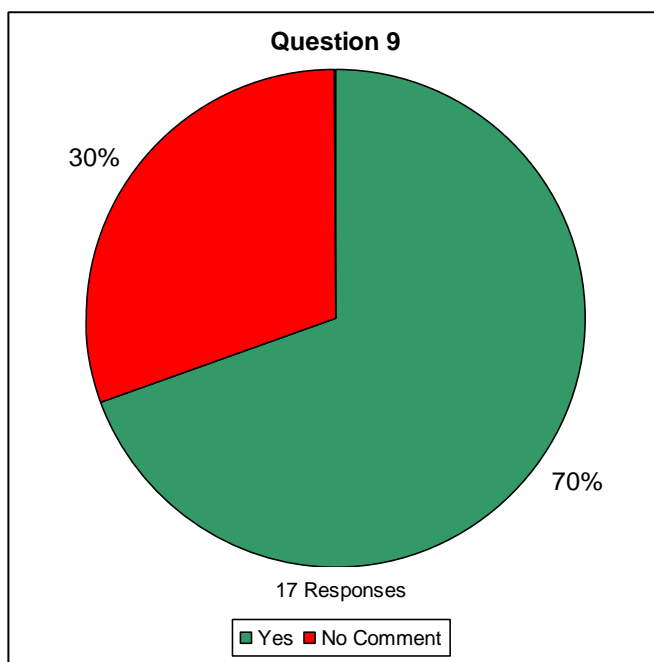
⁴ <http://www.legislation.gov.uk/ssi/2011/209/regulation/33/made>

Concern was raised in relation to the statement “reduce the need to undertake formal enforcement action if operators improved their practices”. It was felt by some that such a direction of travel may result in an increased number of regulated businesses shirking their responsibilities.

Some respondents who disagreed with this proposal did so because of the possible relationship between poor performance and financial restraints - perhaps an addition charge would not be a helpful solution in such a case. The others believed that if guilt of non-compliance is proven then the financial consequences should be in proportion to the offence, not the investigation.

Detail on the proposals and the extent to which the differential costs would already be picked up by penalising poorer performers within the overall incentivisation scheme was sought. There was a general feeling that much more detail should be provided on the criteria to be used for judging an organisation as performing at a "very poor" level. It was stressed by a number of respondents that such enforcement action should only occur as a last resort.

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?

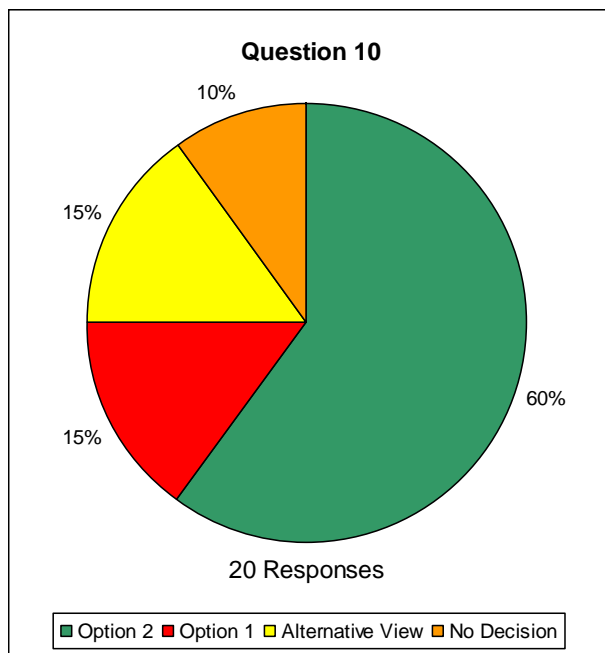


There was majority support for the introduction of a standing charge. The majority of respondents were of the view that it is fairer in principle if a wider range of operators contribute a little towards SEPA's costs for the environmental harm that they cause. A standing charge that amounts to around 10% of SEPA's business charging income was seen to be acceptable by a number of respondents. Emphasis was placed on the importance of

ensuring that any new charges are implemented in a clear and transparent manner. It was noted that the administrative costs of collecting such a standing charge could potentially exceed any gains to be received from collections.

Some responders warned against SEPA relying on variable charging as a reliable source of income, suggesting that the fixed standing charge should be set at a high enough level so as to cover the associated costs of SEPA's regulatory duties. Reassurance that any new charges will not result in a lower GiA contribution by government was sought. Two respondees would like to see the variable element of the charge focusing on the regulatory effort associated with routine site visits - with a sliding scale based on the number of additional visits and effort required where sites present concern.

Question 10 - Would you support Option 1, Option 2 or neither of these options?



There was majority support for Option 2. Those in disagreement with this new approach were primarily concerned about the justification behind such a charge.

Option 2 consists of a standing and variable charge, with the standing charge representing the use of environmental resources component at around 10% of overall revenue, with the relative contributions of GiA and charges remaining broadly as at present. It was seen as fair that certain activities currently not liable to pay annual subsistence charges should be brought within the standing charge regime, as outlined on page 25 of the consultation paper. Some respondents believe such a charge to be fair and equitable even without mention of the environmental resources principle. It was noted by some that the cost of collection should not undermine the cost-effectiveness

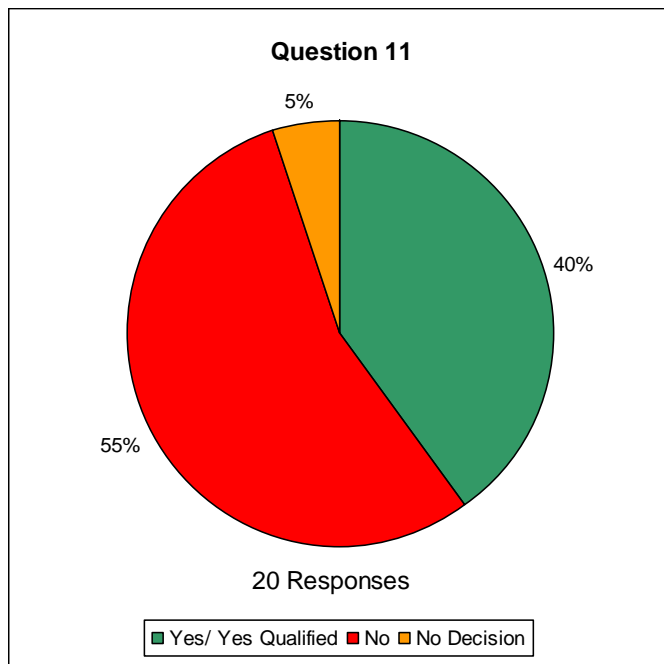
of the proposal. In order to avoid this extra collection cost, it was suggested that SEPA consider incorporate such a standing charge into the application fee for affected activities.

The majority of respondents who were in disagreement with option 2 predominantly had concerns about the justification behind the proposed new charge. Specifically, they saw limited links between the use of the 'environmental resources principle' and proposed charging levels. Other responders in disagreement with option 2 were of the view that introducing such a charge would run contrary to the proposed risk-based agenda as charges, in their view, would be transferred from larger and generally speaking higher risk operators to smaller and lower risk operators. The potentially regressive nature of such a change in charges was also highlighted. Finally, there was a worry that SEPA's open and approachable policy of offering free advice could be restricted in some way if this additional charge were to be implemented.

15% of respondents suggested alternative funding models: one based on Grant-in-Aid, planned charges to provide full cost-recovery based on regulatory effort (either with or without a standing charge element) and the introduction of a variable charge (approx. 5 – 10%) to provide SEPA with greater flexibility.

Further clarity was sought in relation to the definition of environmental risk that would be adopted by SEPA as the underpinning factor i.e. inherent or mitigated risk.

Question 11 - Do you support the concept of facilitating voluntary agreements?



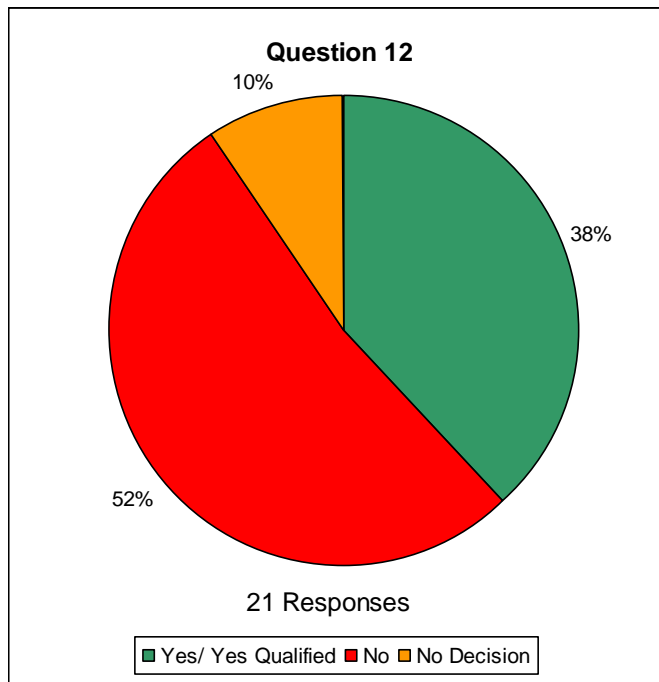
Although the majority of responders were not in favour of introducing voluntary agreements, some noted their specific interest in these arrangements.

Those in support of the proposals see this as a good opportunity for business and SEPA to work together. Some noted that they would willingly offer 'in kind' resources as well as additional funding in order to see their projects given additional regulatory support. Reassurance was sought in relation to SEPA's ability to resource appropriately any agreements entered into.

Two emerging themes surrounding the areas of disagreement arose. Firstly, there was concern that the core purpose of SEPA as an independent regulator could be diluted and as such the lines between the regulator and regulated could become blurred to no benefit. Secondly there was a concern expressed by a number of respondents that resource from core areas of SEPA business could be unfairly diverted, resulting in a two-tier level of service.

A number of respondents have requested further information with regard to the implementation of such voluntary agreements. Others seek reassurances that SEPA's role as an independent regulator wouldn't be compromised if such agreements were to be adopted going forward.

**Question 12 - Do you agree with the principles that would apply if value added services were to be introduced by SEPA?
Tell us if you agree with the concept of value added services and what principles should be applied?**



There was a low level of support expressed for the principle of value added services in the first instance, with only 38% of respondents in agreement. There was a high level of consistency amongst the issues and caveats identified by respondents concerning such services.

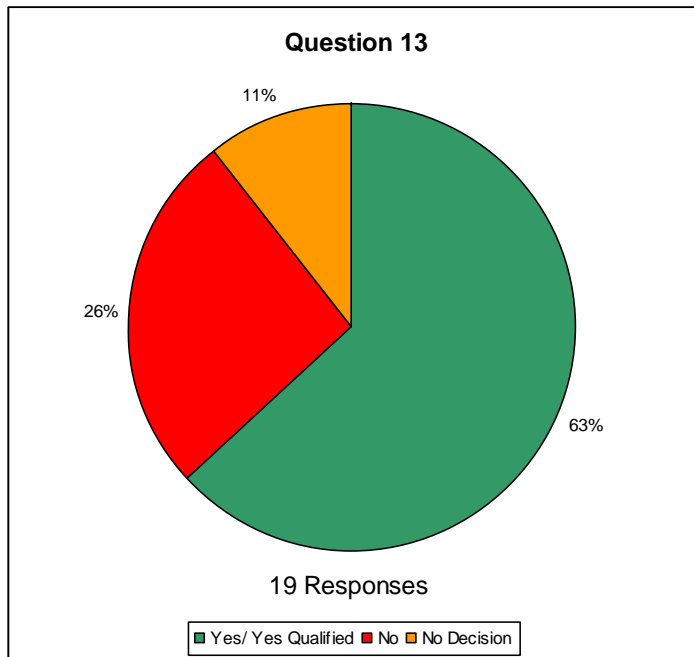
The majority of those that agreed with these proposals did so, on the proviso that there would be very clear guidelines to ensure separation of the regulatory role of SEPA from any service provision role. Respondents considered that any putative value-added services must be without prejudice to the proper and effective provision of SEPA's core work nor should the provision of these services be seen as a significant means of income generation. The reason for introducing such services should be solely based around the provision of services to the public where SEPA has legitimate value to add.

The main concern expressed by respondents was that such value added services would be comparable to a consultancy service and therefore offered the potential for SEPA's impartiality, objectivity and integrity as a regulator to be challenged. It was felt that such a move could bring SEPA into direct competition, and possibly conflict with, the private consultancy market. Furthermore, it was noted that there would be civil liability issues for SEPA to consider, should delivery dates and objectives not be met.

Another significant concern was that these proposals would result in a two-tier level of service, one funded by direct charges and the other funded by Grant-in-Aid and/or subsistence charges. It was felt that such a system could

unfairly favour larger organisations and potentially disadvantage small to medium sized enterprises (SMEs) that would not be able to afford these extra services.

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?



The majority of responders viewed the concept of voluntary agreements for large infrastructure projects positively.

This approach was seen by many respondents as a sensible way of addressing the long-standing under recovery problem that SEPA faces.

Some of those in disagreement would actually favour a stronger, compulsory version of such agreements. They believe that SEPA should aim for a 'cost-recovery' style charge to cover all the work delivered by SEPA's staff to protect Scotland's environment.

A number of responders who were in favour of the proposals did so subject to certain caveats. Specifically, they sought assurances that such voluntary proposals would not become compulsory over time. It was suggested by a number of respondents that the under recovery of costs referred to in the paper should simply be recovered through the initial application fee.

Further clarity was also sought around the definition of large infrastructure projects of national importance. It was stressed by several respondents that they would wish to see such agreements limited to publicly funded major

infrastructure projects, which are currently not controlled via the existing environmental legislation. An example given was the Forth Road Bridge.

Those who disagreed with the proposals were concerned that this is a means to secure greater income from the larger projects without sufficient justification. In particular, they disagree with consultation paper's suggestion that fees could a fractional percentage of the total project costs (0.25% to 1%) as such a charge might not be linked to regulatory and scientific effort. Others in disagreement were concerned that voluntary charging for pre-application consultation could discourage applicants from the proper investment of time and effort in getting applications right first time, resulting in increased GIA costs to SEPA and potentially slowing economic growth. It was also raised by some that performing such voluntary agreements may detract in some way from SEPA's core resource areas at the expense of those not undertaking voluntary agreements. Finally, there was a concern that such arrangements would over time become compulsory.

Despite expressing disagreement with the proposals some responders went on to suggest that there may be circumstances in which a major developer may enter into an agreement with SEPA to fast-track, for whatever reason, the preparation of an application. In such cases they (the private operator) may be willing to offer resources to help SEPA meet an accelerated timetable.

Appendix 1 – List of Responders

Individuals

Anonymous
Gordon Millar

Organisations

Built Environment Forum Scotland
Chartered Institution of Wastes Management
Chemical Industries Association
Confederation of Paper Industries
EDF Energy
Highland Council
IHP HELP Centre for Water Law. University of Dundee
NFU Scotland
Rio Tinto Alcan
Scotch Whisky Association
Scottish Association of Meat Wholesalers
Scottish Environment LINK
Scottish Environmental Services Association
Scottish Natural Heritage
Scottish Power
Scottish Property Federation
Scottish Water
SITA UK Limited
SSE
The Law Society of Scotland
UK Environmental Law Association

Appendix 2 – Pie Charts Incorporating Proportion of “No Comment” Responses.

