

COUNTRY REPORT: SCOTLAND

Reform of Environmental Regulation in Scotland

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Introduction

Regulatory reform can be a slow process, but worth the effort. In Scotland, the Government has been working on environmental regulation for a number of years and the new scheme is now taking effect. Scotland has had a devolved Parliament since 1999, with responsibility for the environment;¹ but has always had a separate legal system with some major differences especially regarding water management, and a separate regulator (Scottish Environment Protection Agency, SEPA). SEPA is responsible for industrial and air pollution, water pollution and water resource management including water allocation, and waste management.²

In the early part of 2011, SEPA began a new consultation process on environmental regulation,³ and a second stage consultation was issued by SEPA with the Scottish Government in 2012.⁴ A major focus was a better use of regulatory effort, with a more proportionate and risk based approach. As well as financial necessity, ongoing shifts in environmental priorities around climate change, resources and waste, biodiversity and ecosystems services, are driving policy; and rationalisation of many different regimes is always welcome, as long as substance is not lost. Four outcomes were sought from the new framework – a ‘single, proportionate and risk-based’ permitting structure, a single consistent

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¹ Scotland Act 1998, 2012.

² See <http://www.sepa.org.uk/>.

³ SEPA 2010 *Better Environmental Regulation: SEPA's Change Proposals*

http://www.sepa.org.uk/about_us/consultations.aspx. See also, for an analysis of the good and bad in the prior law, Scottish Environment LINK *Scotland's Environmental Laws since Devolution – from Rhetoric to Reality*

http://www.scotlink.org/files/policy/PositionPapers/LINK_ScotEnvLawsDec2010.pdf

⁴ SEPA / Scottish Government 2012 *Consultation on Proposals for an Integrated Framework of Environmental Regulation* available at <http://www.scotland.gov.uk/Resource/0039/00392549.pdf>

regulatory procedure, a flexible approach to permitting, and a 'flexible and proportionate' approach to enforcement. The focus is on the four main regimes – water, pollution prevention and control (PPC), waste, and radioactive substances.

A Tiered and Proportionate Approach

In 2012 it was proposed to have three tiers of consents, to allow proportionality, using General Binding Rules (GBRs), registration and full permits as the terminology. This is closest to the current regime for water, which is also the most recently introduced and probably the most coherent of the existing four.⁵ GBRs would set basic conditions for certain environmental activities, which will be published and available to operators. Registration would enable the regulator to track the location and impacts of activities. Full permits would be site specific and it there would be generic, standardised permits for less risky activities.

The paper also suggested more consistent procedures, including for enforcement tools and statutory notices, and a common set of timescales and standard rules on advertising. The proposal to rationalise the existing provision for statutory notices seems sensible. In the water regime, there are general enforcement notices with several functions, but in other regimes there are a series of separately named notices. Similarly, consolidation of appeal provisions and powers of entry etc. seems unobjectionable – 'clearing up the legislative landscape' is undoubtedly to be recommended. There were also proposals around rationalising permitting for multiple activities on one site, and for operators working across multiple sites via corporate permits.

Perhaps the most interesting reforms are around enforcement. In Scotland, although SEPA has power over licensing and can amend, suspend and revoke permits, and issue statutory notices of various types, fines can only be issued by the criminal courts. This requires firstly a report from SEPA to the public prosecutor; then, a decision that prosecution is in the public interest; then, proof beyond reasonable doubt in a criminal court; and then, if convicted, a judge (usually a sheriff) to levy an appropriate penalty. This may mean alleged offenders not reaching court, or penalties that do not sufficiently deter offenders. The introduction of specialist prosecutors has helped at the early stages, but compared to countries where regulators can levy penalties themselves, the powers are limited. So the proposal was to increase the tools and sanctions at SEPA's disposal, including financial penalties, whilst also

⁵ Under the Water Environment (Controlled Activities) (Scotland) Regulations 2011/208.

basing enforcement on the record of the operator (to achieve proportionality and a risk-based approach) under a 'compliance and engagement spectrum' ranging from 'criminal' to 'environmental champion'. Whilst there are risks with this too, some tailoring of sanctions to the known behaviours of established operators does seem a good idea, and is something all regulators do anyway.

There was also a proposal for enforcement undertakings, and for publicity orders, which might provide a deterrent for some operators, including those for whom fines are not a significant problem. SEPA would be required to publish a revised enforcement policy setting out the measures and their use in some detail, which would certainly be necessary before such a scheme came into force. Offences would be consolidated, with a new general offence of knowingly causing significant environmental harm would be introduced.

Meantime, the Scottish Government was also considering a broader proposal for a Better Regulation Bill, including proposals for reform in areas, including food safety; performance related fees in planning; faster payments for invoices in the public sector; and statutory review for infrastructure projects.⁶ Subsequently, it was decided to roll up these two legislative proposals into one Regulatory Reform Bill, containing only high level enabling powers and leaving all that devilish detail to emerge in regulations and guidance at a later stage. Despite some concerns, the Government proceeded on this basis.

The Regulatory Reform (Scotland) Act

The Bill was introduced to the Parliament in spring 2013 and was scrutinised by three committees.⁷ Academics and NGOs were amongst those giving evidence, and there were various concerns especially around the new enforcement powers, the very broad enabling powers and framework nature of the Bill, and a controversial duty on regulators across the spectrum to work towards the Scottish Government's overarching policy goal of 'sustainable economic growth'. This caused much debate, with many suggesting that a duty to work towards sustainable development would be more appropriate, at least for the environmental regulators (as well as SEPA, Scottish Natural Heritage, responsible for nature conservation legislation and policy, is covered by these rules). Indeed the debate over this clause rather

⁶ Scottish Government 2012 Consultation on Proposals for a Better Regulation Bill
<http://www.scotland.gov.uk/Resource/0039/00398287.pdf>.

⁷ Regulatory Reform (Scotland) Bill 2013 SP Bill 26. For the Bill and links to all accompanying documentation see <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/61582.aspx>.

overshadowed the lead committee's debate, which was perhaps a pity as it took time away from discussing other important points.

The breadth of enabling powers is always a concern in areas such as the environment. It is expected that detailed rules will be made by regulation or some other form of executive rule, however, if the enabling power is too broad it is difficult to have clarity as to what the final product is likely to be. In Scotland many regulations have little Parliamentary scrutiny and there was some debate as to which regulations would be subject to a fuller 'affirmative' procedure. Section 18 and schedule 2 enabled wholesale reform of the four control regimes with little detail as to how that would be carried out, though the Government had listened to earlier consultation responses insofar as the new rules will be made by regulation and not, for example, by a direction to the regulators, which would be much less transparent.

On enforcement, a fourth category of authorisation was introduced, a notification, sitting between general rules and registration. It is still not entirely clear what this category will add to the general regime or exactly how it will be distinguished from registrations. There was extensive debate over the new penalty powers, and their relationship to criminal prosecutions, given the variable burden of proof. It was agreed in essence that these powers should be subject to the civil burden of proof, i.e., on the balance of probabilities; that operators should be able to decline the penalty and thereby expect a trial on a criminal charge, with the higher standard of proof; but that once the regulator chose to issue penalties, the regulator would not be able to depart from that and seek prosecution for the same offence. There was also extensive discussion of appropriate routes of appeal; and the necessity for guidance to SEPA from the Lord Advocate regarding the use of the enforcement powers and their relation to the criminal law. A new general offence of causing or permitting 'significant environmental harm' was created; it is a strict liability offence, with specified defences.⁸ The Bill was enacted at the start of 2014, with the Government committed politically to wide consultation on the detail.

⁸ Regulatory Reform (Scotland) Act 2014 asp.3 s.40.

Sustainability Guidance and Codes of Practice

The first stage of that detail came in a consultation on new guidance to SEPA.⁹ The Government already had a duty to issue guidance to SEPA on sustainable development;¹⁰ and now, a requirement to issue guidance on how SEPA will achieve its new statutory purpose. That purpose includes firstly, protecting and improving the environment, but then also contributing to improving health and well-being, and to achieving sustainable economic growth.¹¹ The draft guidance began with the Government's overall purpose: *'To focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth.'* SEPA is to develop its corporate plan, and work programme, to support delivery of this goal.

The Government then gave definitions of sustainable economic growth and of sustainable development, which it had not done when the Bill was introduced. The former is defined as *'building a dynamic and growing economy that will provide prosperity and opportunities for all, while ensuring that future generations can enjoy a better quality of life too.'* The latter has a definition similar to the Brundtland definition: *'to enable all people throughout the world to satisfy their basic needs and enjoy a better quality of life without compromising the quality of life of future generations'*. There was a section on achievement of sustainable development, mentioning climate change, natural capital and ecosystem services – these concepts are likely therefore to frame SEPA's wider agenda, within which both its corporate planning and its operational activities will sit. Clause 3.4 states: *"The Scottish Government expects SEPA to measure success and augment the National Performance Framework by recognising the value of ecosystem services, and the contribution these provide to human wellbeing and sustainable development."* It is not clear exactly what that might mean, but potentially it could be very significant – the valuation of ecosystem services is likely to be a major driver of policy implementation in the future.

The paper ends with three high-level outcomes taken directly from the general purpose – *'Scotland's environment is protected and improving'; SEPA contributes to the achievement of sustainable economic growth; and Health and well-being of people in Scotland is*

⁹ Scottish Government (2014) Consultation on the Statutory Guidance on the General Purpose for the Scottish Environment Protection Agency and its contribution towards Sustainable Development <http://www.scotland.gov.uk/Resource/0044/00449901.pdf>.

¹⁰ Environment Act 1995 c. s.31.

¹¹ Regulatory Reform (Scotland) Act 2014 s.51; Environment Act 1995 s.20A.

improving' – with specific 'Ministerial expectations' beneath each. Under the first, these include a low carbon agenda and tackling climate change, and understanding natural capital and ecosystem services; under the second, managing the impact of regulation on business but also tackling crime and understanding the economic value of the environment; and under the third, taking account of health and well-being, tackling the highest risks and responding to communities.

This was followed by a consultation on a high level Code of Practice, applying to all the regulators covered by the Act.¹² The Code is intended to work with detailed codes and other relevant policies issued by the various bodies, some of which may need revised when the Code is finalised; here a strong focus on sustainable economic growth meant little emphasis on social or environmental issues. For SEPA, this emphasis may be misplaced. The final version is not yet published, but there has been an analysis of the responses.¹³

Next Steps on Regulation and Enforcement

Most recently, the Government has consulted on the new enforcement tools, and specifying the offences to which different tools will apply (Annex A).¹⁴ The tools include Fixed Monetary Penalties (FMPs), Variable Monetary Penalties (VMPs), and Enforcement Undertakings (EUs). The paper also addresses the new Court powers and provisions for vicarious liability. All of these will operate within guidance from the Lord Advocate's office as to the relationship between these powers, and prosecutions for more serious offences. 'Significant, persistent and deliberate acts' will continue to be referred for potential prosecution. The paper builds on evidence to the Parliamentary committee and responses to the various earlier consultations that have already taken place.

¹² Regulatory Reform (Scotland) Act 2014 s.5,6; Scottish Government 2014 *Consultation on Scottish Regulators' Strategic Code of Practice*

<http://www.scotland.gov.uk/Resource/0044/00442858.pdf>.

¹³ Scottish Government (2014) Regulatory Reform (Scotland) Act – Scottish Regulators' Strategic Code of Practice – Consultation Responses Analysis

<http://www.scotland.gov.uk/Resource/0046/00462110.pdf>.

¹⁴ SEPA / Scottish Government (2014) New Environmental Enforcement Framework Consultation on New Enforcement Measures for the Scottish Environment Protection Agency and the Relevant Offences Order

<http://www.scotland.gov.uk/Resource/0045/00455143.pdf>.

'Key aims' for the new regime are given as follows: to 'change the behaviour of the offender; deter future non-compliance; eliminate any financial gain or benefit from non-compliance; be proportionate to the nature of the offence and the harm caused; and restore the harm caused by regulatory non-compliance, where appropriate.' If there is significant financial gain, that would make it likely that there will be a report for prosecution. Repeat offending would be treated similarly.

FMPs will apply to low level, usually administrative offences, such as failures of notification, and will only apply if there is 'little or no actual environmental impact'; the suggestion is for three tiers, £300, £600 and £1000, and there will not be different amounts for individuals and companies. The VMPs will apply to somewhat more serious offences and will be calculated taking account of any financial benefit, the gravity of the offence, and aggravating or mitigating factors. There will be further provision for non-compliance e.g. failure to pay.

Many offences could be subject to either an FMP or a VMP, which means there is little differentiation in the table. The decision would depend on the circumstances, including the effect of the breach, the behaviour of the offender, and the existence of any financial benefit. The removal of that financial incentive to breach is a core driver of these proposals, and could indeed provide a differentiating factor. The 'compliance categorisation' of operators, based on their previous history, will be highly relevant here.

It is suggested that VMPs would be appropriate for breaches of some licence conditions and for failure to obtain some licences, and there is some discussion on how these would be calculated. The intention is to have broad categories of 'gravity' (e.g., no scope for actual harm, risk of harm, actual harm). Then, the aggravating / mitigating component will be operator- and incident-specific and will allow for, e.g., culpability, awareness, incident response and track record. The proposal is that these factors could increase or decrease the gravity factor by up to 50%, and the operator must make the case for mitigating factors. Presumably SEPA will in turn need to make a case for aggravation and this will need to be carefully documented.

In addition, operators will be able to offer an undertaking to make relevant restorations, and this may be accepted in lieu of a VPM or for a lower penalty. These will involve similar rationales to the EU's, but are separate. If there is then non-compliance, SEPA will be able to impose the original VMP along with a 40% uplift as a Non-Compliance Penalty.

EUs will involve a voluntary offer from operators. These may be proactive, or reactive to an investigation, but must be offered before an enforcement decision. They are intended for '*operators who are usually broadly compliant with regulatory requirements*'; which might raise opportunities for some interesting debates around the categorisation process. It is proposed that these should be available for 'a fuller suite' of offences (although looking at Annex A, there seem relatively few offences where EUs are ticked but other penalties are not). It is suggested that operators might be required to consult interested parties (and / or 'the community') as evidence of goodwill and acceptability.

New Court powers include compensation orders (s.34); fines for relevant offences to include financial benefit (s.35) and publicity orders (s.36). Vicarious liability is enabled under s.38 and s.39. It is proposed that all of these could apply where '*the offence carries a risk of significant environmental harm, actual environmental harm or may involve serious wrongdoing*'; and for vicarious liability, where they are capable of being committed by an employee, agent or contractor.

All monies recovered will be paid to SEPA, but then into the Consolidated Fund. In addition SEPA should be able to recover enforcement costs for VMPs and for EUs, and there are questions around whether these should be full cost recovery (typically, between £10,000 - £20,000), or depend on the amount of the VPN to which the investigation relates. In addition, there are proposals for discounts for early payment, and penalties for late payment. Once the period has expired SEPA can recover as a civil debt. So there is a degree of complexity around the detail for the VMP's. It is proposed (rightly) that SEPA be required to publish data on the use of these measures, in addition to the Court's powers to make publicity orders following a conviction (s.36). It is suggested here that the Order will allow appeals on errors of fact and of law, for VMPs that the amount was unreasonable, or that the decision was unreasonable on any other grounds; appeals should go to the Scottish Land Court. A draft Order will be published for further consultation.

Conclusions

These are challenging times for environmental regulation in many countries, with multiple pressures to reduce the 'red tape' burden, cut costs and achieve multiple policy outcomes, not all consistent. SEPA has been under much pressure and the decision to use a single vehicle for multiple reforms was controversial. The use of a single Bill to make so many high level changes to so many different regulators, including the 'sustainable economic growth'

duty, was barely consistent with the intention to radically overhaul and rationalise environmental law. Now we are in a complex period of consultation, in which the detailed rules will be laid before Parliament but are unlikely to be widely scrutinised by any Committee there. Academics, NGOs and professional bodies will respond to each new phase, but there are still concerns over the breadth of the enabling rules as well as the level of scrutiny. As a water person, I am pleased that the new water rules in Scotland are seen as being successful and therefore a model for other areas of environmental law; but again, it is to be hoped that the final regime does not dilute the good work in protecting the water environment in the last decade. As the new regime develops, much will depend on budgets – if SEPA’s monitoring budgets are protected, then enforcement becomes more realistic. If they are not, then any regime with a high use of general rules will struggle to maintain good conditions.