



Law Society  
of Scotland

# Consultation Response

Sector approach to regulation: Consultations on  
Scotch Whisky, Landfill and Metals Sector Plans

April 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Environmental Law sub-committee welcomes the opportunity to consider and respond to Scottish Environment Protection Agency's (SEPA) consultation entitled *Sector approach to regulation: Consultations on Scotch Whisky, Landfill and Metals Sector Plans*.<sup>1</sup> The sub-committee has the following comments to put forward for consideration.

## General comments

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We welcome SEPA's sectoral approach to regulation. However, all three of the sector plans indicate a desire on SEPA's part to radically change the way in which it regulates these sectors through a different set of rules than those used in the past – ie a move away from the 'traditional approach' to regulation. The sector plans lack both an explanation as to why the traditional approach has been deemed ineffectual and any detail as to how it is intended that SEPA will fundamentally alter the regulation and policy which currently exists and comprises the 'traditional approach'.

We consider that there are many examples of where the traditional, rule-based approach to environmental regulation is feasible, such as in relation to the control of emissions, the management of waste and the use of water. There is no explanation offered as to why this approach cannot be extended to cover other problem areas identified by SEPA as 'modern issues'.

The traditional, rule-based approach is, in the main, both measurable and transparent which enables SEPA to be accountable to the public in its approach to regulation and enforcement. A new approach based on partnership working with businesses to encourage improved environmental performance could result in less public engagement and visibility, and therefore affect SEPA's role as a regulator. The public needs to

<sup>1</sup> <https://consultation.sepa.org.uk/communications/sector-approach-to-regulation-consultations-on-sco/>

be reassured that SEPA is no less likely to take enforcement action against operators in sectors that have committed to going beyond compliance.

There is suggestion that, going forward, the level of guidance and advice which SEPA will provide will depend on the performance of operators or business in a sector. We consider that all operators need SEPA's guidance and advice to some extent, including those who are performing poorly. SEPA has appropriate enforcement tools for all forms of non-compliance (from mild to severe) and those tools should be used accordingly.

## Consultation Response

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### **1. We want to be a world class regulator, adopting innovative and novel approaches that help as many operators as possible to move beyond minimum legal standards and create economic and social success for Scotland from environmental excellence. Do you think these first three sector plans set the right level of ambition to achieve this goal?**

The level of ambition for the Scotch Whisky Sector Plan (SWSP) appears to be set at the right level considering the current compliance performance of that sector. However, in relation to the Metals Sector and, more particularly, the Landfill Sector, SEPA has failed in its endeavour to bring all businesses, operators and individuals into compliance, with many sites failing their compliance assessment in 2016<sup>2</sup>. Before these sectors can hope to move beyond compliance, action is needed to address that, particularly in light of the fact that the new compliance assessment scheme (when it is brought into force), will result in more sites being deemed 'non-compliant'. On that basis, we consider that the level of ambition for both the Landfill Sector Plan (LSP) and Metals Sector Plan (MSP) is currently too high. Focus should be retained on bringing all operators into full compliance and on reducing the levels of criminality substantially before moving on to deal with 'beyond compliance'. For the avoidance of doubt, the figures referred to in the LSP and the MSP only take account of those sites which are permitted and that does not reflect the number of illegal sites which are wholly non-compliant with environmental legislation. Little is offered by way of a solution to the level of criminality in either the LSP or the MSP.

### **2. Do you think that the plans set the right level of ambition for the sector?**

See our response to question 1 above.

<sup>2</sup> Landfill Sector Plan notes 71% of sites were compliant in 2016 and eleven of the fifteen non-compliant operational sites have been noncompliant for two or more consecutive years. Also see data within SEPA Enforcement Report 2016-2017: <https://www.sepa.org.uk/media/340366/sepa-enforcement-report-2016-17-final-hi-res.pdf>

### **3. Do the plans contain the right actions to: (a) tackle non-compliance and (b) to help businesses go beyond compliance?**

See our response to question 1 above. We consider that, with regard to the LSP and the MSP, there is not a sufficient or strong enough action plan set out in relation to how SEPA will deal with the current levels of non-compliance and criminality in those sectors.

Some further differentiation between the very worst non-compliance and minor non-compliance by those endeavouring to work towards full compliance is required. However, as compliance is non-negotiable, all compliance failures should be addressed, not just significant ones, and that should be made clear.

In relation to the LSP, there is little acknowledgement of how sites which are forced to close early, as a result of either continued non-compliance or due to the ban on biodegradable municipal waste going to landfill from 2021<sup>3</sup>, will be managed as closed sites. Only following formal legal surrender of a licence or permit for landfill would an operator be in a position to diversify or re-use a landfill site. Such surrender is currently a long-term process. Some clarity is required around this point.

### **4. Are there other opportunities that SEPA should be taking, or partners that we should be working with, that have not been referenced?**

We consider that SEPA could benefit from working more directly with all sectors in relation to their plans and also with the most prominent industry bodies in those sectors. That exercise should be undertaken before the plans are finalised and published, which we note is planned for June of this year.

To improve understanding of what is required of those partners, it would help if SEPA could identify who they consider those partners to be in each sector. Perhaps this could be done as part of the sections about those who are 'key influencers'.

### **5. Do you agree with the targets and priority actions for 2018-2019?**

We are of the view that much of what is set out in the sector plans as targets and priorities is an expression of SEPA's aspirational goals rather than actual targets which can be implemented and measured. More specific action points together with details of how those actions points will be achieved, perhaps via changes to policy and legislation, should be included in the sector plans.

In relation to the LSP and the MSP, it would be useful to have visibility of when SEPA intends to bring in its new compliance assessment scheme and when it intends to start using voluntary monetary penalties – both measures would help to target non-compliance.

<sup>3</sup> Introduced by Waste (Scotland) Regulations 2012/148, Regulation 4.



**6. Do you have any other comments?**

No.

**For further information, please contact:**

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