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**ENVIRONMENTAL JUSTICE IN SEPA'S  
ENVIRONMENTAL PROTECTION ACTIVITIES:  
A REPORT FOR THE SCOTTISH  
ENVIRONMENT PROTECTION AGENCY**

**BY**

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# ENVIRONMENTAL JUSTICE IN SEPA'S ENVIRONMENT PROTECTION ACTIVITIES

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## **DISCLAIMER**

The views expressed in the report are those of the author alone and do not necessarily reflect those of SEPA or the Scottish Executive. The author also takes full responsibility for any errors contained in the report.

## **EXECUTIVE SUMMARY**

The purpose of this research project is to explore the extent to which SEPA can take account of environmental justice within its current legislative framework when making licensing decisions or carrying out enforcement activity. As a contextual background to this the project reviews current environmental justice developments in Scotland and selected international developments to assess how these developments will affect the environmental justice agenda in Scotland as well as SEPA's environment protection activities.

The project has involved a literature review of environmental justice sources. This has not been comprehensive given time constraints but has focused on key domestic sources such as the First Minister's February 2002 speech and the PFMR of SEPA and key international sources, particularly the Aarhus Convention and US sources. Thereafter analysis of SEPA's current legislative framework was conducted to ascertain the extent to which environmental justice concerns could be addressed within the present licensing and enforcement regimes without legislative amendment. Again it was not possible to be absolutely comprehensive but the project considered water pollution controls in the Control of Pollution Act 1974 and the Water Environment and Water Services (Scotland) Act 2003; the pollution prevention and control and integrated pollution control systems in the Pollution Prevention and Control Act 1999, the Pollution Prevention and Control (Scotland) Regulations 2000 and Part I of the Environmental Protection Act 1990; waste management controls in Part II of the Environmental Protection Act 1990 and the Landfill (Scotland) Regulations 2003. The controls in the Radioactive Substances Act 1993 are also briefly considered. However, the approach taken in the legislative regimes that are considered can be applied to other regimes administered by SEPA. Although some recommendations particularly in relation to enhanced monitoring, provision of information and public participation clearly would involve additional resources it is beyond the scope of the report to address resource issues.

A working definition of environmental justice was adopted from a Scottish Executive source:

- “1. the ‘distributive justice’ concern that no social group, especially if already deprived in other socio-economic respects, should suffer a disproportionate burden of negative environmental impacts;
2. the ‘procedural justice’ concern that all communities should have access to the information and mechanisms to allow them to participate fully in decisions affecting their environment.”<sup>1</sup>

It is clear from the review of domestic policy statements or documents that environmental justice is becoming a key Executive and UK Government policy initiative. However, it is also apparent that the policy has not been fully elaborated. The need to address environmental inequalities is recognised and there is support for addressing greater levels of engagement with communities. Indeed as a result of the

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<sup>1</sup> SNIFFER Research Specification: “Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation”, March 2004.

Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in an Environmental Matters (1998) (“the Aarhus Convention”) and the EC directives implementing the Convention’s obligations it is apparent that measures to enhance such engagement by means of, for example, improving access to information and public participation mechanisms have been given greater consideration than measures to address ‘distributive justice’ aspects. However, there are certainly hints at the need to address the more substantive distributive environmental justice concerns. For example, the PFMR hints at some of these (enforcement, the role of and links between the planning system and the environmental law system, consistent regulation, regulation targeted towards risk). Internationally, the clearest comparative lessons for SEPA as to what it might do to address both distributive and procedural environmental justice concerns within its legislative framework come from the US EPA and reports by the US National Academy for Public Administration which provide a detailed account of how the US EPA can address environmental justice work through its legislative framework. India also provides an indication of the possible links between human rights provisions and environmental justice.

Chapter 5 of the report considers whether SEPA can legitimately address environmental justice issues and concludes that it can. This arises partly through its general duties under the Environment Act 1995 and partly by reason of the guidance on sustainable development issued to SEPA under section 31 of that Act to which SEPA must have regard in carrying out its functions and which is currently being revised to make explicit references to environmental justice. It also arises partly by means of general administrative law principles whereby public bodies must take account of relevant government policy documents or statements in carrying out their functions. Therefore, as a result of a number of the policy developments identified in chapter 4, by reason of general administrative law principles, environmental justice is already a material consideration in SEPA’s licensing and enforcement functions. Nonetheless the implications of the environmental justice agenda for SEPA’s day to day licensing and enforcement activities remain relatively undefined and recommendations are made to ensure that there are both explicit SEPA policy commitments to environmental justice and more specific guidance for SEPA officers dealing with licensing and enforcement.

Chapter 6 of the report notes that there is a lack of evidence in Scotland at present on the extent to which particular communities might be disproportionately affected by pollution. There is now a growing body of evidence in England but the first extensive research in Scotland on this topic has only just been commissioned. Nonetheless it is reasonable to assume that, as in the US and England many polluting industries and waste management facilities are located in or near poorer communities. Nonetheless the report notes that SEPA must develop or adopt an appropriate methodology on which to base any environmental justice-driven licensing decisions or enforcement measures. In that context the report reviews SEPA’s monitoring functions and concludes that while SEPA must conduct an adequate amount of monitoring to ensure that water quality standards are not breached under water pollution control legislation, otherwise SEPA is free to conduct monitoring subject to the restriction that the monitoring must be for the purpose of the pollution control regimes administered by SEPA. As a result of the implementation of the Water Framework Directive, SEPA’s monitoring requirements in relation to the water

environment will also be significantly extended from 2006. The report also notes that SEPA can make use of air quality data gathered by local and national monitoring networks to fully inform its views on whether a particular community is being disproportionately affected by air pollution and that SEPA can rely on local authority identification of contaminated land since it must be notified of contaminated sites by local authorities. A collaborative approach is therefore appropriate. Where the impact of pollution is infringing a Convention right and SEPA is responsible for regulating the offending emission or discharge and is not currently monitoring it or monitoring it adequately, a legal duty to conduct monitoring or adequate monitoring may arise under the Human Rights Act 1998. Once an appropriate methodology has been adopted and disproportionately affected communities identified, monitoring efforts should thereafter in part be targeted according to environmental justice criteria. The chapter also considers the role of quality or target standards as a means of assisting to ascertain whether a particular community is disproportionately affected by pollution. The chapter notes that quality standards can take account of cumulative impacts albeit within a particular environmental medium such as air. They would therefore be able to assist in identifying whether a new installation located in a particular place might cause the standard to be breached which might in turn indicate an environmental justice problem. EC-derived limit values in quality standards are mandatory and the European Court of Justice has suggested that such limit values in the air quality directives are directly effective and may thus be enforced by individuals in their domestic courts<sup>2</sup>. This clearly has implications for levels of enforcement by SEPA to ensure that such standards are met. However, quality standards are generally applicable and must be maintained everywhere so the use of such standards does not in itself provide any support for a stricter approach to communities which are disproportionately affected: it merely provides support for tackling any area where the quality standard is not being attained. Secondly, the identification of adversely affected communities depends on adequate widespread monitoring of the quality standard which may be resource intensive. Thirdly, it also depends on being able to identify the source(s) of the problem. In some cases the problem may not be caused by an installation regulated by SEPA but could be caused by, for example, emissions from road traffic. Finally, the use of quality standards in relation to particular substances cannot be used in relation to the overall cumulative impact of all polluting sources in an area eg while air quality standards can be used in relation to all the sources of eg sulphur dioxide, lead, particulates etc they are not of any use in relation to eg contaminated land or radioactive substances.

Chapter 7 considers the relationship between the planning and environmental law regimes. It notes that the planning system is primarily responsible for siting decisions for polluting installations and hence has a considerable role in terms of distributive environmental justice. However, SEPA is a statutory consultee in the development planning and development control process and can therefore influence siting decisions and may be able to draw a planning authority's attention to potential disproportionate or severe cumulative environmental impacts. Nonetheless the report acknowledges that SEPA may have difficulties assessing the impact of a particular development given the time constraints for responding to notifications of planning applications and given the lack of explicit linkage between the planning and environmental law systems. Thus, once SEPA has identified communities disproportionately affected by

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<sup>2</sup> *EC Commission v Germany C-361/88* [1991] ECR I-2567.



pollution it should, where possible, raise environmental justice concerns, for example regarding cumulative impact caused by the emissions from a new development when consulted in the planning process. SEPA should also consider entering into memoranda of understanding with local authorities about twin-tracking planning and environmental licence applications or at least better co-ordinating such applications in order to enhance the comprehensibility of the process for members of the public and to provide SEPA with more timely information on environmental impact which could enable SEPA to make more informed representations in the planning process which in turn may enable environmental justice concerns to be more fully addressed.

Chapter 8 deals with distributive environmental justice and SEPA's licensing functions. Chapter 8 proceeds to examine a range of the pollution control legislation administered by SEPA. It concludes that although the terms of the various regimes differ nonetheless there is generally sufficient discretion to permit SEPA lawfully to address environmental justice concerns in relation to new installations by means of, for example, imposing stricter emission limit values in the relevant licence and, in relation to existing installations, by means of, for example, making use of licence variation provisions to impose stricter emission limit values. This is the case even where BATNEEC or BAT must be applied as there is still sufficient legislative discretion to go beyond BATNEEC or BAT if required. The few reported cases on powers to impose conditions in environmental licences indicate that regulators already impose stricter conditions where local circumstances demand it<sup>3</sup>. It is simply that the approach has not been explicitly articulated previously as furthering environmental justice. The chapter also examines whether SEPA may lawfully require an operator to enter into a Good Neighbour Agreement with a local community as a condition of a licence. It concludes that this may not lawfully be done within the current legislative framework although there is nothing to prevent SEPA from promoting such agreements as long as they do not fetter SEPA's discretion in any way. The chapter suggests that once SEPA has established a methodology for identifying communities subject to disproportionate levels of pollution and has identified such communities it ought to review existing environmental licences to establish whether varying the relevant licences by, for example, imposing stricter emission standards might reduce the pollution burden on such communities and that it also ought to be guided by this information in determining new licence applications and imposing appropriate conditions.

Chapter 9 adopts a similar approach in considering SEPA's enforcement activities. In some cases SEPA is constrained by duties to take action in certain circumstances, such as the use of a prohibition notice under Part I of the Environmental Protection Act 1990 where there appears to SEPA to be an imminent risk of serious pollution or in taking remediation action in relation to contaminated land which constitutes a Special Site under Part IIA of the Environmental Protection Act 1990. Clearly such enforcement action may but need not necessarily coincide with an environmental justice problem. However, where SEPA has discretion under its statutory enforcement powers it can lawfully use these powers to address environmental justice concerns. The chapter thus recommends that SEPA should amend its enforcement policy to indicate that enforcement action will be targeted not simply at operations

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<sup>3</sup> See *R v Secretary of State for the Environment and Peninsular Proteins, ex p Torrridge District Council* [1997] Env LR 557.

involving considerable risk to the environment but also at dealing with pollution affecting communities disproportionately. Where pollution problems are or are likely to cause breaches of human rights under the European Convention on Human Rights (ECHR), SEPA's discretionary enforcement powers may be transformed into duties to take enforcement action by virtue of the Human Rights Act 1998. Once again there may be a coincidence between a human rights violation and an environmental justice issue. The chapter also notes that SEPA enjoys reserve powers under both the Clean Air Act 1993 in relation to declaration of smoke control areas by local authorities and under Part IV of the Environment Act 1995 in relation to local authority air quality functions. The local authority powers in question could play a significant role in addressing environmental justice concerns caused by poor air quality and SEPA therefore ought to develop a clear policy on the use of its reserve powers under these pieces of legislation noting that its reserve powers can be used to address environmental justice concerns of communities which are being adversely affected by air pollution. SEPA also has a range of anti-pollution prevention and clean-up powers which could be used in appropriate circumstances to address environmental justice issues and it is recommended that SEPA develop a policy on the use of these powers which expressly addresses their use in an environmental justice context.

Chapter 10 examines the potential for linkage between human rights provisions and environmental justice concerns. It concludes that although the former are very much related to individual problems whereas the latter are more community-based nonetheless there may be a coincidence between infringements of Convention rights and environmental justice concerns. Therefore in dealing with licensing and enforcement matters, wherever SEPA considers there are human rights questions which arise it would be prudent to consider whether those questions might not simply affect a particular individual but might actually be environmental justice issues affecting a whole community. If indeed there are environmental justice concerns which might or might be about to result in infringements of Convention rights (or vice versa) SEPA may be required under the Human Rights Act 1998, on human rights grounds, to review licence conditions, refuse or impose stricter emission limits in new licences or take enforcement action to avoid or end the infringement of Convention rights. SEPA should therefore ensure that its licensing and enforcement procedures fully take account of the human rights dimension and also ensure that its licensing and enforcement teams are aware of the potential for coincidence between Convention rights infringements and environmental justice issues. The anti-discrimination provisions of Article 14 of the ECHR ought also to be borne in mind by SEPA. Thus, to avoid allegations of discrimination in the treatment of licence holders (1) in imposing stricter conditions to address environmental justice concerns whether in a new or varied permit; or (2) in deciding to take enforcement action, SEPA should objectively and reasonably justify any changes on the grounds which the relevant legislation enables it to consider.

Chapter 11 considers procedural environmental justice issues in the context of public access to environmental information held by SEPA. There are extensive public rights of access to environmental information, partly by means of public registers of licence and enforcement related information and partly by means of a more general right of access to information under the Environmental Information Regulations 1992. The Scottish Pollution Release Inventory which derives from legislative requirements in the EC Integrated Pollution Prevention and Control Directive (IPPC) and

implementing legislation provides an electronic map-based information resource enabling users to get data on emissions from industrial installations regulated under the IPPC regime. There has been a considerable amount of socio-legal research into existing access to environmental information provisions. It has identified they suffer from a number of problems in practice including lack of awareness, accessibility, comprehensibility of the available data and charges imposed for copies. However, no research has been conducted into whether these problems impact particularly on those in disadvantaged communities although it may be fair to assume that they do. Nonetheless the report recommends that SEPA should endeavour to establish participation baselines both to establish whether there are procedural environmental justice problems and also to enable targeting of awareness raising measures on rights of access to environmental information. There have been a considerable number of legislative improvements which have largely been the result of EC or international obligations. These have included measures to ensure that information can be requested by a variety of means to obviate the need to visit the register and the greater standardisation of charges which has resulted from the establishment of SEPA since it now holds most of the pollution control registers in Scotland. From 2005 when the domestic measures implementing the new EC Directive on access to environmental information (2003/4) which in turn implements the Aarhus Convention (1998) provisions on access to environmental information there will, for example, be additional duties imposed on SEPA to assist those applying for information and to make information progressively available by electronic means. Although recent non-legal research has identified that many are still unable to access information electronically, nonetheless electronic GIS-based systems are the most accessible to those who have access to computers which is reinforced by the experience of the US Environmental Protection Agency. Research from the US also suggests that provision of information in libraries may be particularly useful for those who lack computing skills or access to computers. The chapter notes that although the UK Government's preferred approach is for information and services to be made available electronically pursuant to an Order made under the Electronic Communications Act 2000, SEPA is not legally precluded at present from making its registers available electronically. Therefore, as a minimum step SEPA should thus endeavour to make its public registers electronically available and should also consider making information regarding specific licence applications available in libraries to assist those who do not have computer skills – or at least providing guides for library staff on accessing environmental information electronically so they might assist those lacking computer skills. However, given that research has identified that registers suffer from the range of problems noted above it is important to note that SEPA is not legally precluded from presenting a wider range of information extracted from public available register information on the more user-friendly Scottish Pollutant Release Inventory. One problem which is noted is that non-legal research has recently identified that the public are less interested in raw data than processed or interpreted data and indeed cumulative data or at least data that is comparable between sectors. This suggests that SEPA should not simply be extracting information from the public register and making it available via the SPRI but that it should also be presenting interpreted information rather than raw emissions data (eg whether or not a licensed facility is complying with licence conditions or not) as well details of what enforcement action, if any, was taken by SEPA where there was a breach of a condition. The chapter also notes that under the Aarhus Convention and implementing measures SEPA will be required to make available on request its decisions on licence applications and the

reasons and considerations which underpin those decisions. This enhanced transparency should enhance confidence in SEPA's regulatory approach but will also obviously be of assistance to those who wish to challenge decisions or actions taken by SEPA. Nonetheless SEPA should consider and publicise how it will make available decisions on licence applications and the reasons and considerations which underpin those decisions in an effective and user-friendly way.

Chapter 12 considers procedural environmental justice further in the context of rights of public participation in the environmental law systems administered by SEPA. The chapter notes that although there are considerable rights of public participation in the domestic environmental law framework (usually a right to make a representation during a particular period following a licence application and notification thereof) there has been little research into their effectiveness let alone in the context of their effectiveness from the perspective of those in communities disproportionately affected by pollution. Although it may be possible to assume that such communities are affected to a greater degree than others if there are problems of engagement, nonetheless the chapter suggests that SEPA should endeavour to establish participation baselines both to establish whether there are procedural environmental justice problems and also to enable targeting of awareness raising measures on rights of participation in decision-making. Some research into the effectiveness of public participation mechanisms has been carried out for the Environment Agency. That research found that consultation exercises needed to be better planned, that there should be earlier public involvement, that a variety of mechanisms should be employed, that better links should be made with other relevant public bodies, that better relationships should be forged with communities and that there should be mechanisms to evaluate the effectiveness of the public participation. The chapter recommends that SEPA should consider some of the recommendations in that research. The chapter also reviews research in the US which suggests that formal notice and representation provisions have proved largely ineffective and that a range of measures to ensure more effective engagement are necessary. The chapter notes that Aarhus Convention reinforces the need for early participation and also enhances accountability through its requirement that reasons and considerations underlying decisions should be made publicly accessible. Although electronic measures to enhance participation may suffer from drawbacks identified in Chapter 11, nonetheless it is argued that enabling representations to be made electronically this would be a positive, if minimal, step to enhancing participation and the chapter concludes that SEPA is not legally precluded from encouraging representations to be made electronically even though the UK Government's preferred approach is for information and services to be made available electronically pursuant to an Order made under the Electronic Communications Act 2000. To facilitate the making of representations generally the chapter recommends that advice be placed on SEPA's website and in paper form in libraries to assist those wishing to make representations. In terms of developing other measures to encourage more effective public participation the chapter principally considers the holding of hearings into licence applications and the possible designation and training of community liaison officers. Although the holding of hearings is not required by Article 6 of the European Convention on Human Rights there is no legal barrier to SEPA holding such hearings and the chapter recommends that SEPA considers their use in defined circumstances which are well advertise via SEPA's website. There are no legal barriers to the adoption of other means of engaging with the public more effectively which might be

suitable for communities suffering disproportionately from pollution. These might include the use of community liaison officers who could convene public meetings or local focus groups, explain SEPA's role and position, explain decisions and actions and feedback community views to licensing and enforcement teams and/or SEPA's Regional Boards. Picking up a point raised in the PFMR of SEPA, the chapter recommends that SEPA should consider establishing with local authorities (and the Scottish Executive) a single point of contact environmental hotline within each local authority area (or even nationally) so that the public can readily direct their concerns and complaints to a well known single source which would pass them to the correct body.

## 1. PURPOSE AND OBJECTIVES

1.1 The purpose of the research project is to explore the extent to which SEPA can take account of environmental justice within its current legislative framework when making licensing<sup>4</sup> decisions or carrying out enforcement activity. The research has involved reviewing recent developments at international and national level which refer to or are part of the policy and legal development of the concept of environmental justice, and assessing the potential impact of these developments on SEPA and its contribution to the future achievement of environmental justice.

1.2 The objective of the research is to review current developments in Scotland and internationally for consideration of environmental justice, and to assess how these developments will affect the environmental justice agenda in Scotland as well as SEPA's environment protection activities.

1.3 There are three strands to the research project:

1. Identification and consideration of developments at international and national level in relation to environmental justice
2. Assessment of how these are affecting or are likely to affect the environmental justice agenda in Scotland
3. Assessment of the extent to which current and future environmental justice initiatives and developments can be taken account of within SEPA's *current* legislative framework (ie what could be achieved or facilitated within the current framework and more broadly what SEPA policy changes might be required) and identification of initiatives which cannot be accommodated within SEPA's *current* legislative framework

## 2. SCOPE AND RESEARCH METHODS

2.1 The project has essentially involved a literature review. Sources on environmental justice have been reviewed although given the constraints of time a comprehensive review has not been possible. A working definition of "environmental justice" has been developed from the sources.

2.2 In order to fulfil the purpose of the project and deliver the objective a number of key sources on content of environmental justice initiatives and developments have been considered including:

- US developments given the origins of the concept of environmental justice lie in the US<sup>5</sup>
- The First Minister's speech<sup>6</sup>

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<sup>4</sup> The terms 'licence' and 'licensing' are used throughout in a generic sense to refer collectively to the various types of environmental licences administered by SEPA, ie authorisations, permits, discharge consents, waste management licences etc. Where a specific regime is being considered, the appropriate term used in the relevant statute to describe the licence is used.

<sup>5</sup> See para 4.10.2.1-4.10.2.4 below.

<sup>6</sup> First Minister Jack McConnell, speech on the Executive's environmental policy, Dynamic Earth, Edinburgh, on February 18, 2002. See paras 4.1.1 – 4.1.4 below.

- The Labour-Liberal Democrat Partnership Agreement<sup>7</sup>
- The Policy and Financial Management Review of SEPA<sup>8</sup>
- Various recent planning consultation papers<sup>9</sup>
- Research in England and Wales on legal aspects of environmental justice<sup>10</sup>
- International developments and European and domestic implementing measures (particularly but not restricted to the Aarhus Convention<sup>11</sup>, the Espoo Convention<sup>12</sup>, Directive 2003/35/EC<sup>13</sup>; Directive 2003/4 on public access to environmental information<sup>14</sup>, Directive 2001/42/EC on the Assessment of Environmental Effects of Certain Plans and Programmes (“the Strategic Environmental Assessment Directive”)<sup>15</sup>; and
- The environmental dimensions of European Convention on Human Rights<sup>16</sup>.

<sup>7</sup> Labour-Liberal Democrat, A Partnership for a Better Scotland, 2003. See paras 4.6.1 – 4.6.7 below.

<sup>8</sup> Policy and Financial Management Review of the Scottish Environment Protection Agency, March 2003. See paras 4.5.1 – 4.5.13 below.

<sup>9</sup> See paras 4.9.1 – 4.9.5.

<sup>10</sup> M Grant, Environmental Court Report, 1999 (a research report for the DETR); Royal Commission on Environmental Pollution, Twenty-third report, Environmental Planning, 2002; MacCrory & Woods, Regulatory Reform and Access to Environmental Justice, 2003 (a research report for DEFRA). See paras 4.8.1 – 4.8.2 below. There is non-legal research on environmental justice, see eg: Burrows R. and Rhodes D. (1998) *Unpopular places: area disadvantage and the geography of misery in England* Joseph Rowntree Foundation/York Publishing Ltd; Burningham K. and Thrush D. (2001) *Rainforests are a long way from here* Joseph Rowntree Foundation/York Publishing Ltd; Dunn C and Kingham S (1006) Establishing links between air quality and health: searching for the impossible, *Social Sciences Studies of Medicine*, vol 42, no 6, pp 831-841; Environment Agency, Bristol; FoE (2000) *Pollution Injustice*. www.foe.co.uk/pollution-injustice/ (Friends of the Earth). FoE (2001) *Pollution and Poverty - Breaking the Link*. (Friends of the Earth, London); Mitchell G and Dorling D, 2003 *An Environmental Justice Analysis of British Air Quality*, Environment and Planning A, 35, 909-929; Walker, G.P, Mitchell, G., Fairburn, J. and Smith, G. (2003) *Environmental Quality and Social Deprivation. Phase II: National Analysis of Flood Hazard, IPC Industries and Air Quality*. R&D Project Record E2-067/1/PR1, The Environment Agency, Bristol; Wheeler B (2004) Health-related environmental indices and environmental equity in England and Wales, *Environment and Planning A*, 36(5) 803-822.

<sup>11</sup> The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in an Environmental Matters (1998). See paras 4.10.1.1 – 4.10.1.2 and chapters 11 and 12.

<sup>12</sup> The Espoo Convention on Environmental Impact Assessment in a Transboundary Context (1991).

<sup>13</sup> Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L156, 25.6.03, p 17).

<sup>14</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41, 14.02.2003, p 26). See paras 4.10.1.3 – 4.10.1.8. See also chapter 11.

<sup>15</sup> Directive 2001/42/EC on the Assessment of Environmental Effects of Certain Plans and Programmes (OJ L97, 21.07.01, p 30). See also Environmental Assessment of Development Plans – Interim Planning Advice, August 2003 and Strategic Environmental Assessment: A Consultation on Proposed Legislative Measures to Introduce Strategic Environmental Assessment in Scotland, December 2003. See also now the Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004, SSI 2004/258; and Scottish Executive Environment Group, Strategic Environmental Assessment – A Consultation on the Proposed Environmental Assessment (Scotland) Bill, Paper 2004/12, September 2004.

<sup>16</sup> See eg Cook, “Environmental Rights as Human Rights” [2002] EHRLR 197; Poustie, “Planning and Human Rights” (2001) (ch.15 in the *Scottish Planning Encyclopaedia* ed Lord Gill); Thornton & Tromans, “Human Rights and Environmental Wrongs - Incorporating the European Convention on Human Rights: Some Thoughts on the Consequences for the UK Environmental Law” [1999] 11 JEL 35. See also chapter 10 below.

Certain other relevant developments such as the concept of community planning are also touched upon given they may provide an opportunity for a co-ordinated approach to be taken by public bodies to delivering environmental justice. Given the constraints of time a full review of all relevant materials has not been possible so the selection is designed to both key domestic policy and legal sources and a fair selection of overseas material.

2.3 Given that the purpose of the project is to explore the extent to which SEPA can take account of environmental justice within the *current* legislative framework when making licensing decisions or carrying out enforcement activity, the current legislative framework is examined<sup>17</sup>. Key areas which are addressed include:

- The extent to which the various pollution control regimes provide a basis for addressing environmental justice concerns in the determination of licence applications and the imposition of conditions in licences where they are granted
- Opportunities for public participation in particular cases (obtaining information, making representations) in the environmental licensing system.
- Relationship between planning law system and environmental law system since key decisions about siting of industries take place under the former and there is often more public involvement in the former – also some degree of confusion in public mind as to relative responsibilities of planning authorities and SEPA in this regard<sup>18</sup>.
- Compatibility of legislation with Convention rights – the key issue here is the positive duty on states and their public authorities to take action to protect Convention rights which might require enforcement action to be taken in some circumstances<sup>19</sup>.
- General public rights of access to information under the Environmental Information Regulations 1992, the forthcoming new Environmental Information Regulations to implement Directive 2003/4/EC; and the pollution inventory provisions of the Pollution Prevention and Control (Scotland) Regulations 2000.

The opportunities for public participation at strategic level in the development of strategies such as the National Waste Strategy and the forthcoming River Basin Management Plan and Sub-Basin Plans are also touched upon.

2.4 Clearly there are many non-statutory initiatives which SEPA might take within the existing legislative framework and these are examined. These include:

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<sup>17</sup> Including the Water Environment and Water Services (Scotland) Act 2003; Pollution Prevention and Control (Scotland) Regulations 2000; the Environment Act 1995; the Radioactive Substances Act 1993; the Environmental Protection Act 1990; and the Control of Pollution Act 1974.

<sup>18</sup> It is known that a SEDD Research Project on the Interaction Between Land Use Planning and Environmental Regulation is currently underway although it is not known when the results of this project will be published. If they appear during the period for this project they will be taken into account.

<sup>19</sup> See eg *Lopez Ostra v Spain* (1995) 20 EHRR 277; *Oneryildiz v Turkey* (2004) 39 EHRR 23. This issue has also been raised domestically in *Magnohard v UKAEA & SEPA* 2003 SLT 1083 and *Anne v Test Valley Borough Council* [2002] Env LR 22.



- Evaluation of whether SEPA can promote or contribute to require regulated undertakings to enter into good neighbour agreements with local communities as such agreements are seen as one means of furthering the environmental justice agenda.
- Evaluation of whether various SEPA policies and codes such as the Enforcement Policy, the Code of Practice on Openness, the Service Charter could be revised if necessary in the light of the environmental justice agenda.

2.5 From the analysis cross-cutting themes are highlighted. These include:

- Building in environmental justice considerations into SEPA's licensing and enforcement functions.
- Responsiveness to local communities<sup>20</sup>. This is perhaps one of the key themes in the environmental justice agenda. It encompasses a wide range of issues including dealing effectively with complaints (including provision of a one stop shop for environmental complaints<sup>21</sup>); delivering effective regulation; encouraging businesses to be "good neighbours"; engaging effectively in the community planning process with local authorities under the Local Government in Scotland Act 2003; engaging local communities more effectively in dealing with licence applications and more strategically in eg strategy development such as river basin management plans, the National Waste Strategy; and improving public access to information (which might include making registers available electronically – progressively making information electronically available is a key obligation in the Aarhus Convention<sup>22</sup>).
- Improving enforcement of environmental law. A number of initiatives are underway including increasing penalties for various environmental offences, the establishment of a Sentencing Commission, the Partnership Agreement's reference to consideration of an environmental court. Most of these obviously require action by the Executive but there are certainly steps SEPA might take including reviewing its enforcement policy, enhancing training on reporting offences further, being more pro-active in engaging with communities – where this is not restricted for legal reasons – where enforcement action is being contemplated or in providing feedback to communities where enforcement action has been taken.
- Relationship between environmental and planning law. Although a review of the relationship between the environmental law and planning law systems is apparently underway although no report has as yet been published<sup>23</sup>, there may be scope for better co-ordination of the application processes for planning permission and environmental licences where possible or at least much closer liaison between SEPA and planning authorities where applications are being considered and in particular making the responsibilities of each body clearer to the public so that representations are appropriately focused. Proposals for an environmental court or tribunal also potentially raise the issue of combining planning and environmental jurisdictions at appeal level.

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<sup>20</sup> PFMR, para 1008, pp 2-3

<sup>21</sup> PFMR, para 3046, p 17.

<sup>22</sup> Aarhus Convention, art 5(3).

<sup>23</sup> SEDD Research Project on the Interaction Between Land Use Planning and Environmental Regulation.

2.6 Recommendations are made in terms of how SEPA can accommodate existing and forthcoming environmental justice policies and developments within its existing legislative framework. These recommendations include suggested modifications to SEPA policies including its enforcement policy. Where environmental justice policies and developments cannot be accommodated within the current framework that is made clear. More broadly the report also identifies what wider impacts international, European and other national environmental justice initiatives might have on the Scottish environmental justice agenda. Although some recommendations particularly in relation to enhanced monitoring and procedural environmental justice issues involving the enhancement of provision of access to environmental information and public participation measures would involve clearly additional resources it is beyond the scope of the report to address resource issues.

### 3. WORKING DEFINITION OF ENVIRONMENTAL JUSTICE

3.1 The report adopts the Scottish Executive working definition of environmental justice adopted for use in a SNIFFER research project which in turn is similar to a definition developed by Kevin Dunion, the Scottish Information Commissioner and former Chief Executive of Friends of the Earth Scotland<sup>24</sup>. The definition consists of two elements:

- “1. the ‘distributive justice’ concern that no social group, especially if already deprived in other socio-economic respects, should suffer a disproportionate burden of negative environmental impacts;
2. the ‘procedural justice’ concern that all communities should have access to the information and mechanisms to allow them to participate fully in decisions affecting their environment.”<sup>25</sup>

3.2 This definition appears in turn to reflect to some extent from a more elaborate definition adopted by the US Environmental Protection Agency which defines environmental justice thus:

“Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, culture, education, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies. *Fair treatment* means that no group of people, including racial, ethnic or socioeconomic groups, should bear a disproportionate share of the negative consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal environmental programs and policies. *Meaningful involvement* means that (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public’s contribution can influence the regulatory agency’s decision; (3) the concerns of all participants involved will be considered in the decision-making process; and

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<sup>24</sup> See eg Dunion, K, Troublemakers: The Struggle for Environmental Justice in Scotland, Edinburgh UP May 2003, pp 11-12.

<sup>25</sup> SNIFFER Research Specification: “Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation”, March 2004.

(4) the decision-makers seek out and facilitate the involvement of those potentially involved<sup>26</sup>.”

“Fair treatment” to some extent equates to the “distributive justice” limb of the Scottish Executive/SNIFFER definition with “meaningful involvement” equating to “procedural justice”.

3.3 The working definition adopted could certainly be improved on in the sense that the ‘distributive justice’ limb could also have a positive dimension in that it could refer to equitable access to environmental ‘goods’ as well as the negative avoidance of exposure of environmental ‘bads’.

3.4 The distributive justice limb of the definition is examined in the context of SEPA’s substantive functions to grant licences, impose conditions and take enforcement action. In broad terms it is clear as will be argued below that although SEPA is not responsible for decisions relating to siting of installations which is a planning function, it nonetheless can have a significant influence on distributive environmental justice by, for example, making representations within the planning process, or refusing a licence where the cumulative impact of the proposed installation taken along with existing installations might result in a community suffering disproportionately or imposing stricter licence conditions to prevent a community suffering a disproportionate impact or taking enforcement action where breaches of licence conditions are having the same effect. Procedural justice concerns are discussed in the context of statutory provisions providing access to information both in general terms and specifically in the context of particular licences and in the context of the statutory mechanisms enabling members of the public to make representations to SEPA as part of the various environmental licensing regimes.

## **4. DEVELOPMENTS IN ENVIRONMENTAL JUSTICE AT NATIONAL AND INTERNATIONAL LEVEL AND POSSIBLE IMPLICATIONS FOR SEPA**

### **4.1 First Minister’s speech, February 2002**

4.1.1 One of the key drivers for the adoption of an environmental justice agenda in Scotland was the First Minister’s speech delivered on 18 February 2002. He stressed that social and environmental justice was a theme of his administration and indicated that

“... the reality is that the people who have the most urgent environmental concerns in Scotland are those who daily cope with the consequences of a poor quality of life, and live in a rotten environment – close to industrial pollution, plagued by vehicle emissions, streets filled by litter and walls covered in graffiti. This is true for Scotland and also true elsewhere in the world. These are circumstances which would not be acceptable to better off communities in our society, and those who have to endure such environments

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<sup>26</sup> Office of Environmental Justice, US Environmental Protection Agency, *Guidance to Assessing and Addressing Allegations of Environmental Injustice*, Working Draft (January 10, 2001), p 7 as adopted in National Academy of Public Administration, *Environmental Justice in EPA Permitting: Reducing Pollution in High-Risk Communities is Integral to the Agency’s Mission*, December 2001, p 1.

in which to bring up a family, or grow old themselves are being denied environmental justice.”

4.1.2 He acknowledged that there had been far too little research in Scotland into the social effects of environmental degradation. Key points in the speech were

- Industries which discharge to the environment cohabited with communities, and were interdependent on each other – for workers and for work.
- Improved relations between a community and industry should be encouraged with industries striving to be good neighbours, and aiming to engage with local communities to address their concerns and promote better mutual understanding<sup>27</sup>.
- A thorough and honest appraisal of environmental performance could be the spur to further improvements – this could be achieved in part by more Scottish businesses publishing Corporate Social Responsibility Reports.
- Openness and accountability to stakeholders, not just shareholders, would be improved by environmental reporting and a concerted effort to reduce emissions and resource use.
- The cumulative experience of communities growing up in the shadow of old traditional industry impacts on life chances and future opportunities<sup>28</sup>.
- There needed to be more openness in dealing with complaints so that people who wanted to raise issues knew who was dealing with it and organisations had to work together to deal with genuine concerns<sup>29</sup>.
- It would only be possible to accurately assess the effectiveness of current powers when communities could fully understand the impact and activities of SEPA, local authorities and others, or the reasons why no action seemed possible or appropriate<sup>30</sup>.

4.1.3 SEPA is not in a position to address all these points, particularly Corporate Social Responsibility (CSR) Reports and indeed environmental reporting in a general sense. While there is no doubt that SEPA could encourage wider environmental reporting it has no direct statutory mandate to do so and promotion of such general initiatives is more a matter for the Executive or indeed the DTI which hitherto has been responsible for CSR and Environmental Reporting initiatives<sup>31</sup>.

4.1.4 The First Minister’s speech clearly raises issues about the procedural dimensions of environmental justice in terms of the need for more accountability and openness to stakeholders and openness and clarity in dealing with complaints. Improved relations between industry and communities also falls within the procedural dimension of environmental justice. The speech begs the question as to whether SEPA can promote good neighbour agreements between industry and communities. Distributive or substantive environmental justice is also hinted at in the references to the need for improved environmental performance and to the cumulative experience of communities.

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<sup>27</sup> The issue of whether SEPA can require regulated industries to enter into good neighbour agreements with communities is discussed in paras 8.8.1 – 8.8.11 below.

<sup>28</sup> The extent to which SEPA can address cumulative impacts is considered in section 6 below.

<sup>29</sup> See paras 12.5.6 and 12.8 below.

<sup>30</sup> See chapters 11 and 12 below.

<sup>31</sup> See generally [www.csr.gov.uk](http://www.csr.gov.uk).

## **4.2 Scottish Executive Environment Group, Meeting the Needs ... Priorities, Actions and Targets for Sustainable Development in Scotland, Paper 2002/14 April 2002**

4.2.1 Executive policy on environmental justice was elaborated further in its policy statement in April 2002 on priorities, actions and targets for sustainable development. This paper indicated that sustainable development was based on three principles: (1) having regard for others who did not have the same level of access to resources; (2) minimising the impact of our actions on future generations by radically reducing use of resources and environmental impacts; and (3) living within the capacity of the planet<sup>32</sup>. In the context of having regard for others, the Executive made clear that

“Both environmental and social justice are central to our view of sustainable development ...”<sup>33</sup>

4.2.2 The paper noted that there were communities in Scotland which felt that their quality of life and hopes for the future were stunted by the legacy of past environmental degradation, poor quality homes and the consequences of socially and environmentally-regrettable methods of disposing of waste and discharging pollution:

“For these reasons we are committed to environmental justice: fundamentally that means ensuring that people do not live in degraded surroundings and it means not making unrealistic demands on the environment to absorb waste and pollution.”<sup>34</sup>

The Executive saw that promoting and rewarding methods of production which reduced resource and energy use and which minimised pollution would not only often bring financial savings to the investor but would also reduce the risk faced by communities which lived next to sources of pollution and nuisance, as well as safeguarding the environment and making better use of the world’s resources<sup>35</sup>. The Executive identified waste generation as “the most obvious symptom of poor resource use” with most waste going to landfill. This represented not only a lost economic opportunity but also “a blight on the communities who live near landfill sites”. Thus, the Executive made clear that “On environmental justice grounds we are determined to reduce the waste going to landfill. ...”<sup>36</sup>

4.2.3 Although pitched at a level of generality the centrality of environmental justice to the Executive’s view of sustainable development is reinforced. There is general justification for pollution and particularly landfill minimisation but also arguably a justification for SEPA targeting controls at reducing risk to communities exposed to pollution.

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<sup>32</sup> Scottish Executive Environment Group, Meeting the Needs ... Priorities, Actions and Targets for Sustainable Development in Scotland, Paper 2002/14 April 2002, para 4.

<sup>33</sup> Ibid, para 5.

<sup>34</sup> Ibid, para 7.

<sup>35</sup> Ibid, para 9.

<sup>36</sup> Ibid, para 22.

### 4.3 Policy Priorities for SEPA, March 2003

4.3.1 Relevant priorities in the context of environmental justice are those where SEPA's role in protecting the public or engaging with the public are mentioned. These include SEPA's roles in local air quality management<sup>37</sup>, in promoting sustainable waste management<sup>38</sup>, waste regulation and contaminated land<sup>39</sup>, radioactive waste management<sup>40</sup>, nuclear emergency planning and response<sup>41</sup>, flood warning<sup>42</sup>, and the development of an on-line pollution inventory and other web-based services<sup>43</sup>. A key overall Executive target in the context of environmental justice is for SEPA to provide a consistent and fair system of environmental regulation and provide access to environmental information for the public and for public confidence in the system of regulation to be maintained and enhanced<sup>44</sup>. SEPA is to provide guidance to its staff to ensure consistent and fair regulation<sup>45</sup>. Two views of consistency and fairness could be taken: on the one hand consistency and fairness could be seen to require all regulated parties to be treated in the same way which might work against distributive environmental justice; on the other hand consistency and fairness could be seen as justifying targeted regulatory efforts to address environmental justice concerns as long as there were clear, transparent policies and guidance to staff providing a justification for such an approach (ie it may arguably be fair to treat one regulated party differently because of its particular impact on a community). Provision of information and enhancing opportunities for participation clearly serve to further the procedural dimension of environmental justice.

### 4.4 Social Justice ... a Scotland where everyone matters, Annual Report 2002

4.4.1 One of the aspects of the Executive's social justice policy is building strong inclusive communities<sup>46</sup>. The 2002 Annual Report included a set of articles by independent commentators on topics to broaden understanding of social justice in Scotland. These were included because previous government interventions had failed to recognise that the reasons people faced social exclusion were complex and inter-related<sup>47</sup>. Poor environment was one of the reasons for social exclusion and it could not be tackled in isolation. Thus, one of the chapters giving a broader perspective on social justice and authored by Kevin Dunion dealt with the interaction between social and environmental justice<sup>48</sup>. This chapter outlines the US origins of environmental justice and notes the spread of the concept elsewhere, notably South Africa<sup>49</sup>. Dunion indicates that it is necessary to establish whether environmental injustice is being

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<sup>37</sup> Policy Priorities for SEPA, pp 6-7; see also paras 8.3, 8.4 and 9.7 below.

<sup>38</sup> Ibid, p 8.

<sup>39</sup> Ibid, p 9.

<sup>40</sup> Ibid, p 10.

<sup>41</sup> Ibid, p 11.

<sup>42</sup> Ibid, p 11.

<sup>43</sup> Ibid, pp 11-12, see paras 11.5.2-11.5.3, 11.6 and 11.7 below.

<sup>44</sup> Ibid, p 13. See paras 4.5.8, and 11.5.3-11.5.4 below.

<sup>45</sup> Ibid.

<sup>46</sup> Social Justice ... a Scotland where everyone matters, November 1999.

<sup>47</sup> Social Justice ... a Scotland where everyone matters, Annual Report 2002, p 6.

<sup>48</sup> Kevin Dunion, 'Interaction between Social and Environmental Justice' in Social Justice ... a Scotland where everyone matters, Annual Report 2002, pp 96-99.

<sup>49</sup> See also para 4.10.2 below.

experienced and what measures need to be taken to improve matters for disadvantaged communities. He notes the lack of research on this topic in Scotland but argues that we should proceed on the basis that it is likely to be poorer, disadvantaged communities which live next to the most polluting and environmentally degrading activities. Dunion indicates that environmental crimes do not seem to be taken as seriously in Scotland as they might be but notes that environmental justice is “more to do with the outcome of decisions which allow legally-permitted operations to cluster next to poor populations and where, in turn, these environmentally undesirable features compound other economic and social adverse indicators giving rise to a poor quality of life”<sup>50</sup>. He argues that “environmental justice is about decency and fairness” and asks whether there are people disproportionately exposed to polluting operations; whether these operations are necessary; whether alternatives have been considered as well as risks; whether regulatory standards and fiscal measures have been set which make the polluters truly bear the costs rather than local people and the environment bearing the impacts and whether communities have a real voice in the decision making processes and an adequate means of redress when they are aggrieved or standards are breached.

4.4.2 Dunion certainly makes reference to both the distributive and procedural dimensions of environmental justice. The planning system lies behind his reference to decisions permitting the clustering of operations near certain communities. Consideration of risks and alternatives is also something that can be addressed through the planning system notably through the system of Environmental Impact Assessment. SEPA would clearly have a role as a statutory consultee in those planning processes. His reference to regulatory standards may also have considerable relevance for distributive environmental justice. Some of these standards may be within SEPA’s control although others may be set at national or European level. Enforcement is clearly relevant to distributive environmental justice but whether environmental crime is taken seriously is arguably more a matter for the Crown Office/Procurator Fiscal Service and the judiciary than for SEPA.

#### **4.5 Policy and Financial Management Review of the Scottish Environment Protection Agency, March 2003**

4.5.1 The PFMR of SEPA was announced in May 2002. A PFMR is the mechanism by which the Scottish Executive seeks to ensure that public bodies which are accountable to the Executive are delivering its policies economically, effectively and efficiently. It is not concerned with the policies themselves but with their delivery.

4.5.2 The key overall finding in relation to environmental justice was classified as coming under the heading “Responsiveness and openness”:

**“Responsiveness and openness:** to local communities, other stakeholders and Scottish Ministers. SEPA has a wide range of stakeholders, who between them often have divergent interests. As a NDPB, SEPA must deliver Ministers policies on the environment and more widely, frequently working in partnership with the Scottish Executive in particular areas. It must also work with a range of local interests, not least if it is to contribute to Ministers

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<sup>50</sup> Ibid, p 98.

commitment to environmental justice. *This requires SEPA to engage with, understand and respond to the concerns of local communities and other stakeholders more effectively.* This is a demanding task. SEPA is responsible for applying often complex and highly technical legislation and regulations. *It has to maintain and develop open relations with regulated operators, local communities and other stakeholders explaining to them the standards to which it works, its processes for handling permit applications and complaints, its charging schemes, the legal constraints under which it operates and the reasons behind its ultimate decisions.* At the highest level, SEPA needs to be aware of local interests and concerns and we believe that the regional boards have a crucial to play role in advising and briefing the main board on issues of concern to communities in their areas.”<sup>51</sup> (emphasis added)

The PFMR clearly indicated that environmental justice required better engagement with local communities in terms of understanding their concerns, responding to them and also explaining matters to them. SEPA’s regional boards were seen as being crucial in advising and briefing the main board on local concerns.

4.5.3 Other key findings and recommendations included: (1) the empowerment of SEPA staff to enable them to respond, inter alia to community concerns and to participate effectively with the Executive, local interests or the regulated community – this could be achieved by the devolution of more authority to “action officers”; (2) being proactive in achieving environmental outcomes particularly by using regulation as an opportunity to engage with the regulated sector to persuade them of the wider commercial and environmental benefits they could achieve; (3) using resources effectively and efficiently by matching resources to risks and opportunities and, where possible, releasing resources by relying on self monitoring when dealing with operators who had good track records and also by managing database of environmental information in manner which maximises its usefulness and minimises burden on regulated sector and staff.

#### *Regional boards*

4.5.4 In terms of engagement with local communities the PFMR recommended that SEPA revise the scheme of delegation to its regional boards so that their core role became engaging with local communities so as to advise the Main Board of issues of concern locally<sup>52</sup>.

#### *Relations with the public*

4.5.5 Although the PFMR established that there was a fairly high level of awareness of SEPA, it also established that there was confusion amongst the public as to SEPA’s functions and particularly the demarcation between local authority and SEPA functions in relation to planning, fly tipping and contaminated land. To deal with this the PFMR recommended that SEPA together with the Executive should develop and publicise an integrated source of contacts for environmental issues for the public<sup>53</sup>.

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<sup>51</sup> PFMR, para 1008.

<sup>52</sup> PFMR, para 3042. See generally paras 3036-3044.

<sup>53</sup> Ibid, paras 3045-3046.



SEPA should also ensure that its staff know where to direct queries in other organisations if the query does not fall within SEPA's remit<sup>54</sup>.

#### *SEPA and the planning system*<sup>55</sup>

4.5.6 The PFMR noted that the Executive had given guidance to planning authorities that environmental licence applications should be considered in parallel with planning applications. However, in practice most were considered sequentially with consideration of the planning application coming first. This had a number of negative consequences not least that SEPA might not be able to provide the planning authority with fully considered advice during the planning process since it would not yet have full information about the proposed installation. SEPA might also be in the position that it imposed permit conditions which required the applicant to re-apply for planning permission where SEPA required, for example, a higher stack than had been stipulated in the grant of planning permission. SEPA itself had urged better interaction between the two regimes and this had also been recommended by the Royal Commission on Environmental Pollution. This would provide a better service and reduce risk of applicants being required to resubmit applications. The report recommended that a study be carried out by the Executive to establish the scope for greater interaction between the two regimes. The community planning concept promoted by the Local Government in Scotland Act 2003 also provides a focus for the more co-ordinated delivery of planning and environmental law regulation although from the perspective of local authorities.

#### *SEPA's website*<sup>56</sup>

4.5.7 The report noted that the website was a key tool for communicating with stakeholders and recommended that as much information and data as possible be made available to the public via the website. The report also noted that a theme raised by the regulated sector was for SEPA to improve its electronic communication with them, for example, in terms of licence applications and the report recommended that SEPA should seek to maximise electronic exchange of information with the regulated sector wherever possible.

#### *SEPA's regulatory approach*

4.5.8 The report noted that the consistent and rigorous application of regulations was the means by which SEPA protected the environment from the potentially harmful effects of activities and processes and that individuals, communities and NGOs looked to SEPA's application of the regulations to safeguard the environment from such risks<sup>57</sup>. The report indicated that many stakeholders including an environmental NGO believed that SEPA's approach to regulation was too focused on regulatory activity and insufficiently focused on achieving environmental improvements. The report agreed that SEPA ought to focus on outcomes although it noted that SEPA's activity was bound by legal requirements as to the manner in which it regulated and monitored. Significantly from the perspective of environmental justice the reported noted:

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<sup>54</sup> Ibid, para 3047.

<sup>55</sup> Ibid, paras 3049-3052.

<sup>56</sup> Ibid, paras 3081-3083.

<sup>57</sup> Ibid, para 3098.

“Moreover rigorous and consistent regulation to protect the environment necessarily involves a measure of repetitive activity if the credibility of SEPA and the regulatory regime are to be maintained in the eyes of local communities and regulated operators, and if information on operators, for example, for use in prosecutions is to be reliable”.<sup>58</sup>

The report welcomed the establishment of the Effective Regulation Group whose purpose was to establish a set of consistent general regulatory principles across all SEPA’s regulatory regimes<sup>59</sup>. The report also welcomed the publication of a set of general standards to supplement those in the Service Charter which regulated customers could expect of SEPA.

4.5.9 One factor for SEPA to consider in managing its regulatory activity was the continued development of a risk-based approach to regulation within the constraints of legislation. SEPA should therefore identify the risks posed by activities it regulates so as to focus and prioritise regulatory effort on those activities identified as posing the greatest risk to the environment<sup>60</sup>.

4.5.10 The report noted that both operators and local communities were keen to know and understand the requirements which SEPA imposes on operations. The report therefore recommended that SEPA should be proactive in sharing the general standards to which it works with regulated operators, local communities and other stakeholders and in doing this, SEPA should ensure that it makes clear the standards to be met, for example, through licence conditions and the environmental benefits they are intended to secure and it should indicate clearly how long a properly filed licence application should take to process<sup>61</sup>. To enhance stakeholder understanding in this regard the report recommended that SEPA should pilot a scheme for sharing the guidance it issues to its staff with other stakeholders<sup>62</sup>.

4.5.11 Concerns about levels of SEPA staff knowledge about processes and activities were expressed both by operators and community groups. Community concerns tended to arise in difficult often high profile situations (such as the spreading of organic waste to land) and posed significant challenges for SEPA staff in having to explain unwelcome facts to communities and organisations with strongly held views. Although recognising that these kinds of situations were the minority, the report nonetheless recommended that SEPA review its training procedures to ensure they equip staff for communicating effectively with local communities and other stakeholders<sup>63</sup>.

4.5.12 In terms of enforcement the report focused exclusively on prosecution and penalty issues. Concerns were not expressed so much about SEPA’s role in preparing reports for the procurator fiscal but rather about the level of fines being imposed by the courts and what SEPA might do to address that, including the possibility of

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<sup>58</sup> Ibid, para 3099.

<sup>59</sup> Ibid, para 3100.

<sup>60</sup> Ibid, para 3101.

<sup>61</sup> Ibid, para 3106.

<sup>62</sup> Ibid, para 3107.

<sup>63</sup> Ibid, paras 3109-3111.

organising training for sheriffs through the Judicial Studies Committee<sup>64</sup>. The use of Fixed Penalty Notices for minor breaches of conditions was also canvassed<sup>65</sup>.

4.5.13 There are therefore a number of recommendations in the PFMR which clearly suggest ways in which SEPA can enhance both the distributive justice dimension of environmental justice (for example, through its role in the planning system and the application of rigorous and consistent regulation) and the procedural dimension (greater engagement with local communities, use of the website and greater use of electronic communications).

#### **4.6 A Partnership for a Better Scotland, May 2003**

4.6.1 The coalition Partnership Agreement does not make explicit reference to environmental justice but it does contain a number of policy commitments which arguably fall within the scope of the environmental justice agenda. In the context of building stronger, safer communities, the justice section indicates the following relevant supporting activities:

- “Increased training and support for prosecutors and police in dealing with environmental and wildlife crime
- Consulting on access to courts for NGOs in environmental matters ...
- Strengthening the enforcement of environmental law including consideration of the establishment of environmental courts and other options for improving prosecution and dispute resolution
- Complete the introduction of environmental information regulations to improve public access to environmental information.”<sup>66</sup>

4.6.2 Better enforcement of environmental law can contribute to distributive environmental justice if appropriately targeted. SEPA’s enforcement role is not directly addressed by these proposals although SEPA is expected to contribute to training of procurator fiscals in dealing with environmental crime. SEPA will have a significant role in providing training for the new specialist procurator fiscals. Their establishment is clearly the result of consideration of “other options for improving prosecution”. In the social justice section one supporting activity mentioned in this regard is the strengthening of local authority powers of enforcement to tackle fly-tipping and a doubling of the fines available<sup>67</sup>. This has been taken forward by enacting provisions introducing fixed penalty notices for fly-tipping and increasing the maximum fine on summary conviction for fly-tipping from £20,000 to £40,000<sup>68</sup>. SEPA is also empowered to serve fixed penalty notices for fly-tipping by the new provisions.

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<sup>64</sup> Ibid, paras 3112-3120.

<sup>65</sup> Ibid, paras 3121-3124.

<sup>66</sup> Partnership Agreement, pp 36-37.

<sup>67</sup> Ibid, p 39.

<sup>68</sup> See the Anti-Social Behaviour (Scotland) Bill 2004, cls 49, 52 and Sch 2.

4.6.3 Procedural environmental justice is served by policy commitments to “require publication of a pollution inventory for every community accessible through the internet”<sup>69</sup>. SEPA had already developed an on-line pollution inventory as required by the IPPC Directive and its implementing legislation so to some extent this policy “initiative” had already been delivered when the commitment was made. However, as discussed below the inventory could be enhanced further to contribute further to procedural environmental justice<sup>70</sup>.

4.6.4 The Partnership Agreement also seeks to ensure that community planning works effectively<sup>71</sup>. This has implications both in terms of distributive environmental justice in ensuring, for example, co-ordinated action between local authorities and SEPA in enforcement action against fly-tippers but also procedurally in terms of ensuring effective co-ordinated engagement with local communities<sup>72</sup>.

4.6.5 There is also a commitment to legislate to implement the Strategic Environmental Assessment Directive<sup>73</sup> which will have implications for assessment of plans developed by SEPA, notably the River Basin Management Plan for Scotland under the Water Environment and Water Services (Scotland) Act 2003. However, this does not have a direct impact on SEPA’s licensing and enforcement functions.

4.6.6 There are a range of Social Justice policy commitments to improve aspects of the planning system. Thus, there is a high level commitment to “improve the planning system to strengthen involvement of communities, speed up decisions, reflect local views better and allow quicker investment decisions”<sup>74</sup>. Although this does not have direct implications for SEPA, in itself it arguably would assist in contributing to environmental justice at least in a procedural sense given the significance of the planning system in determining the location of development. However, there are possibly indirect implications in that it might assist SEPA to engage with communities at an early stage as part of the planning process. There are perhaps also wider implications for SEPA in terms of better engagement with communities given the similarity of the regulatory structures which it administers and these are explored below<sup>75</sup>. Supporting activities also indicate that there is to be a consultation on the introduction of a third party right of appeal in the planning system and an examination of mechanisms required for pre-application consultation so that communities can engage with developers<sup>76</sup>. These initiatives are considered in more detail below<sup>77</sup>.

4.6.7 Although the Partnership Agreement therefore contains a number of policy initiatives which may further the environmental justice agenda, the policies have not been elaborated and presented in a particularly coherent manner nor have they been explicitly linked to environmental justice.

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<sup>69</sup> Ibid, p 40.

<sup>70</sup> See para 11.5.6 below.

<sup>71</sup> Partnership Agreement, p 46.

<sup>72</sup> See eg para 12.5.4 below.

<sup>73</sup> Partnership Agreement, p 48.

<sup>74</sup> Ibid, p 38.

<sup>75</sup> See chapter 12.

<sup>76</sup> Partnership Agreement, p 40.

<sup>77</sup> See paras 4.9.1 – 4.9.5.

#### **4.7 Taking it on – developing the UK sustainable development strategy together, A Consultation Paper, DEFRA, Scottish Executive, Welsh Assembly 2004**

4.7.1 This consultation paper sets out the UK Government’s guiding principles and approaches for achieving sustainable development drawn from the 1999 Strategy, A Better Quality of Life<sup>78</sup>. It also sets out the Executive’s guiding principles which have been discussed above. Key principles for the purpose of environmental justice are (1) putting people at the centre of concerns for sustainable development; (2) combating poverty and social exclusion; (3) transparency, information, participation and access to justice. The paper seeks views on what the guiding principles should be and how they can be made practical and relevant within and beyond government<sup>79</sup>. The paper also interestingly seeks views on whether there are any social, environmental or economic limits which must be protected in all circumstances and, if so, what they are<sup>80</sup>. The paper also indicates that the Government considers that further action is needed to help communities find local solutions and “to look at what more can be done to ensure all people have a healthy environment no matter what their income or where they live”<sup>81</sup>. Accordingly the Government proposes that environment and social justice are to be one of their four priority areas for a UK focus for action<sup>82</sup>.

4.7.2 Chapter 7 of the paper is devoted to environment and social justice. The paper notes, for example, the research carried out in England which demonstrates that people in the most deprived areas experience the worst air quality and that some groups in the community have poor access to legal advice and support for addressing environmental problems<sup>83</sup>. The paper acknowledges the strategies which have been developed to create decent places, reduce poverty, exclusion and health inequalities<sup>84</sup> posed by the paper is “What more can be done to address environmental inequalities?”<sup>85</sup>.

#### **4.8 Environmental justice legal research – England and Wales<sup>86</sup>**

4.8.1 Much of the recent legal research on environmental justice in England and Wales has focused on the procedural dimension of environmental justice<sup>87</sup>. Recommendations have been made about improving participation, access to justice in courts and having specialist courts. While obviously addressing important aspects of environmental justice in terms of access to effective and reasonably priced remedies these reports do little to explore what is arguably a more fundamental issue about

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<sup>78</sup> Taking it on, para 3.6.

<sup>79</sup> Ibid, p 17.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid, para 4.6.

<sup>82</sup> Ibid, para 4.7.

<sup>83</sup> Ibid, para 7.3. See also para 4.8.1 below.

<sup>84</sup> Taking it on, para 7.4. See eg ODPM, Creating Sustainable Communities, 2004; Scottish Executive, Social Justice – A Scotland Where Everyone Matters.

<sup>85</sup> Ibid, p 24.

<sup>86</sup> There is a considerable amount of non-legal research. See note 10 above.

<sup>87</sup> See M Adebowale, Using the Law: Access to Environmental Justice – Barriers and Opportunities, Capacity Global, DATE?; Report by the Environmental Justice Project, 2004; UCL, Macrory with Woods, Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal, UCL 2003.

building environmental justice concerns into the regulatory system. This would minimise the extent to which judicial remedies were actually needed to secure environmental justice goals. While the issue of a specialist court or tribunal is very much on the agenda in England and Wales, the issue has received little attention in Scotland. As noted above, the Partnership Agreement indicates that a specialist court will be considered for Scotland in the context of improving the criminal enforcement of environmental law. To date, this proposal has not yet been taken up. Research on civil aspects of an environmental court for Scotland is almost entirely lacking<sup>88</sup>.

4.8.2 These issues are not pursued further in this report since the focus is on SEPA's licensing and enforcement functions not on appeals, challenges to regulatory decisions and prosecution in the criminal courts which are matters for the Scottish Ministers and the Crown Office and Procurator Fiscal Service.

#### **4.9 EJ developments in the planning system**

4.9.1 Considerable reforms are currently proposed for the planning system which are designed to enhance public participation<sup>89</sup>. Arguably these have implications for the procedural dimensions of environmental justice in general but may also serve as an illustration of what may be feasible within SEPA's legislative framework. The White Paper, *Your Place, Your Plan*, makes explicit reference to environmental justice: "Increased access to information and the means to allow greater public participation in the planning process will contribute to achieving Environmental Justice ..."<sup>90</sup>. However, the White Paper also recognised that enhancing opportunities for involvement was only part of the solution. More had to be done to ensure that all sections of the community actually exercised their rights to avoid the situation of more powerful, organised and articulate communities ensured that unpopular developments were not located near them with the result that they were located near communities which were already disadvantaged<sup>91</sup>. In that respect the Executive noted the existence of the free, independent planning advice service, Planning Aid for Scotland and the Community Local Environment Awareness Raising (CLEAR) project<sup>92</sup>. Further recommendations for addressing these concerns included:

- A wider range of publicity including innovative use of ICT;
- Neighbour notification over a wider area for major developments;
- Community forums to permit improved community involvement;
- Opportunities for earlier community involvement in planning
- Full feedback to the public on relevant factors taken into account in planning decisions
- Role of community planning in producing integrated planning and provision for local communities;
- Enhanced use of ICT generally;

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<sup>88</sup> J Rowan-Robinson, 'Environmental Protection – The Case for a New Dispute Resolution Procedure' 1993 JLSS 5; M Poustie, *An Environmental Court for Scotland*, unpublished conference paper, April 2004.

<sup>89</sup> See eg Scottish Executive Development Department, *Getting Involved in Planning*, November 2001; Scottish Executive Development Department, *Your Place, Your Plan*, March 2003; Scottish Executive Development Department, *Rights of Appeal in Planning*, April 2004.

<sup>90</sup> *Your Place, Your Plan*, para 44.

<sup>91</sup> *Ibid*, para 45.

<sup>92</sup> *Ibid*, para 46.

- Different procedures for different sizes of developments (eg bad neighbour developments)
- Adoption of harmonised deadlines for making representations and ensuring that these are very clearly stated on public notices
- Use of simpler language in planning documents<sup>93</sup>.

Relevant proposals in the White Paper include establishment of more active consultation arrangements in the form of Local Planning Forums; extending the time for responding to neighbour notification; publication of weekly lists with posting of the list on the internet; extension of period for making representations to 21 days in all cases other than EIAs; providing for standard ways for comments to be made electronically with possibly a national form for comments, reducing the timescale for making appeals from 6 to 3 months (which would reduce uncertainty for members of the public), making available reasons for planning decisions publicly available in all cases; making available the full text of planning decisions from local authorities; provision of more information about planning agreements on the planning register; making appeal inquiries more accessible and less intimidating; promoting greater use of electronic delivery of planning services generally<sup>94</sup>. Although not necessarily directly relevant to the environmental law system, nonetheless the planning and environmental law systems are cognate systems of administrative regulation and if measures are considered necessary to enhance information provision and opportunities for participation in the planning system, these are likely to be even more necessary for the environmental law system about which there is much less public awareness<sup>95</sup>.

4.9.2 In implementation of the Partnership Agreement to consult on a third party right of appeal in planning, the Scottish Executive have published a consultation paper, *Rights of Appeal in Planning*<sup>96</sup>. In this paper the Executive canvasses views on whether a third party right of appeal is supported in certain types of planning cases. The paper explicitly indicates that it does not have implications for comparable decision making processes eg environmental law<sup>97</sup>. However, it is hard to avoid seeing the proposal in isolation particularly given the work in England on environmental courts and third party rights of appeal<sup>98</sup>. As an alternative to third party appeals, the paper also canvasses the possibility of mandatory oral hearings in defined circumstances<sup>99</sup>.

4.9.3 It is suggested that these proposals do have implications for SEPA. They principally suggest that improvements to procedural justice may be possible to enhance public access to information and opportunities to participate in the licensing processes. For example, enhanced use of ICT is as applicable in environmental law

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<sup>93</sup> Ibid, para 47.

<sup>94</sup> Ibid, paras 52-124.

<sup>95</sup> See eg Rowan-Robinson J, Ross A, Walton W & Rothnie J, '*Public Access to Environmental Information – A Means to What End?*' [1996] 8 JEL 19. See also Reid C T, Lloyd M G, Illsley B & Lynch B, '*Effective Access to Planning Information*' [1998] JPL 1028-1034; Sanders A-M & Rothnie J, '*Planning Registers; Their Role in Promoting Public Participation*' [1996] JPL 539-546.

<sup>96</sup> SEDD, *Rights of Appeal in Planning*, April 2004. For the Partnership Agreement commitment see para 4.6.6 above.

<sup>97</sup> *Rights of Appeal in Planning*, para 1.8.

<sup>98</sup> See para 4.8.1 above.

<sup>99</sup> *Rights of Appeal in Planning*, para 6.7.2.

as it is in planning and it is clear that holding oral hearings on certain licence applications would be feasible.

4.9.4 The community planning concept provided for by the Local Government in Scotland Act 2003 is also relevant. Community planning per se is something entirely different from land use planning but the former does have relevance for the latter. Community planning is about delivering public services at local authority level in a more co-ordinated way. Indeed a duty is imposed on local authorities to engage in community planning and to consult with other relevant public bodies<sup>100</sup>. As has been noted earlier in this report, community planning might provide an opportunity for local authorities to better co-ordinate the delivery of land use planning services with SEPA's environmental licensing regime. This might serve to reduce confusion in the public mind about the respective functions of the planning and environmental law regulatory systems and to facilitate better opportunities for meaningful participation in both the planning and environmental licence application processes.

4.9.5 However, what is striking is that the various planning proposals relate almost exclusively to improvements to procedural justice not to distributive justice. What is not explored is the extent to which local authorities might legitimately refuse permission for a particular type of environmentally damaging development in circumstances where a community already suffered from the effects of a number of such developments. To some extent the system of Environmental Impact Assessments may provide a structured mechanism for considering the cumulative impact of a new development in a particular area and alternative sites<sup>101</sup>. Impact on humans is an issue which must be addressed in the Environmental Statement. SEPA is also obviously a consultee in the EIA process<sup>102</sup>. Additionally, it is also arguable that just as environmental justice has become a material consideration for SEPA in its decision making processes<sup>103</sup>, so too has it become a material consideration for local authorities in their capacity as planning authorities<sup>104</sup>.

## **4.10 EJ Developments at International Level**

### *4.10.1 The Aarhus Convention and implementing measures*

4.10.1.1 At a level of generality the Rio Declaration contains a principle expressed in mandatory language regarding participatory rights including access to environmental information and participation in decision making processes<sup>105</sup>. Although there is little doubt that the Rio Declaration is a soft law instrument, this principle is reflected in a number of other binding international environmental instruments<sup>106</sup>. However, the

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<sup>100</sup> Local Government in Scotland Act 2003, ss 15-16.

<sup>101</sup> See eg Environmental Impact Assessment (Scotland) Regulations 1999, SSI 1999/1; Sch 4, Pt I, paras 2 & 4.

<sup>102</sup> Ibid, Sch 4, para 3.

<sup>103</sup> See paras 5.2.1 – 5.4 below.

<sup>104</sup> Eg the First Minister's speech, the Executive's document, Meeting the Needs ... Priorities, Actions and Targets for Sustainable Development in Scotland, Paper 2002/14, April 2002 are material considerations as much for local authorities as for SEPA.

<sup>105</sup> Declaration of the UN Conference on Environment and Development, UN Doc A/CONF.151/26/Rev.1, principle 10.

<sup>106</sup> See the World Charter for Nature UNGA Res 37/7, 37 UNGAOR Supp (No 51) at 17, UN Doc A/37/51 (1982), principle 23; Convention on Environmental Impact Assessment in a Transboundary



international development with the greatest significance for SEPA in terms of the procedural dimension of environmental justice is the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998)<sup>107</sup>. The first and second pillars of the Aarhus Convention are the most relevant in the context of this report. Access to justice is clearly relevant to procedural environmental justice but not directly in the context of SEPA's licensing and enforcement activities. It is relevant rather to appeals against or challenges to such decisions or actions and is therefore not considered further here. Given the Aarhus Convention is being implemented in the EC by means of a range of directives it makes sense considering the provisions of those implementing Directives and, in turn, proposed domestic implementing measures.

4.10.1.2 The Aarhus Convention is designed to contribute to the protection of the right of every person of both present and future generations to live in an environment adequate to his or her health or well-being by means of guaranteeing rights of access to information, public participation in decision-making and access to justice in environmental matters<sup>108</sup>. It is the only international convention which explicitly recognises such a right.

4.10.1.3 The new directive on public access to environmental information is designed to implement the EC's obligations under the first pillar of the Aarhus Convention as well as clarifying aspects of the earlier access to environmental information legislation<sup>109</sup>. Although on the face of it there are considerable similarities between the 2003 Directive and Directive 90/313 which it replaces, closer examination indicates that the new Directive contains a number of improvements not least in terms of broadening the definition of environmental information, putting a range of obligations on public authorities to assist those requesting information and improving the remedies required where a request for information is refused. The core provision of the new EC directive requires public authorities (which would clearly include SEPA) to make available such information relating to the environment held by or for them to any applicant at his request and without his having to state an interest<sup>110</sup>. A charge, not exceeding a

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Context ('the Espoo Convention) 30 ILM (1991), 802, arts 2(6) and 3(8) (see the Environmental Impact Assessment (Scotland) Regulations 1999, SSI 1999/1, regs 40-41); Convention on Biological Diversity 31 ILM (1992), 818, art 14 (albeit only 'where appropriate'); and the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 32 ILM (1993), 1228, arts 14-16.

<sup>107</sup> UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention'), UN Doc ECE/CEP/43, 25 June 1998. See J Ebbesson, *The Notion of Public Participation in International Environmental Law* 8 YbIEL 98 (1997); M Lee & C Abbot *The usual suspects? Public participation under the Aarhus Convention* (2003) 66 MLR 80; S McAllister *The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* 14 COJIELP (2003) 191; R McCracken & G Jones *The Aarhus Convention* 2003 JPL 802.

<sup>108</sup> Aarhus Convention: note 87 above, art 1.

<sup>109</sup> EC Council and Parliament Directive 2003/4 (OJ L41, 14.2.03, p 26) on public access to environmental information and repealing EC Council Directive 90/313. Directive 2003/4 repeals and replaces the earlier EC Council Directive 90/313 (OJ L158, 23.6.90, p56) on freedom of access to information on the environment as from 14 February 2005: Directive 2003/4, art 11. At the time of writing implementing legislation had yet to be made but see DEFRA, Consultation on new draft Environmental Information Regulations on Public Access to Environmental Information, July 2002 and Scottish Executive Environment Group, Access to Environmental Information, A Consultation, April 2004, Paper 2004/5.

<sup>110</sup> EC Council and Parliament Directive 2003/4, art 3(1). 'Environmental information' is defined more

reasonable amount, may be made for supplying such information<sup>111</sup> although it is now expressly provided that access to any public registers or lists established and maintained and examination in situ of the information requested shall be free of charge<sup>112</sup>, and where charges are levied, public authorities must publish and make available to applicants a schedule of such charges as well as information on the circumstances in which a charge may be levied or waived<sup>113</sup>. The obligations on public authorities are considerably enhanced under the new directive. Environmental information must be made available to an applicant as soon as possible or, at the latest, within one month after the receipt by the public authority referred of the applicant's request; or within two months after the receipt of the request by the public authority if the volume and the complexity of the information is such that the one-month period referred to cannot be complied with<sup>114</sup>. The proposed domestic implementing provision refers to periods of 20 and 40 working days respectively<sup>115</sup>. Previously where the request was formulated in too general a manner that was simply a ground for refusing the request<sup>116</sup>. Now, the public authority receiving such a request must as soon as possible, and at the latest within the timeframe laid down above, ask the

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broadly than in EC Council Directive 90/313 as any information in written, visual, aural, electronic or any other material form on: (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements; (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a); (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements; (d) reports on the implementation of environmental legislation; (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c): EC Council and Parliament Directive 2003/4, art 2(1). 'Public authority' is defined as: (a) government or other public administration, including public advisory bodies, at national, regional or local level; (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b): *ibid*, art 2(2). It is also provided that Member States may provide that the definition of public authorities shall not include bodies or institutions when acting in a judicial or legislative capacity and that if their constitutional provisions at the date of adoption of the Directive make no provision for a review procedure within the meaning of *ibid*, art 6, Member States may exclude those bodies or institutions from that definition: *ibid*, art 2(2). 'Information held by a public authority' is defined as environmental information in its possession which has been produced or received by that authority: *ibid*, art 2(3). 'Information held for a public authority' is defined as environmental information which is physically held by a natural or legal person on behalf of a public authority: *ibid*, art 2(4). 'Applicant' is defined as any natural or legal person requesting environmental information: *ibid*, art 2(5).

<sup>111</sup> *Ibid*, art 5(2).

<sup>112</sup> *Ibid*, art 5(1). I.e registers and lists as maintained under *ibid*, art 3(5). This obviously reflects the current position with registers held by SEPA.

<sup>113</sup> *Ibid*, art 5(3).

<sup>114</sup> *Ibid*, art 3(2). In such cases, the applicant shall be informed as soon as possible, and in any case before the end of that one-month period, of any such extension and of the reasons for it: *ibid*, art 3(2)(b).

<sup>115</sup> Scottish Executive Environment Group, Access to Environmental Information, A Consultation, April 2004, Paper 2004/5, Draft Environmental Information (Scotland) Regulations 2004, regs 4(2)(b) and 7.

<sup>116</sup> EC Council Directive 90/313, art 3(3).

applicant to specify the request and shall assist the applicant in doing so, e.g. by providing information on the use of the public registers<sup>117</sup>. In some notable improvements to the earlier regime Member States are placed under a duty to ensure that: (a) officials are required to support the public in seeking access to information; (b) lists of public authorities are publicly accessible; and (c) the practical arrangements are defined for ensuring that the right of access to environmental information can be effectively exercised, such as: the designation of information officers; the establishment and maintenance of facilities for the examination of the information required; registers or lists of the environmental information held by public authorities or information points, with clear indications of where such information can be found<sup>118</sup>. Member States are also importantly placed under a duty to ensure that public authorities inform the public adequately of the rights they enjoy as a result of the Directive and to an appropriate extent provide information, guidance and advice to this end<sup>119</sup>. A request for information in a particular form or format must be complied with unless the information is already publicly available in another form or format which is easily accessible by applicants or it is reasonable for the authority to make it available in another form or format<sup>120</sup>.

4.10.1.4 As with the earlier EC Council Directive there are extensive grounds which member states may adopt for refusing a request for environmental information<sup>121</sup>. Thus, a request may be refused if (a) the information requested is not held by or for the public authority to which the request is addressed<sup>122</sup>; (b) the request is manifestly unreasonable<sup>123</sup>; (c) the request is formulated in too general a manner, taking into account the duty to ask the applicant to specify the request and provide him with assistance<sup>124</sup>; (d) the request concerns material in the course of completion or unfinished documents or data<sup>125</sup>; and (e) the request concerns internal communications, taking into account the public interest served by disclosure<sup>126</sup>. Member states may also provide for a request for environmental information to be refused if disclosure of the information would adversely affect: (a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law; (b) international relations, public security or national defence; (c) the course of

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<sup>117</sup> EC Council and Parliament Directive 2003/4, art 3(3). However, it is still possible for public authorities to refuse the request under *ibid*, art 4(1)(c), where they deem it appropriate, presumably after contacting the applicant and seeking to assist him: *ibid*.

<sup>118</sup> *Ibid*, art 3(5).

<sup>119</sup> *Ibid*.

<sup>120</sup> *Ibid*, art 3(4). Public authorities are placed under a duty to make all reasonable efforts to maintain environmental information held by or for them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means: *ibid*. Where information is supplied in another form or format reasons must be given for this and must be supplied to the applicant within the time limit stipulated above: *ibid*.

<sup>121</sup> *Ibid*, art 4(1),(2). Where a Member State provides for exceptions, it is empowered to draw up a publicly accessible list of criteria on the basis of which the public authority concerned may decide how to handle requests: *ibid*, art 4(3).

<sup>122</sup> *Ibid*, art 4(1)(a). In such a case, where the public authority receiving the request is aware that the information is held by or for another public authority, it must, as soon as possible, transfer the request to that other authority and inform the applicant accordingly or inform the applicant of the public authority to which it believes it is possible to apply for the information requested: *ibid*.

<sup>123</sup> *Ibid*, art 4(1)(b).

<sup>124</sup> *Ibid*, art 4(1)(c). The duty referred to is the duty under *ibid*, art 3(3).

<sup>125</sup> *Ibid*, art 4(1)(d).

<sup>126</sup> *Ibid*, art 4(1)(e). Where a request is refused on this ground, the public authority is placed under a duty to state the name of the authority preparing the material and the estimated time needed for completion.

justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature; (d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or EC law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy; (e) intellectual property rights; (f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law; (g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned; or (h) the protection of the environment to which such information relates, such as the location of rare species<sup>127</sup>. It is provided that none of the foregoing grounds for refusal must be interpreted in a restrictive way; taking into account for the particular case the public interest served by disclosure and, in every particular case, the public interest served by disclosure must be weighed against the interest served by the refusal<sup>128</sup>. The proposed domestic implementing measures reflect this and provide for a public interest test which is aligned with that contained in the Freedom of Information (Scotland) Act 2002<sup>129</sup>. It is provided that an authority must make available requested information in part to an applicant where it is possible to separate out any information falling within the scope of certain of the grounds for refusal<sup>130</sup>. A refusal to make available all or part of the information requested must be notified to the applicant in writing or electronically, if the request was in writing or if the applicant so requests, within the applicable time limits and the notification must state the reasons for the refusal and include information on the review procedure provided for<sup>131</sup>.

4.10.1.5 Provisions relating to remedies for those whose requests for information have been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the relevant provisions of the directive are much enhanced over those appearing in the original EC Council Directive on freedom of access to environmental information and now reflect the requirements of the Aarhus Convention<sup>132</sup>. It is provided that in such circumstances a person must have access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law and that any such procedure must be expeditious and either free of charge or inexpensive<sup>133</sup>.

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<sup>127</sup> Ibid, art 4(2)(a)-(h).

<sup>128</sup> Ibid, art 4(2). This includes the grounds in art 4(1) as well as art 4(2). Member States may not, by virtue of art 4(2)(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment: *ibid*. In the case of the art 4(2)(f) ground for refusal EC data protection requirements under European Parliament and Council Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p 31) must be complied with: *ibid*.

<sup>129</sup> Scottish Executive Environment Group, Access to Environmental Information, A Consultation, April 2004, Paper 2004/5, Draft Environmental Information (Scotland) Regulations 2004, reg 10(1).

<sup>130</sup> EC Parliament and Council Directive 2003/4, art 4(4).

<sup>131</sup> Ibid, art 4(5). The applicable time limits are contained in art 3(2)(a), (b). The review procedure is provided for by *ibid*, art 6.

<sup>132</sup> Ibid, art 6. The relevant provisions of the directive are arts 3-5.

<sup>133</sup> Ibid, art 6(1).

This requirement is to be implemented by applying the system of remedies established under the Freedom of Information (Scotland) Act 2002, namely recourse to the Information Commissioner on the full merits of the issue and thereafter to the Court of Session on a point of law only<sup>134</sup>. In addition to the foregoing review procedure, Member States are placed under a duty to ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final<sup>135</sup>. This requirement is to be implemented domestically by means of a requirement for each public authority to establish an internal review procedure, again in line with the provisions of the Freedom of Information (Scotland) Act 2002<sup>136</sup>.

4.10.1.6 There are much more extensive requirements in relation to dissemination of environmental information than those required by the original EC Council Directive on freedom of access to environmental information<sup>137</sup>. Firstly member states are placed under a duty to ensure that public authorities organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology, where available<sup>138</sup>. Secondly, the directive provides for a minimum range of information which is to be made available, disseminated and updated as appropriate: (1) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it; (2) policies, plans and programmes relating to the environment; (3) progress reports on the implementation of the items referred to in (1) and (2) when prepared or held in electronic form by public authorities; (4) the reports on the state of the environment; (5) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment; (6) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or found; and (7) environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a) or a reference to the place where the information can be requested or found<sup>139</sup>. Without prejudice to any specific reporting obligations laid down by EC law, Member States have a duty

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<sup>134</sup> Scottish Executive Environment Group, Access to Environmental Information, A Consultation, April 2004, Paper 2004/5, Draft Environmental Information (Scotland) Regulations 2004, reg 14.

<sup>135</sup> EC Parliament and Council Directive 2003/4, art 6(2). Final decisions must be binding on the public authority holding the information and reasons must be stated in writing, at least where access to information is refused under art 6: *ibid*, art 6(3). It is also provided that Member States may provide that third parties incriminated by the disclosure of information may also have access to legal recourse: *ibid*, art 6(2).

<sup>136</sup> Scottish Executive Environment Group, Access to Environmental Information, A Consultation, April 2004, Paper 2004/5, Draft Environmental Information (Scotland) Regulations 2004, reg 13.

<sup>137</sup> EC Parliament and Council Directive 2003/4, art 7. The exceptions in *ibid*, article 4(1),(2) may apply in relation to the duties imposed by art 7: *ibid*, art 7(5). It is provided that Member States may satisfy the requirements of art 7 by creating links to Internet sites where the information can be found: *ibid*, art 7(6).

<sup>138</sup> *Ibid*, art 7(1). The information made available by means of computer telecommunication and/or electronic technology need not include information collected before the entry into force of this Directive unless it is already available in electronic form: *ibid*. However, Member States are placed under a duty to ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks: *ibid*.

<sup>139</sup> *Ibid*, art 7(2).

imposed on them to ensure that national, and, where appropriate, regional or local reports on the state of the environment are published at regular intervals not exceeding four years<sup>140</sup>. Furthermore, and without prejudice to any specific obligation laid down by EC law, Member States are placed under a duty to ensure that, in the event of an imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information held by or for public authorities which could enable the public likely to be affected to take measures to prevent or mitigate harm arising from the threat is disseminated, immediately and without delay<sup>141</sup>.

4.10.1.7 Member states must, so far as is within their power, ensure that any information that is compiled by them or on their behalf is up to date, accurate and comparable<sup>142</sup>. On request, public authorities must reply to requests for information on factors affecting or likely to affect the elements of the environment, reporting to the applicant on the place where information, if available, can be found on the measurement procedures, including methods of analysis, sampling, and pre-treatment of samples, used in compiling the information, or referring to a standardised procedure used<sup>143</sup>.

4.10.1.8 There are a number of key implications for SEPA under the new access to environmental information regime. SEPA will need to ensure that adequate assistance is provided to those seeking information; that it publishes clear lists of publications and/or types of information available; that information is increasingly made available electronically; and that an internal review procedure is established to deal with representations by applicants that it has not complied with its duty to provide information. Significantly given the Directive (and the proposed implementing Regulations) include within the definition of 'environmental information' "measures (including administrative measures) such as policies, legislation, plans, programmes, environmental agreements etc it would appear that all SEPA's licensing decisions will be publicly accessible as they seem to fall within this definition. Arguably decisions relating to enforcement proceedings may also be available as measures or activities but they may fall within the course of justice exemption if criminal proceedings are at all contemplated or perhaps even possible. There is an argument that such decisions are already available under the existing Environmental Information Regulations 1992 but the Aarhus Convention certainly clarifies the position with the provisions discussed here. Even if the above provision of the Aarhus Convention does not encompass decisions and there underlying reasons, these are nonetheless expressly required to be disclosed by the Aarhus Convention in relation to the specific activities covered by it<sup>144</sup>. These changes can obviously be achieved by administrative measures and do not require any amending legislation. However, SEPA could also usefully amend its Service Charter to reflect the requirements of the new information regime.

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<sup>140</sup> Ibid, art 7(3). Such reports must include information on the quality of, and pressures on, the environment: *ibid*.

<sup>141</sup> Ibid, art 7(4).

<sup>142</sup> Ibid, art 8(1).

<sup>143</sup> Ibid, art 8(2). *Re* requests for information under, *ibid*, art 2(1)(b).

<sup>144</sup> Aarhus Convention, art 6(9).

4.10.1.9 The second pillar of the Aarhus Convention relates to public participation. Although there are already extensive public participation provisions in domestic environmental law and to that extent the Aarhus Convention does not apparently add that much to existing public participation rights, nonetheless there are some significant ways in which it does enhance those rights. For example, there is emphasis on provision for early participation when all options are open<sup>145</sup>. Although this is perhaps of more significance in the context of planning procedures, nonetheless given the possible need to bring planning and environmental licensing procedures together to a greater extent it should still be noted<sup>146</sup>. SEPA will be required to provide information related to the licence application free of charge on request<sup>147</sup>. This information is to include a non-technical summary<sup>148</sup>. Currently SEPA may charge for any copies taken from the relevant public register containing licence applications and non-technical summaries of application information are only required in the planning process where the application is subject to environmental impact assessment and even then the non-technical summary is simply of the information contained in the environmental statement. The public must also be informed promptly of the decision and both the decisions and the reasons for it and indeed any considerations on which the decision was based must be made accessible to the public<sup>149</sup>. It will be noted here that this appears to be a much wider requirement than simply notifying those members of the public who made representations: it is a requirement to make the decision and the underlying reasons generally accessible to the public. This suggests that the decisions and the reasons underlying them will need to be put on the public registers, which given the provisions of the Aarhus Convention on making information progressively available electronically, should be made electronically accessible<sup>150</sup>. There are also provisions on enabling public participation in the preparation of plans and programmes relating to the environment. To some extent this is being addressed through the Strategic Environmental Assessment regime<sup>151</sup>.

#### 4.10.2 *United States of America*

4.10.2.1 The whole concept of Environmental Justice had its origins in the US in relation to the discriminatory siting of hazardous waste and other facilities disproportionately near communities of colour and/or native American communities. A very extensive literature has developed which provides evidence that certain communities were being disproportionately affected by pollution<sup>152</sup>.

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<sup>145</sup> Aarhus Convention, art 6(3).

<sup>146</sup> See paras 4.5.6 and 4.6.6 above and ch 7 below.

<sup>147</sup> Aarhus Convention, art 6(6).

<sup>148</sup> *Ibid*, art 6(6)(d).

<sup>149</sup> *Ibid*, art 6(9).

<sup>150</sup> *Ibid*, art 5(3) and particularly art 5(9). See also para 11.4–11.5 below.

<sup>151</sup> See Directive 2001/42/EC on the Assessment of Environmental Effects of Certain Plans and Programmes (OJ L97, 21.07.01, p 30), the Environmental Assessment Plans and Programmes (Scotland) Regulations 2004; and Scottish Executive Environment Group, Strategic Environmental Assessment – A Consultation on the Proposed Environmental Assessment (Scotland) Bill, Paper 2004/12, September 2004. See also Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L156, 25.6.03, p 17).

<sup>152</sup> See eg United Church of Christ Commission for Racial Justice, *Toxic wastes and race: a national report on the racial and socio-economic characteristics of communities with hazardous waste sites*,

4.10.2.2 President Clinton made an Executive Order 12898 of 1994 requiring all federal bodies to take account of environmental justice in their functions<sup>153</sup>. For the purposes of this report it may be noted that the US Environmental Protection Agency (US EPA) has taken a number of steps to address environmental justice issues, not least the establishment of an Office of Environmental Justice. However, what should be of most interest to SEPA are the recommendations made to the US EPA by the National Academy of Public Administration in a number of reports, notably for the purposes of this work, *Environmental Justice in EPA Permitting: Reducing Pollution in High-Risk Communities is Integral to the Agency's Mission*, December 2001 (hereafter *Environmental Justice in EPA Permitting*).

The Office of Environmental Justice in the US EPA requested NAPA to conduct a study into how environmental justice could be integrated into 3 permitting programmes (air, water and waste) as a matter of practical public administration. The key recommendations of *Environmental Justice in EPA Permitting* focus on leadership, permitting procedures, priority setting and public participation. They are summarised as follows in the foreword:

**“Leadership.** The Panel recommends that EPA build on the solid policy foundation underlying its environmental justice programs to ensure that these considerations are integrated into the agency’s core mission. This change will require sustained leadership, clearer performance goals, improved outcome measures, stronger accountability mechanisms, and better training.

**Permitting procedures.** The panel recommends that EPA use fully its existing legal authorities to ensure that its permitting programs can more effectively address environmental justice concerns. EPA should provide simpler tools that enable permit writers to identify and address exposures in high-risk communities, expand monitoring to provide these writers with better information, and focus more enforcement resources on communities that are disproportionately impacted by pollution.

**Priority setting.** The Panel recommends that EPA work with state and local authorities to identify high-risk communities and prioritize them for pollution reduction efforts using various tools, including the permitting process.

**Public participation.** Public participation is critical to a credible permitting program. The Panel recommends that EPA provide more resources to aid participation by historically underrepresented groups, create new opportunities

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1987; R Pinder Hughes, ‘*The impact of race on environmental quality: an empirical and theoretical discussion*’ (1996) 39 *Sociological Perspectives* 231; R Bullard, ‘*Environmental justice: its more than waste facility siting*’ (1996) 77 *Social Science Quarterly* 493; and R Bullard, ‘*Dismantling environmental racism in the USA*’ (1999). For more sceptical approaches see eg V Been, ‘*Locally undesirable land uses in minority neighbourhoods: disproportionate siting or market dynamics*’ (1994) 103 *Yale LJ* 1383; and D Anderson et al, ‘*Environmental Equity: the demographics of dumping*’ (1994) 31 *Demography* 229. For a useful review of the US literature generally, see A Szasz & M Meuser, ‘*Environmental inequalities: literature review and proposals for new directions in research and theory*’ (1997) 45 *Current Sociology* 100.

<sup>153</sup> Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations (1994).



for them to participate earlier in the process, and use informal dispute resolution processes more frequently.”

*Mutatis mutandis* these broad recommendations could be applied with equal force to SEPA. The detailed recommendations from *Environmental Justice in EPA Permitting* are discussed where appropriate in the following sections of this report. However, at this point it is worth noting that a considerable number of useful, practical suggestions about integrating environmental justice concerns into permitting and enforcement activities are made in *Environmental Justice in EPA Permitting*.

There are also some similarities between the US experience and what is now happening in Scotland. There is high level political commitment to environmental justice in both countries with limited detailed implementation in practice. However, there are key differences<sup>154</sup>. First, the US political commitment came following clear evidence that there were communities being disproportionately affected by pollution whereas there is very limited evidence of this to date although it arguably can be assumed to some extent. Secondly, the US experience relates to discrimination based on race as much as poverty given the links between the two in the US which is not the Scottish experience. It is likely that any environmental discrimination in Scotland is based principally on poverty. Thirdly, a point which is linked to the preceding one, is that the political commitment in the US therefore derives from the civil rights movement whereas in Scotland and the UK more generally it is based on social justice concerns. Finally, the US is now much further down the road of implementing environmental justice concerns into its environmental regulation system.

#### 4.10.3 South Africa

4.10.3.1 The National Environmental Management Act, 107 of 1998 provides for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state<sup>155</sup>. One principle which it contains is that:

“Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.”<sup>156</sup>

In addition there is a participation principle:

“The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving

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<sup>154</sup> See eg G P Walker & K Bickerstaff, ‘Polluting the poor: an environmental justice agenda for the UK?’, 2000;

[www.staffs.ac.uk/schools/sciences/geography/IESR/downloads/Polluting%20the%20poor%20B.doc](http://www.staffs.ac.uk/schools/sciences/geography/IESR/downloads/Polluting%20the%20poor%20B.doc)

<sup>155</sup> For brief discussion of the Act see J Glazewski, “*South Africa: the National Environmental Management Act, 107 of 1998*” [1999] Environmental Liability CS8-9; and N Goolam, “*Recent Environmental Legislation in South Africa*” [2000] 44 Jo of African Law 124.

<sup>156</sup> National Environmental Management Act, s 2(4)(c).

equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.”<sup>157</sup>

Together these cover the distributive and procedural aspects of environmental justice.

4.10.3.2 The Act provides that the various principles established including the environmental justice principle apply throughout the Republic to the actions of all organs of the state which may significantly affect the environment<sup>158</sup>. Specifically the principles are in effect deemed to be material considerations and are, for example, to (i) apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination; (ii) serve as the general framework within which environmental management and implementation plans must be formulated; (iii) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment; and (iv) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment<sup>159</sup>.

4.10.3.3 The relevance of the South African experience is largely in terms of the extent to which environmental justice can be formalised as a guiding principle of regulatory action. It demonstrates that it is possible to enshrine the principle in a statute which then serves as indication of what matters environmental regulators should take into account when making decisions or taking action such as enforcement action. It is suggested below<sup>160</sup> that this is strictly unnecessary; that it is possible for environmental justice to be regarded as a material consideration for SEPA and other public bodies such as local authorities in terms of their decisions and actions by virtue of its existence in the policy statements and documents discussed above. The value of the South African model is that it provides environmental justice with a more stable and valued position by explicitly including it in a statute.

#### 4.10.4 India

4.10.4.1 The experience of India is discussed here principally in the context of the relationship between human rights and environmental justice. The environmental justice agenda in India has been intimately linked to the development of an environmental dimension to human rights jurisprudence by the courts, notably the Indian Supreme Court itself<sup>161</sup>. Article 21 of the Indian Constitution contains the

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<sup>157</sup> Ibid, s 2(4)(f).

<sup>158</sup> Ibid, s 2(1).

<sup>159</sup> Ibid.

<sup>160</sup> See paras 5.2.1 – 5.4.

<sup>161</sup> For discussions of this see M Anderson, 'Individual Rights to Environmental Protection in India' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford, 1996); A Dias, 'Judicial Activism in the Development and Enforcement of Environmental Law: Some Comparative Insights from the Indian Experience' [1994] 6 JEL 243; R Seghal, 'Human rights and environmental protection: some European cases and an Indian perspective' (2003) 16 Environmental Law 9; and K I Vibhute, 'Environment, Development and the Law: The Indian Perspective' [1995] JEL 137.

right to life. This has been interpreted in a dynamic way by the Indian Courts to promote, for example, cleaner air, clean drinking water, the closure of polluting industries and compensation remedies for those injured by harmful emissions from industrial plants. Although this environmental rights jurisprudence appears to relate to individual rights, the reality is that it affects collective rights of communities since most of the actions brought are representative actions by interest groups or indeed by environmental lawyers which have widespread implications through affected communities.

4.10.4.2 The principal relevance of the Indian experience for SEPA is in the context of enforcement. One of the reasons why the Indian courts have been so activist in promoting environmental rights is because of the general failure of the system of public administration in India (in this case the state pollution control boards) to address environmental problems adequately and to take enforcement action where required to protect fundamental rights. This parallels to some extent the experience of environmental rights litigation in Europe. Although this is discussed in detail elsewhere in this report it may be noted that the successful environmental rights cases before the European Court of Human Rights both involved failures by state authorities to take the necessary enforcement action, in one case to bring a tannery waste treatment plant under control and, in the other, to require a company to produce an emergency plan for the nearby community as was required under EC law<sup>162</sup>. However, the volume of cases in India showing enforcement failures is of an entirely different order and arguably has been a major factor in the development of judicial activism in this regard as the Supreme Court and the state High Courts have struggled to get the various state pollution control boards to enforce environmental laws in India effectively<sup>163</sup>. In Europe it is clear from the case law mentioned above that there is a positive duty on states to protect rights and, in the environmental law context that may well mean that enforcement action is required where, for example, a person's article 8 rights are being infringed by emissions from a plant. Thus, there may be cases where SEPA is required to take enforcement action to prevent rights being infringed. However, there are major differences at present from the experience in India. Firstly, despite criticisms of enforcement in Scotland, it is clear that enforcement does occur on a regular basis. Secondly, representative rights actions are not possible since standing in rights claims in Scotland is restricted to the victim or would-be victim. While this may permit actions which have a wider impact for a community this may not always be the case. It is possible that this will change somewhat given the requirements of the Aarhus Convention to provide standing for environmental NGOs, an issue raised as a policy commitment in the Partnership Agreement<sup>164</sup>.

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<sup>162</sup> *Lopez Ostra v Spain* (1995) 20 EHRR 277; and *Guerra v Italy* (1998) 26 EHRR 357. See also ch 10 below.

<sup>163</sup> A particularly notable example is *Vellore Citizens Welfare Forum v Union of India & Others* AIR 1996 SC 2715, *Supreme Court of India* 28 August 1996 - see also [1997] JEL 387 (also available via [www.elaw.org/](http://www.elaw.org/)) which involved water pollution from a large number of tannery plants affecting drinking and agricultural water supplies for a large number of villages and the failure of the state authorities to take action to prevent or minimise the pollution.

<sup>164</sup> See para 4.6.1 and Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L156, 25.6.03, p 17),

#### **4.11 Concluding remarks**

It is clear that environmental justice is becoming a key Executive and UK Government policy initiative. However, it is also apparent that the policy has not been fully elaborated. The need to address environmental inequalities is recognised and there is support for addressing greater levels of engagement with communities – the latter derives largely from the Aarhus Convention and the EC directives implementing the Convention’s obligations. The various domestic policy documents provide a strong steer for SEPA to take environmental justice issues seriously particularly in the procedural sense of improving access to information, public participation mechanisms and general engagement with local communities. However, there are certainly hints at the need to address the more substantive distributive environmental justice concerns. For example, the PFMR hints at some of these (enforcement, the role of and links between the planning system and the environmental law system, consistent regulation, regulation targeted towards risk). The clearest comparative lessons for SEPA as to what it might do to address both distributive and procedural environmental justice concerns come from the US EPA and reports by the US National Academy for Public Administration.

### **5. INTEGRATING EJ CONCERNS INTO SEPA’S FUNCTIONS GENERALLY**

#### **5.1 SEPA’s legal mandate for addressing environmental justice**

5.1.1 Charleson and Kind rightly indicate that section 32(1)(d) of the Environment Act 1995 imposes inter alia a duty on the Scottish Ministers and SEPA “in formulating any proposals relating to any functions of SEPA - ... (d) to have regard to the social and economic needs of any area or description of area of Scotland and, in particular, to such needs of rural areas”. Arguably this duty might provide a way of ensuring that SEPA takes environmental justice concerns into account but only in relation to the formulation of proposals relating to its functions. It is unlikely that a duty relating to formulating a proposal relating to a function could refer directly to dealing with a licence application or consideration of enforcement action, both of which are functions of SEPA rather than proposals relating to functions. Thus it is suggested that this duty is not directly applicable to licensing and enforcement functions but to a level above that. Tromans and Poustie suggest “It arguably includes any proposal by the Scottish Ministers to issue guidance under s 31(1)” but it would almost certainly also include the formulation of or revision of SEPA policy documents, for example, on licensing or enforcement. The other point to note about section 32(1)(d) is it forms part of a section containing a raft of duties including, for example, a duty “to have regard to the desirability of conserving and enhancing the natural heritage of Scotland” (section 32(1)(a)). SEPA could not therefore pursue an environmental justice agenda without regard to these other duties.

5.1.2 Charleson and Kind also indicate that section 31 of the Environment Act 1995 states that SEPA must “contribute towards attaining the objective of achieving sustainable development” and implicitly suggest that because the Executive has confirmed that social and environmental justice is central to the Executive’s view of sustainable development, SEPA is therefore under a duty to address environmental

justice issues<sup>165</sup>. Legally the position is slightly more complex. Section 31 does not impose the duty indicated directly on SEPA. Section 31(1) imposes a duty on the Scottish Ministers to give SEPA guidance from time to time with respects to the aims and objectives which the Ministers consider it appropriate for SEPA to pursue. That guidance must include guidance on the contribution which they consider it is appropriate for SEPA to make by the performance of its functions “towards attaining the objective of achieving sustainable development” (s 31(2)). The duty imposed on SEPA is simply to have regard to this guidance<sup>166</sup>. The current guidance, *SEPA and Sustainable Development*, was issued by the then Secretary of State in November 1996<sup>167</sup>. This guidance pre-dates the explicit recognition of an environmental justice dimension to sustainable development. However, this certainly does not mean that SEPA cannot take account of the evolving Executive policy on sustainable development. There are parallels here (albeit not exact) with planning law and the development planning system. There is in the planning legislation a presumption in favour of development in accordance with the statutory development plan unless material considerations indicate otherwise<sup>168</sup>. The presumption in favour of development in accordance with an old statutory development plan is likely to have less force whilst correspondingly the weight to be given to draft emerging plans is likely to increase and national policy that has subsequently been adopted<sup>169</sup>. Thus, considering the status of the 1996 guidance to SEPA, since it is the statutory guidance to SEPA on sustainable development and it has not yet been replaced it must still be the starting point for SEPA in any consideration of sustainable development. However, since UK Government and Executive policy on sustainable development has evolved, it would be appropriate for SEPA to attach less weight to the 1996 guidance and an increasing weight to the evolving policy which clearly does focus on environmental justice. In this regard planning case law on changes to policy is also relevant<sup>170</sup>. Although it has been doubted whether an after dinner speech by a

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<sup>165</sup> P Charleson & V Kind, ‘*Environmental Justice and its Implications for SEPA*’ (SEPA, 22 April 2003), paras 4.3-4.4

<sup>166</sup> There is case law, particularly from the field of housing law on the meaning of ‘have regard to’. In homelessness legislation a duty is placed on housing authorities to have regard to a Code of Guidance issued by the relevant Minister. Where the relevant provisions of such guidance were ignored, the resulting decision of a housing authority was held to be unlawful: *Kelly v Monklands District Council* 1986 SLT 169. However, as long as regard is had to the guidance it is possible to depart from it. Thus, in *Mazzaccherini v Argyll & Bute District Council* 1987 SCLR 475, Lord Jauncey held that while a housing authority had to have regard to the Code of Guidance it could depart from it and added that “if a housing authority considers that in a particular case the circumstances do not merit the rigid application of a part of the Code I do not consider they could be faulted at law or said to have acted unreasonably. In a planning case, *JA Pye (Oxford) Estates v Wychavon District Council and Secretary of State for the Environment* [1982] JPL 575 it was held that a planning authority departing from Ministerial guidance must justify such a departure by giving sound and clear reasons.

<sup>167</sup> From a procedural environmental justice perspective it has always struck the author as being problematic that this guidance to SEPA is not actually readily available to the public given it is arguably of crucial importance since it provides the definition of sustainable development which guides SEPA’s performance of its functions. It is not, for example, available on SEPA’s website. Arguably it is up to the Ministers to arrange for its publication – in fact there is a duty in s 31(8) on the Ministers to publish the guidance but this is qualified by “in such manner as they consider appropriate”.

<sup>168</sup> Town and Country Planning (Scotland) Act 1997, s 25.

<sup>169</sup> See *City of Edinburgh Council v Secretary of State for Scotland* 1997 SCLR 1112, HL. See also eg *JA Pye (Oxford) Estates v Secretary of State for the Environment and Wychavon District Council* [1987] JPL 363.

<sup>170</sup> For a general discussion see Rowan-Robinson, Young, Purdue & Farquharson-Black, *Scottish Planning Law and Procedure*, (W Green, 2001), para 8.30.

Secretary of State could be a material consideration<sup>171</sup>, there is little doubt that the First Minister's speech on environmental justice arguably could be a material consideration. It has been accepted that a decision of a Secretary of State could, of itself, make or alter policy and so would have to be considered to ascertain the new or revised policy<sup>172</sup>. Parliamentary statements explaining or altering government policies have also been held to be material considerations particularly because they are publicly available<sup>173</sup>. Although doubt has been expressed as to whether draft guidance can be a material consideration in the context of planning because it may be changed or may never be issued<sup>174</sup>, nonetheless it has been taken into account by the Court of Appeal<sup>175</sup>.

5.1.3 To summarise, although section 31 does not give SEPA a direct mandate to consider environmental justice issues, and requires SEPA to have regard to the guidance issued in November 1996, nonetheless draft revised guidance and clear statements of revised policy on sustainable development would be material considerations that SEPA would require to take into account in its licensing and enforcement activities. The publication of revised guidance by the Scottish Ministers will reduce the legal complexity of the current situation, presumably by giving a clear direction to SEPA on environmental justice issues<sup>176</sup>.

## 5.2 EJ as a material consideration

5.2.1 In determining licence applications, imposing conditions, varying licence conditions and deciding on appropriate enforcement action, on normal administrative law principles SEPA must take account of all material considerations<sup>177</sup>. Failure to take account of a material consideration could potentially open a decision or action open to a judicial review challenge. Such considerations include relevant strategies, plans and policies whether statutory or not adopted by the UK Government and/or the Scottish Executive, policies adopted by SEPA itself and representations made in relation to the application. Arguably environmental justice is already a material consideration as a result, for example, of the First Minister's speech, the Partnership Agreement policies and the PFMR. In addition SEPA has also obviously itself begun to consider the implications of environmental justice<sup>178</sup>. However, although these policies are relevant in a general sense they do not provide a coherent indication of how environmental justice ought to be considered in the context of SEPA's day to day licensing and enforcement activities.

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<sup>171</sup> *Dimsdale Developments (South East) Ltd v Secretary of State for the Environment & Hounslow London Borough Council* (1985) 275 EG 58.

<sup>172</sup> See eg *Sears Blok v Secretary of State for the Environment and London Borough of Southwark* [1982] JPL 248.

<sup>173</sup> See eg *R v Secretary of State for the Environment & Charles Church Developments Ltd, ex p Surrey Heath BC* [1988] JPL 783.

<sup>174</sup> *J A Pye (Oxford) Estates Ltd. v West Oxfordshire District Council* (1982) 47 P & CR 125.

<sup>175</sup> *Gateshead MBC v Secretary of State for the Environment* [1995] JPL 432, CA.

<sup>176</sup> It should be noted that the Scottish Ministers published draft revised guidance for consultation in July 2004: Scottish Executive Environment Group, *SEPA and Sustainable Development, Statutory Guidance to SEPA made under Section 31 of the Environment Act 1995*. This draft guidance does contain specific references to social and environmental justice; see section 3.3 and actions 14-21.

<sup>177</sup> See eg *R v Secretary of State for the Environment and Peninsular Proteins, ex p Torridge District Council* [1997] Env LR 557.

<sup>178</sup> P Charleson & V Kind, 'Environmental Justice and its Implications for SEPA' (SEPA, 22 April 2003).

5.2.3 One might compare the position to that identified in the US where despite President Clinton's Executive Order 12898 on environmental justice and top level policy statements by EPA Administrators, the *Environmental Justice in EPA Permitting* Report identified a problem that this top level support had not been consistently translated into changes in how staff such as permit writers conducted their work<sup>179</sup>. This problem, *Environmental Justice in EPA Permitting* identified, could be addressed in part by "making policy decisions, such as those needed for guidance on how environmental justice will be treated in the context of EPA's permitting programs"<sup>180</sup> and accordingly recommended that "EPA should finalize its draft national environmental justice guidance and develop practical tools for permit writers to identify and address environmental justice issues arising in air, water and waste permits"<sup>181</sup>.

5.2.4 Thus, to ensure environmental justice issues are more clearly and coherently articulated, identified and addressed in relation to SEPA's licensing and enforcement functions it is suggested that (1) an overall steer is provided by setting environmental justice as a management priority (this would have the effect of adopting the top level Executive policy commitment to environmental justice); and (2) developing a policy document(s) on environmental justice. Alternatives would be to have a single policy on environmental justice or to amend existing policies on licensing and enforcement. To provide practical tools for licensing teams and enforcement officers, guidance could be provided to them to indicate how they can address environmental justice issues. Doing all the above might also be appropriate so that SEPA staff have both an overall picture of how SEPA can contribute to environmental justice but also specifically how it is now a material consideration in licensing and enforcement functions and therefore has to be taken into account as well as spelling out in what ways environmental justice concerns can be addressed.

5.2.5 Another more general implication of environmental justice being a material consideration is ensuring that the fact environmental justice issues were taken into account in decision-making is recorded in the decision-making process. This obviously holds true for all material considerations taken into account by SEPA. In the context of planning, an officer's recommendation to a local authority planning committee would contain details of all the considerations taken into account by the officer as well as his or her reasoning and recommendations. SEPA officers should be preparing similar documents in relation to environmental licence applications. Since SEPA's licensing decisions (and arguably, some of its enforcement decisions) are available to the public by virtue of the Environmental Information Regulations 1992 (and their successors, regulations to be made to implement EC Council Directive 2003/4 on public access to environmental information) the clear recording of the decision-making process or at least the reasons for the decision would now appear to be essential.

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<sup>179</sup> *Environmental Justice in EPA Permitting*, p 17.

<sup>180</sup> *Ibid*, p 27

<sup>181</sup> *Ibid*, p 28.

### **5.3 Findings**

- SEPA can legitimately address environmental justice issues. This arises partly through its general duties under the Environment Act 1995 and partly by reason of the guidance on sustainable development issued to SEPA under section 31 of that Act to which SEPA must have regard in carrying out its functions and which is currently being revised to make explicit references to environmental justice. It also arises partly by means of general administrative law principles whereby public bodies must take account of relevant government policy documents or statements.
- As a result of a number of the policy developments identified in chapter 4, by reason of general administrative law principles, environmental justice is already a material consideration in SEPA's licensing and enforcement functions
- Nonetheless the implications of the environmental justice agenda for SEPA's day to day licensing and enforcement activities remain relatively undefined

### **5.4 Recommendations<sup>182</sup>**

- SEPA should make an explicit commitment to environmental justice in its management priorities/statement. This would provide a link between top-level Executive policy commitments and SEPA.
- SEPA should consider the adoption of a general policy on environmental justice. This would explain at a general level how environmental justice issues were to be addressed in SEPA's licensing and enforcement activities.
- Specific policy amendments (eg to the Policy Statement on Enforcement) could be made to incorporate a commitment to addressing environmental justice (see also below).
- More detailed guidance could be provided to licensing teams and enforcement officers.
- SEPA should ensure that the fact that environmental justice issues are or are not taken into account and the weight attached thereto are recorded in the licensing or enforcement decision-making process.

## **6. ESTABLISHING WHETHER THERE IS A PROBLEM**

### **6.1 Developing an appropriate methodology**

6.1.1 It is one thing to state that SEPA is able in broad terms to address environmental justice issues. However, this presupposes that there are actually environmental justice problems. There is presently limited evidence of distributive environmental justice problems in Scotland although further research is currently underway. Equally, although there is evidence of problems relating to procedural issues such as access to information and participation in decision making there has been little consideration of

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<sup>182</sup> To some extent it would be worth awaiting the finalised revised guidance from the Scottish Executive to SEPA under section 31 of the Environment Act 1995 on the contribution it can make to sustainable development as SEPA's legal locus for taking account of environmental justice issues would then be much clearer.



these problems from an environmental justice perspective<sup>183</sup>. However, it appears clear that if SEPA is to address distributive environmental justice problems it must be able to identify afflicted communities in order to be able to respond appropriately. It is therefore premature to suggest that, for example, SEPA should target its regulatory efforts to dealing with such “high-risk communities”, without SEPA having a clear idea of which communities these are. So before SEPA can vary permits by imposing stricter permit conditions and refocus enforcement action it has to know that there is a problem for it to deal with. Arguably this means the development of a methodology for establishing which communities are high-risk and conducting an appropriate level of monitoring to establish whether there is a problem in a particular case. Although arguably this could be done by SEPA alone, it might make more sense for SEPA to work with other bodies such as local authorities which already have information on issues such as local air quality and contaminated land (which should to some extent be shared with SEPA in any case<sup>184</sup>). It may well also be important to carry out some qualitative research to assess the perceptions of those living in certain communities which quantitative data suggest are those particularly afflicted.

6.1.2 This problem has been identified in the US. *Environmental Justice in EPA Permitting* identified that the US EPA did not at the time of the report have a routine process for identifying high-communities and hence giving them priority attention<sup>185</sup>. It noted that there was support for cumulative risk assessments when evaluating permit applications but that the current state of that science had not advanced sufficiently to be able to conduct those assessments<sup>186</sup>. Ambient monitoring of existing pollution levels was seen as one method available for the EPA to evaluate the additive impacts and aggregate effects of community exposure<sup>187</sup>. Recommendations to address this included (1) consultation with other relevant agencies to assist in the identification of high-risk communities; (2) collection of monitoring data from high – risk areas or use of modelling where monitoring was impractical for cost or other reasons; (3) evaluation of existing tools developed by regional and other offices to identify potential best practice; and (4) work to ensure accuracy of data on emissions and exposures in specific communities<sup>188</sup>. These recommendations could apply with equal force to SEPA.

6.1.3 Although scientific issues are beyond the scope of this report it can be noted that some baseline research has been conducted in England and Wales<sup>189</sup> (which might be useful particularly as regards methodology) and some work is underway on the relationship between deprivation and air quality is underway and is being

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<sup>183</sup> See para 11.2 below.

<sup>184</sup> Where a local authority identifies contaminated land it must notify SEPA: Environmental Protection Act 1990, s 78B(3).

<sup>185</sup> *Environmental Justice in EPA Permitting*, Finding 10 p 45

<sup>186</sup> *Ibid*, Finding 11

<sup>187</sup> *Ibid*, p 47

<sup>188</sup> *Ibid*, p 56.

<sup>189</sup> See eg Friends of the Earth (England and Wales), *Pollution Injustice: the geographic relation between household income and polluting factories*, April 1999 ([www.foe.co.uk/resource/reports/income\\_pollution.html](http://www.foe.co.uk/resource/reports/income_pollution.html)); Friends of the Earth, *Environmental Justice: Rights and Means to a Healthy Environment for All*, November 2001 ([www.foe.co.uk/resource/reports/environmental\\_justice.pdf](http://www.foe.co.uk/resource/reports/environmental_justice.pdf)); Walker & Mitchell, *Environmental Quality and Social Deprivation, an R & D Technical Report E2-067/1/TR* for the Environment Agency, September 2003.

commissioned by SNIFFER to assess whether there are links between poor environmental quality and social deprivation<sup>190</sup>. Although at one level the question for this report is whether or not SEPA can within its existing legislative framework address environmental justice issues when making licensing decisions or carrying out enforcement activity and hence such background work is not directly relevant to the project, nonetheless it is considered crucial that SEPA address this issue since otherwise environmental justice will not be capable of being addressed at all when SEPA officers are dealing with licences or considering enforcement action.

6.1.4 One system that might be of considerable significance for SEPA in assessing cumulative health impacts for environmental justice purposes is the Environmental Health Surveillance System for Scotland (EHS3). The EHS3 Project Brief outlines the role of EHS3 as follows:

“EHS3, in its completed form, will be an ongoing multi-agency collaboration involving area NHS boards, NHS Information & Statistics Division, local authorities, the Scottish Environment Protection Agency (SEPA), Water Authorities [now Scottish Water] and other relevant agencies. Its purpose will be to collect, hold and, as appropriate, analyse and interpret environmental and health data throughout Scotland. Much of this data is currently available but is under-utilised. In keeping with the principles of surveillance, data gathering will be ongoing and regular outputs will be agreed which will inform policy and action to promote improved environmental standards and public health. With appropriate development, the system will also have potential as a predictive tool for managing environmentally occasioned (including weather-related) fluctuations in demand for NHS services. A further important characteristic of EHS3 will be its dynamic character with an ability to change emphasis and enhance outputs in response to circumstances as they emerge. Thus EHS3 will provide information for action.”<sup>191</sup>

6.1.5 The Project Brief also notes that although the physical environment is widely accepted as a key determinant of human health, the current trend towards evidence-based public health is less obvious in policy and action on the environment than in other areas:

“A role for the physical environment is accepted in the causation and exacerbation of many conditions and is hypothesised for many more. Many cancers, much heart disease and aspects of respiratory and mental health are known to have an environmental component within an, often complex, causal “cocktail”. Although mechanisms are poorly understood, few doubt the influence of physical environment in conditions such as asthma, adult onset hypersensitivity and some degenerative neurological disorders. The modern

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<sup>190</sup> SNIFFER, Investigating environmental justice in Scotland: links between measures of environmental quality and social deprivation – research specification, March 2004. However, it should be noted that this research and referred to in note 189 primarily provides a “snapshot” picture of geographic, social and environmental conditions. It does not necessarily explain how these came about. For a genuinely informed policy response some more detailed historical research may be useful: see eg A Szasz & M Meuser, “Environmental Inequalities: Literature Review and Proposals for New Directions in Research and Theory” [1997] 45(3) Current Sociology 99 at pp 107-111.

<sup>191</sup> EHS3 Project Brief, SCIEH/EHS3/01/03, Issue 1, p 1.

perspective, rightly, sees health as the product of a wide range of jointly interacting factors, promoting a recognition that changes to physical environment may affect health in ways which may be quite indirect and extend beyond physical illness.”

EHS3 is designed to provide such evidence and its potential focus on cumulative impacts should be apparent.

6.1.6 EHS3 is currently being rolled out in Scotland. An initial pilot was completed in 1998. This is to be followed by an extended pilot incorporating a detailed evaluation of environmental data, and Phase 3, a final stage during which, subject to fulfilment of appropriate criteria, the project will be rolled out to Scotland as a whole. The project is designed to collect data on the following:

- NO<sub>2</sub>, SO<sub>2</sub>, PM<sub>10</sub> from local authorities
- Al, Pb, trihalomethanes (THMs) and polycyclic aromatic hydrocarbons (PAHs) from Scottish Water
- Radiation monitoring data from SEPA and local authorities
- Neighbourhood noise complaints from local authorities
- Mobile phone masts and cooling towers from local authorities
- Part A and Part B processes/installations and landfills from SEPA
- Incivilities (graffiti, dog-fouling, fly-tipping, weed growth and cleanliness standards) from Keep Scotland Beautiful, local authorities

6.1.7 From a non-scientific viewpoint at least this project appears to have considerable potential to provide the necessary evidence to underpin distributive environmental justice action by SEPA. However, it clearly does not cover all possible impacts – notably there is nothing specifically on water pollution regulated by SEPA (unless it forms part of a Part A process/installation).

## **6.2 SEPA and local authority monitoring**

6.2.1 Legally there are few restrictions on SEPA’s monitoring abilities. For example, section 37(1) of the Environment Act 1995 arguably provides a general power to conduct monitoring. That provision enables SEPA to

- “(a) ... do anything which, in its opinion, is calculated to facilitate, or is conducive or incidental to, the carrying out of its functions; and
- (b) without prejudice to the generality of that power, may, for the purposes of, or in connection with, the carrying out of those functions, acquire and dispose of land and other property and carry out such engineering or building operations as it considers appropriate ...”

“Engineering or building operations” is defined as including “the construction, alteration, improvement, maintenance or demolition of any building or structure .... and the installation, modification or removal of any machinery or apparatus.” Powers of compulsory purchase are ultimately available if an owner were unwilling to

provide SEPA with rights to conduct monitoring on his or her property<sup>192</sup>. Such powers are quite separate from SEPA's powers of inspection and investigation under the Environment Act 1995. One limitation is that SEPA inspection powers are only exercisable for the purpose of establishing whether any of the pollution control enactments which it administers are not being complied with<sup>193</sup>. It is likely that a similar restriction would be implied in the case of SEPA's monitoring powers. Where this restriction might bite is in cases where SEPA wished to establish the contribution of particular installations regulated by it to, for example, a local air quality problem. It might preclude SEPA from conducting wider monitoring. However, as noted below SEPA would have ready access to data from local and national air quality monitoring networks so the restriction would not be significant in practice. Even if that were not the case it could be argued that SEPA requires to carry out wider ambient monitoring of pollution levels in order to determine the appropriate standards for installations which it does regulate.

6.2.3 There are specific legislative provisions governing monitoring in relation to certain of the regimes which SEPA administers. For example, in the context of water pollution controls, SEPA is placed under a duty to monitor the extent of pollution in controlled waters for the purpose of carrying out its functions under Part II of the Control of Pollution Act 1974<sup>194</sup>. Given the wider scope of the controlled activities which are to be regulated under the new domestic regime<sup>195</sup> implementing the EC Water Framework Directive<sup>196</sup>, the application of the legislation to the water environment rather than controlled waters<sup>197</sup> the wider parameters being used to measure water quality<sup>198</sup>, more extensive monitoring is required<sup>199</sup>. Accordingly, SEPA is placed under a duty in relation to each river basin district to carry out or secure the carrying out of monitoring of the status of the water environment and relevant territorial water adjacent to the district and analyse or secure the analysis of the information obtained from the monitoring<sup>200</sup>. SEPA is also placed under a duty to prepare a monitoring programme<sup>201</sup>. Monitoring in accordance with the programme must start by 22 December 2006<sup>202</sup>. The Scottish Ministers are empowered to make

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<sup>192</sup> Environment Act 1995, s 26.

<sup>193</sup> *Ibid*, s 108(5).

<sup>194</sup> Control of Pollution Act 1974, s 30D(2). SEPA's water pollution monitoring functions are contained, *inter alia*, in the Rivers (Prevention of Pollution)(Scotland) Act 1951, s 18. Interestingly the duty in COPA, s 30D(2) is expressly stated to apply to the "following provisions of this Part" which would appear to exclude its application to the duty in s 30D(1) to exercise its powers under the 1951, 1965 or 1974 Acts to ensure that any water quality objectives are achieved.

<sup>195</sup> See Water Environment and Water Services (Scotland) Act 2003, s 20 and Sch 2, para 1.

<sup>196</sup> EC Council Directive 2000/60 establishing a framework for community action in the field of water policy OJ L327, 22.12.2000, p.1.

<sup>197</sup> Water Environment and Water Services (Scotland) Act 2003, s 3.

<sup>198</sup> EC Council Directive 2000/60, art 4(1)(b), Annex V. Until the present water quality has been assessed with reference to its chemical status only. However, the Water Framework Directive require a significant shift in approach as it requires, in the case of surface waters, good status to be achieved within 15 years after its entry into force terms of both ecological and chemical status and, in the case of groundwaters, a similar requirement in terms of both chemical and quantitative status.

<sup>199</sup> *Ibid*, s 8.

<sup>200</sup> *Ibid*, s 8(1).

<sup>201</sup> *Ibid*, s 8(2).

<sup>202</sup> *Ibid*, s 8(3). This is subject to any provision made in regulations stipulating that monitoring in protected areas will start on a date determined in the regulations (*ie* regulations under *ibid*, reg 8(5)): *ibid*, s 8(4).

regulations in relation to monitoring<sup>203</sup> and also to issue guidance to SEPA or any other person in relation to monitoring who are placed under a duty to have regard to any such guidance<sup>204</sup>10.

6.2.4 Air quality is monitored by national and local authority networks<sup>205</sup>. Information from these networks is publicly available and would thus obviously be available to SEPA to assist in establishing which communities were high risk. There is a duty in the Environment Act 1995 on local authorities to review the current and future likely air quality from time to time in their areas<sup>206</sup>. Such a review must also include an assessment of whether air quality standards and objectives are being achieved or are likely to be achieved within the relevant period<sup>207</sup>. Where standards or objectives are not being achieved or are not likely to be achieved within the relevant period the local authority must declare an Air Quality Management Area (AQMA) and develop an action plan to address the problem<sup>208</sup>. SEPA has reserve powers to require inter alia the implementation of the action plan<sup>209</sup>. The designation of an area as an AQMA may in itself be an indication of a high risk community or area in environmental justice terms and may assist SEPA in addressing environmental justice issues if there are installations within the AQMA which SEPA is responsible for regulating. Indeed it may become apparent from the local authority review that the emissions from such an installation is what is causing the failure to meet air quality standards and objectives for the area<sup>210</sup>. In such a case it may be for SEPA to respond by varying permit conditions or taking enforcement action if stipulated standards are not being complied with as appropriate.

6.2.5 The duty upon local authorities to inspect their areas from time to time in order to identify contaminated land and to enable the authority to decide whether any such land must be designated as a special site may also be of considerable value to SEPA in enabling it to address environmental justice issues in particular cases<sup>211</sup>. Where the local authority identifies any contaminated land it must give notice inter alia to SEPA<sup>212</sup>. Having thus been alerted to the issue, SEPA may be able to take action if it is responsible for regulating any installations in the area, to ensure that any risks posed by the contaminated land are not exacerbated by the impact of any emissions or discharges. However, more directly, if the local authority identifies any contaminated

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<sup>203</sup> Ibid, reg 8(5).

<sup>204</sup> Ibid, reg 8(6).

<sup>205</sup> See DETR, Scottish Executive, National Assembly for Wales, Dept of the Environment in Northern Ireland, *The Air Quality Strategy for England, Scotland, Wales and Northern Ireland: Working Together for Cleaner Air*, Cm 4548, January 2000, paras 317-324.

<sup>206</sup> Ibid, s 82(1). Considerable guidance and technical guidance has been published by DEFRA to assist local authorities. See [www.defra.gov.uk/environment/airquality/laqm.htm](http://www.defra.gov.uk/environment/airquality/laqm.htm).

<sup>207</sup> Environment Act, s 82(2).

<sup>208</sup> Ibid, ss 83-84.

<sup>209</sup> Ibid, s 85. See also para 9.7.3 below.

<sup>210</sup> Or equally, there may be uncertainty. Thus in *R (on the application of Vetterlein) v Hampshire County Council & Hampshire Waste Services Ltd* [2001] EWHC Admin 560; [2002] Env LR 198, QBD the claimants considered that the emissions from a proposed incinerator would result in air quality problems when arguably any problems that did exist were being caused by road traffic and were being addressed by tighter emission standards for new vehicles and tighter fuel product standards. This again highlights the need for effective monitoring methodologies to enable the source of the problem to be identified so that if it is something SEPA has responsibility for it can respond appropriately.

<sup>211</sup> Environmental Protection Act 1990, s 78B(1).

<sup>212</sup> Ibid, s 78B(3).

land which requires to be designated as a special site then SEPA becomes the enforcing authority and is responsible for securing its remediation<sup>213</sup>.

6.2.6 If there is a particular problem in a community with exposure to a particular type of pollution a duty may be owed by SEPA under human rights provisions to particular families (ie under ECHR, art 8) or property owners (ie under ECHR, Protocol 1, Article 1) who might be affected to take action to deal with the problem which might include as a minimum monitoring programmes and dissemination of information to enable victims or potential victims to assess the risks to their homes and families<sup>214</sup>.

6.2.7 While SEPA must conduct adequate monitoring to ensure that applicable water quality standards are not breached, arguably SEPA could target its monitoring efforts (eg in relation to air quality) to communities which are suffering the effects of pollution disproportionately. In any event monitoring for quality standards may assist in identifying communities that are disproportionately affected by pollution. As noted in 6.9 above SEPA may actually be legally required to target its monitoring in this way in some cases. In any case, targeting of monitoring would be an objectively justifiable response given the Executive's policy priorities. However, prior to that a monitoring programme is required to establish whether there is a problem in the first place. Once it is known which communities are suffering disproportionately that provides a base line for future monitoring which can then feed into subsequent licensing decisions and enforcement action.

### 6.3 Quality standards and environmental justice

6.3.1 Environmental quality or target standards which have been mentioned above also require some comment<sup>215</sup>. Such standards focus on the receiving environment and, in theory at least, are capable of dealing with cumulative impact from point source and diffuse pollution. To establish whether or not a quality standard is being met or not clearly requires considerable ambient monitoring. Quality standards have been adopted in relation to air and water. The former standards deal with the presence of certain substances in air and are based on impacts on human health while the latter reflect the particular usage of water but again in some cases are directly based on impacts on human health. Quality standards legislation, which in many cases derives from European legislation provides for limit values which are mandatory, guide values which are stricter objectives to be aimed at and, in the case of air, alert thresholds which are triggers for action to be taken (normally informing the public as a first step that there is a problem). It has been hinted by the European Court of Justice that the mandatory limit values in the air quality directives are directly effective and may thus be enforced by individuals in their domestic courts<sup>216</sup>. This

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<sup>213</sup> Ibid, ss 78(9); 78C.

<sup>214</sup> See *Guerra v Italy* (1998) 26 EHRR 357; and *Magnohard Ltd v UKAEA & SEPA* 2003 SLT 1083. For a full discussion of human rights requirements see ch 10 below.

<sup>215</sup> For a discussion of types of standard see A Ogus, *Regulation: Legal Form and Economic Theory* (OUP, 1994), pp.150-151; G Winter, 'Standard-setting in Environmental Law' in G Winter, *European Community Law: a Comparative Perspective* (Dartmouth, 1996), J Scott, *EC Environmental Law* (Longman, 1998), pp.25-29 and M Poustie, "Air" in C T Reid (ed), *Environmental Law in Scotland* (2<sup>nd</sup> ed, 1997), pp.44-49.

<sup>216</sup> *EC Commission v Germany C-361/88* [1991] ECR I-2567 .

clearly has implications for levels of enforcement by SEPA to ensure that such standards are met.

6.3.2 The value of using a quality standard approach in the context of environmental justice is that, in theory at least, it should be possible to identify areas where quality standards are being breached and cumulative impact at least of the substances which are covered by the particular quality standard. The use of quality standards should also be able to inform the initial setting or subsequent revision of emission limit values from installations. Thus, if it is known by virtue of monitoring that air quality standards in a particular community are close to being breached by virtue of emissions from a number of installations, an application for a new installation in the area could be refused or subject to stringent limits and the emission standards of existing installations could be tightened by the variation of their licence conditions.

6.3.3 However, it is clear that while this approach has potential benefits for assessing whether a particular community is disproportionately affected by pollution it is by no means unproblematic. Firstly, the quality standards are generally applicable and must be maintained everywhere so the use of such standards does not in itself provide any support for a stricter approach to communities which are disproportionately affected: it merely provides support for tackling any area where the quality standard is not being attained. That might be in a rural area or it might be an urban area which had a number of identifiable communities. Secondly, the identification of adversely affected communities depends on adequate widespread monitoring of the quality standard which may be resource intensive. Thirdly, it also depends on being able to identify the source(s) of the problem. In some cases the problem may not be caused by an installation regulated by SEPA but could, for example, be caused by emissions from road traffic<sup>217</sup>. Finally, the use of quality standards in relation to particular substances cannot be used in relation to the overall cumulative impact of all polluting sources in an area eg while air quality standards can be used in relation to all the sources of eg sulphur dioxide, lead, particulates etc they are not of any use in relation to eg contaminated land or radioactive substances.

6.3.4 It should be noted in this regard that a more coherent approach is to be taken in the field of water with the implementation of the Water Framework Directive<sup>218</sup>. The Directive replaces a number of earlier pieces of EC water legislation<sup>219</sup> within a more

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<sup>217</sup> This was actually the issue underlying an English case where a challenge was mounted to the granting of planning permission for an incinerator but the air quality problem in the area was actually the result of road traffic: *R (on the application of Vetterlein) v Hampshire County Council & Hampshire Waste Services Ltd* [2001] EWHC Admin 560; [2002] Env LR 198, QBD

<sup>218</sup> EC Council Directive 2000/60 establishing a framework for community action in the field of water policy OJ L327, 22.12.2000, p.1.

<sup>219</sup> The following earlier legislation is to be repealed with effect from 7 years after EC Council Directive 2000/60 enters into force: EC Council Directive 75/440 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States; EC Council Decision 77/795 establishing a common procedure for the exchange of information on the quality of surface freshwater in the Community; EC Council Directive 79/869 concerning the methods of measurement and frequencies of sampling and analysis of surface water intended for the abstraction of drinking waters in the Member States; EC Council Directive 2000/60, art 22(1). The following earlier legislation is to be repealed with effect from 13 years after EC Council Directive 2000/60 enters into force: EC Council Directive 78/659 on the quality of freshwaters needing protection or improvement in order to support fish life; EC Council Directive 79/923 on the quality required of shellfish waters; EC Council Directive 76/464 controlling the discharge of dangerous substances into the water environment

integrated, coherent framework and the adoption of new environmental objectives for surface waters based not only on chemical but also on ecological parameters<sup>220</sup> and for groundwater based on chemical and quantitative parameters<sup>221</sup>. The directive seeks to realise good status for waters within managed river basin units. The Directive specifies that member States will protect, enhance and restore all surface water bodies “with the aim of “achieving “good surface water status” within fifteen years after the entry into force of the directive<sup>222</sup>. Certain 'protected areas', for example, areas designated as bathing waters under EC Council Directive 76/160 receive enhanced protection<sup>223</sup>. The Directive also incorporates the requirements in EC Council Directive 75/440/EEC on standards for surface water quality for drinking<sup>224</sup>.

#### 6.4 Findings

- SEPA must conduct an adequate amount of monitoring to ensure that water quality standards are not breached, otherwise SEPA is free to conduct monitoring subject to the restriction that the monitoring must be for the purpose of the pollution control regimes administered by SEPA.
- SEPA’s monitoring requirements in relation to the water environment will be significantly extended from 2006.
- SEPA can make use of air quality data gathered by local and national monitoring networks to fully inform its views on whether a particular community is being disproportionately affected by air pollution.
- SEPA can rely on local authority identification of contaminated land.
- Where the impact of pollution is infringing a Convention right and SEPA is responsible for regulating the offending emission or discharge and is not currently monitoring it or monitoring it adequately, a legal duty to conduct monitoring or adequate monitoring may arise under the Human Rights Act 1998.
- The use of quality standards may help in the identification of communities which are disproportionately affected and indeed in setting emission limit values for installations within such areas although such standards do have limitations including the need for considerable monitoring and the fact that currently applicable quality standards do not deal with cumulative impacts, only impacts within one particular medium such as air or water.
- It is likely that limit values in quality standards derived from EC legislation are enforceable by individuals using the “direct effect doctrine”.

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OJ L129, 18.5.76, p 23 (except for art 6 thereof which is repealed on the coming into force of EC Council Directive 2000/60); and EC Council Directive 80/68 on the protection of ground water against pollution caused by certain dangerous substances (OJ L20, 26.1.80, 43): EC Council Directive 2000/60, art 22(2). However, EC Council Directives 96/61, (OJ L257, 10.10.96, p 26) 91/271 (OJ L 135, 30.5.91, p 40) and 91/676 (OJ L375, 12.12.91, p 1) are not replaced.

<sup>220</sup> EC Council Directive 2000/60, art.4(1)(a), Annex V.

<sup>221</sup> Ibid, art.4(1)(b), Annex V.

<sup>222</sup> EC Council Directive, art. 4(1)(a)(ii).

<sup>223</sup> Ibid, art.4(1)(c).

<sup>224</sup> Ibid, art.7. EC Council Directive 75/440(OJ L 194, 16.6.75, p 26).



### **6.5 Recommendations**

- SEPA should develop or adopt an existing methodology for assessing the communities which are disproportionately affected by pollution. The EHS3 project may provide a possible route although it may require further development.
- SEPA should develop a monitoring programme in collaboration with other relevant bodies such as local authorities to establish which communities are disproportionately affected by pollution. Where necessary qualitative research looking at the perceptions of those living in communities which may be so affected should be conducted – possibly in collaboration with other relevant bodies.
- Monitoring efforts should thereafter be targeted in part by reference to environmental justice criteria.
- An appropriate policy document should be drawn up explaining the methodology, the programme and the basis for monitoring priorities.
- Potential breaches of quality standards (where these are applicable) may be used to justify licensing and/or enforcement decisions in relation to installations operating in areas which are disproportionately affected by pollution.

## **7 SEPA AND THE PLANNING SYSTEM**

### **7.1 SEPA's role as a consultee in the planning system & better co-ordination of planning and environmental licence applications**

7.1.1 Although it is planning authorities that play the key role in land use siting decisions for industrial and waste facilities and hence play a key role in delivering the distributive element of environmental justice, SEPA nevertheless has a very significant role to play as a statutory consultee in both the development planning and development control systems<sup>225</sup>. At the strategic development plan level effective participation by SEPA in plan making could minimise the extent to which planning applications that might impact adversely on a community which is already disproportionately affected by pollution are submitted to the planning authority. This process will presumably be further enhanced by the process of Strategic Environmental Assessment of development plans. At the level of a specific application SEPA also plays a key role as a consultee in the environmental impact assessment process if a project is subject to EIA requirements<sup>226</sup>. SEPA can clearly raise issues of impact of a proposed installation on a particular community and indeed the cumulative environmental impact which might be caused by the establishment of a new installation in a particular location which already contains a number of existing installations and problems which this might cause for compliance with, eg air quality standards for the local community. Such interventions may serve to influence local authority decision making and reduce the extent to which SEPA is obliged to address environmental justice concerns in relation to new installations or other developments through its own legislative framework as fewer inappropriate applications should receive planning permission from local authorities.

7.1.2 The PFMR identified that one problem SEPA faced in this regard was that the full environmental information that SEPA might require to determine the appropriate licence for the installation might not be available at the planning stage and recommended research into better interaction between the two regimes<sup>227</sup>. Twin-tracking of the applications for planning permission and the necessary environmental licence(s) might be the ideal solution to this perceived problem although it may be that while a lender would be happy to fund the planning application process for a regulated development they would not necessarily also fund the environmental licence application process until it was clear that planning permission had been granted. However, where the proposal is subject to an EIA, then sufficiently detailed information ought to be available to SEPA to make an informed response. The problem SEPA faces is that it has less time to make a representation as a consultee in the planning process than it would have to consider the information if it had been

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<sup>225</sup> Town and Country Planning (General Development Procedure) (Scotland) Order 1992 SI 1992/224, art 15(h), (p)(development control); Town and Country Planning (Structure and Local Plans)(Scotland) Regulations 1983, SI 1983/1590, reg 4(2)(development planning).

<sup>226</sup> Environmental Impact Assessment (Scotland) Regulations 1999, SSI 1999/1, regs 2(1), 14(1)(c), 16 and 22.

<sup>227</sup> See para 4.5.6 above. A report for the Environment Agency also recommended that the Agency should build better links with planning authorities because of existing public confusion about how the licence application consultation process fits with consultation on other aspects of permitting: Environment Agency, Evaluating Methods for Public Participation, February 2002.

contained in a licence application to SEPA<sup>228</sup>. Nonetheless, where the proposal is for an installation that would be subject to the Pollution Prevention and Control (Scotland) Regulations 2000, the same environmental statement would be used by the applicant for planning and environmental licence applications. Also, where SEPA did raise concerns about the impact of the proposed installation by itself or in combination with existing installations even if there were no twin-tracking of planning and environmental licence applications, SEPA could well effectively be putting the applicant on notice that if the development were to be permitted under the planning system, then stricter emission controls might well be inevitable given local issues of cumulative impact. Twin-tracking of planning and environmental licence applications would arguably make the current system more comprehensible and also enable SEPA to have a more effective role in that its representations on the planning application could be informed by the information which the applicant had submitted on its environmental licence application. In the latter sense twin-tracking would serve to enhance the procedural dimension of environmental justice by facilitating public participation. Twin-tracking might be achieved without legislative amendment by means of memoranda of understanding between SEPA and local authorities. However, alignment of the periods for determination of planning permission and environmental licences might be necessary in some cases<sup>229</sup>.

## **7.2 Relationship between planning and environmental law**

7.2.1 There are few statutory provisions which set out the relationship between the planning and environmental regimes and indeed there is little statutory linkage between the planning and environmental regimes. In most cases the legislation does not stipulate the order in which the respective licences should be granted. The one major exception to this is in the case of waste facilities where it is provided that planning permission must be obtained before the environmental licence can be granted<sup>230</sup>. However, as noted above where the application is for a PPC installation then the same EIA can be used for both the planning and PPC licence application procedures<sup>231</sup>.

7.2.2 Nonetheless, case law has provided some indication of the linkage between planning and environmental controls. The leading case is the English Court of Appeal

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<sup>228</sup> As a consultee in the planning process, SEPA would normally have only 14 days to make a representation: Town and Country Planning (General Development Procedure)(Scotland) Order 1992, art 15(3). Where an EIA was required there would normally be consultation with the developer on the environmental statement and then a further period of 4 weeks consultation once the environmental statement was submitted to the planning authority: regs 13(1), 14(3), 16(2). In dealing with environmental licence applications SEPA normally has a period of 4 months which can be extended by agreement with the applicant: see eg Pollution Prevention and Control (Scotland) Regulations 2000, Sch 4, para 15(1).

<sup>229</sup> Local authorities have two months to determine planning applications unless a longer period is agreed with the applicant or it is an EIA application in which case the period is extended to 4 months. For environmental licences, many but not all of which will involve projects which are EIA applications, the determination has generally been harmonised at 4 months unless a longer period has been agreed with the applicant.

<sup>230</sup> Environmental Protection Act 1990, s 36(2); Pollution Prevention and Control (Scotland) Regulations 2000, reg 7(4)(b),(5).

<sup>231</sup> Directive 96/61/EC on integrated pollution prevention and control, art 6(2); Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, art 2(2a); Pollution Prevention and Control (Scotland) Regulations 2000, Sch 4, para 1(1)(i).

decision, *Gateshead MBC v Secretary of State for the Environment*<sup>232</sup>. There the local authority had refused planning permission for an incinerator because it did not believe that HMIP (one of the predecessors of the Environment Agency) could adequately control the emissions from the proposed plant through the IPC system. It was held that the planning authority could not second guess the expert judgement of the environmental regulator and could only refuse permission where there were valid land use reasons for doing so such as the fact that the proposed development was incompatible with existing neighbouring land uses. Full and early consultation was thus required between the two authorities. The Court of Appeal also made clear that the granting of planning permission did not mean that the environmental regulator had to grant the relevant environmental licence. The case also thus indirectly raises issues about the fact that there is no statutory staging of the planning and environmental licence applications. This decision is now reflected in relevant planning guidance (which also incidentally provides a steer towards twin-tracking):

**“16.** The planning and pollution control systems are separate but complementary in that both are designed to protect the environment from the potential harm caused by development and operations. The dividing line between planning and pollution controls is not always clear cut but the planning system should:

- **focus on whether the development itself is an acceptable use of the land rather than the control of the processes or substances involved;**
- **regulate the location of the development and the control of operations in order to avoid or minimise adverse effects on the use of land and on the environment; and**
- **secure restoration to a condition capable of the agreed after-use.**

**17.** Matters relevant to a pollution control authorisation or licence may also be material planning considerations. The weight attached to those matters will depend on the scope of the pollution control system in each case. It is however a long established policy that planning controls should not duplicate other statutory controls, or be used to secure objectives achievable under other legislation. In using their discretion both planning and pollution control authorities should exercise their duties to consult, either as required by the GDPO, the 1994 Regulations or the 1995 Act. It is recommended that planning applications, licences and authorisations are discussed prior to submission (then determined in parallel wherever possible), to avoid delay and to enable conditions to be taken into account in each decision. ...

- **planning authorities should not substitute their own judgement on pollution control issues for that of SEPA, which has the relevant expertise and statutory responsibility for that control.**
- **planning authorities should consult SEPA since in most cases both planning permission and a pollution control permit such as a waste management licence, will be needed before a waste facility can commence operation.”**<sup>233</sup>

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<sup>232</sup> *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* [1995] Env LR 37, CA.

<sup>233</sup> NPPG 10, Planning and Waste Management, paras 16-17. See also PAN 51 Planning and Environmental Protection.

7.2.3 The Gateshead case is one of several where what are arguably environmental justice concerns have been raised in court proceedings in the context of challenges to grants of planning permission<sup>234</sup>. It is thought that it is always more likely that challenges based on distributive environmental justice concerns will be made in that context given the grant of planning permission is the fundamental decision about the location of the proposed development. However, this will not always be the case. One particular example is the litigation relating to the authorisation of the use of different types of fuel in cement kilns and lime works in England<sup>235</sup>.

### 7.3 Findings

- The planning system is primarily responsible for siting decisions for polluting installations.
- SEPA is nonetheless a statutory consultee in the development planning and development control process and can therefore influence siting decisions and may be able to draw a planning authority's attention to potential disproportionate or severe cumulative environmental impacts at an early stage.
- SEPA may have difficulties assessing the impact of a particular development given the time constraints for responding to notifications of planning applications and given the lack of explicit linkage between the planning and environmental law systems.

### 7.4 Recommendations

- Once SEPA has identified communities disproportionately affected by pollution it should – where it has sufficiently full information - raise environmental justice concerns (eg regarding cumulative impact caused by the emissions from a new development) when consulted in the planning process.
- SEPA should consider entering into memoranda of understanding with local authorities about twin-tracking planning and environmental licence applications or at least better co-ordinating such applications which would serve both to enhance the comprehensibility of the process for members of the public but would also arguably provide SEPA with more timely information on environmental impact which could enable SEPA to make more informed representations in the planning process which in turn may enable environmental justice concerns to be more fully addressed.

<sup>234</sup> See eg *R v Leicestershire County Council, ex p Blackfordby & Boothorpe Action Group* [2000] Env LR 35, QBD; *R v Bolton Metropolitan Borough Council, ex p Kirkman* [1998] Env LR 719, CA.

<sup>235</sup> See eg *Levy v Environment Agency* [2003] Env LR 11; *R v Environment Agency, ex p Gibson, R v Environment Agency, ex p Leam, R v Environment Agency, ex p Sellars & Anr* [1999] Env LR 73.

## 8 DISTRIBUTIVE ENVIRONMENTAL JUSTICE AND SEPA'S LICENSING FUNCTIONS

### 8.1 Introduction

8.1.1 SEPA is a statutory creation. It was established by section 20 of the Environment Act 1995 "for the purpose of carrying out the functions transferred or assigned to it by or under this Act". Therefore it cannot do things which are outwith its statutory powers. Nonetheless many of the statutes which govern SEPA's functions provide it with considerable discretion in the exercise of its powers which may well provide scope for the pursuit of an environmental justice agenda through its licensing and enforcement functions. Section 33(1) of the Environment Act 1995 provides an overarching aim for the exercise of SEPA's pollution control powers<sup>236</sup>:

"SEPA's pollution control powers shall be exercisable for the purpose of preventing or minimising, or remedying or mitigating the effects of, pollution of the environment".

This is clearly a very general aim and is not inconsistent with the application of environmental justice priorities since in the distributive context, these priorities would clearly require pollution prevention or minimisation or enforcement action aimed at remedying or mitigating the effects of pollution<sup>237</sup>.

8.1.2 Certain of the legislative regimes administered by SEPA are considered in this section to ascertain whether or not distributive justice concerns could determine whether or not to grant a licence or impose or vary particular conditions. Not all the regimes are considered for reasons of space. Nonetheless the approach taken in relation to the regimes which have been considered provides a model for considering the extent to which environmental justice issues can be applied through those other regimes. In each regime SEPA has discretion as to whether or not a licence can be granted and has discretion in imposing or varying conditions although the precise

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<sup>236</sup> See those contained in the Alkali &c Works Regulation Act 1906; Part III of the Rivers (Prevention of Pollution)(Scotland) Act 1951; the Rivers (Prevention of Pollution)(Scotland) Act 1965; Parts I, IA and II of the Control of Pollution Act 1974; Part I of the Health and Safety at Work etc Act 1974; the Control of Pollution (Amendment) Act 1989; Parts I,II and IIA of the Environmental Protection Act 1990; section 19 of the Clean Air Act 1993; the Radioactive Substances Act 1993; regulations under section 2 of the Pollution Prevention and Control Act 1999; and regulations made by virtue of section 2(2) of the European Communities Act 1972 to the extent that the regulations relate to pollution: Environment Act 1995, s 33(5). A general discussion of the meaning of 'pollution of the environment' may be found in Tromans & Poustie, *Environmental Protection Legislation 1990-2002* (4<sup>th</sup> ed, 2003) at pp.660-661.

<sup>237</sup> It should be noted that SEPA's functions in relation to waste management under Parts I and II of the EPA 1990, under the PPC Regime and the Landfill (Scotland) Regulations 2003 must be discharged so as to fulfil the "relevant objectives" derived from EC Directive 75/442 (as amended by EC Directive 91/156) on waste. Given these objectives derive from EC law they must ultimately take priority over the overarching aim in s 33 of the 1995 Act if the latter is indeed inconsistent with those objectives. Since ensuring that waste is recovered or disposed of without endangering human health is an objective as is waste minimisation (at least in terms of plan making) it is arguable that there is no real substantive inconsistency and indeed the waste management objectives with their specific reference to avoidance of harm to human health are arguably more directly aligned with environmental justice considerations.

boundaries of that discretion is not uniform and is dependent on the language of the particular statutory regime.

## **8.2 Water pollution controls: Control of Pollution Act 1974 (COPA) & Water Environment and Water Services (Scotland) Act 2003**

8.2.1 Part II of this statute governs the granting of consents permitting the discharge of effluent etc into controlled waters where the discharge is not the subject of an IPC authorisation or PPC permit. It also provides a framework of controls over diffuse water pollution. The regime is to be replaced by a system controls made by regulations under the Water Environment and Water Services (Scotland) Act 2003. In terms of point source controls in COPA, there is a duty imposed on SEPA not to withhold consent unreasonably<sup>238</sup>. This is effectively a presumption in favour of granting consent which arguably provides SEPA with the smallest degree of discretion to refuse a consent under any of its environmental licensing regimes although it is clear that a consent may be refused<sup>239</sup>. Consents may be granted subject to conditions and section 34(4) provides the scope of SEPA's power to impose conditions: SEPA can impose such reasonable conditions as it thinks fit. This power appears broad but is likely to be interpreted fairly narrowly by the courts in line with cases on planning conditions. The condition would need to be imposed for one of the purposes of Part II of COPA, be relevant to the application and otherwise be reasonable. It would need to further the overall aim of SEPA's pollution controls given in section 33 of the Environment Act 1995 (see para 8.1.1 above). A number of examples of issues which could be the subject of conditions are then given: (a) the place of discharge and the design and construction of any discharge outlets; (b) the nature, origin, composition, temperature, volume and rate of discharge and the period during which the discharge may be made; (c) provision of facilities for sampling and the provision, maintenance and use of manholes, inspection chambers, observation wells, boreholes; (d) provision, maintenance and testing of meters to measure the volume and rate of discharge and apparatus for determining the nature, composition and discharge; (e) the keeping of records of the nature, origin, composition, temperature, volume and rate of discharge and apparatus provided; (f) the making of returns to SEPA about the nature, origin, composition, temperature, volume and rate of discharge; and (g) treatment or other processing of the discharge so as to minimise its polluting effects on controlled waters<sup>240</sup>. Section 34(4) also provides that different conditions may be imposed in relation to different periods which presumably may be designed to reflect the fact that the flow of rivers may be considerably altered during different seasons or weather conditions. It could also possibly also relate to discharges being made during the day rather than at night to minimise noise being made by discharges impacting on neighbouring properties although this presumably would not be possible with plants which operated 24 hours a day as it would be an unreasonable restriction.

8.2.2 SEPA is also empowered to review any consent and the conditions attached to it and may revoke or modify the consent if it is reasonable to do so or to impose reasonable conditions on unconditional consents<sup>241</sup>. The Scottish Ministers may

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<sup>238</sup> Control of Pollution Act 1974, s 34(2)(b).

<sup>239</sup> Ibid, s 34(2)(a).

<sup>240</sup> Ibid, 34(4)(a)-(g).

<sup>241</sup> Ibid, s 37(1).

direct SEPA to revoke or modify a consent or to impose conditions on an unconditional consent in order to implement EC or other international obligations or to protect public health or flora and fauna dependent on the aquatic environment or as a consequence of representations made to them or otherwise<sup>242</sup>. However, there are restrictions on SEPA's ability to use its powers of revocation and modification. The consent cannot be revoked or modified by SEPA without the consent holder's written consent for a period of not less than 4 years from the day on which the consent takes effect and a subsequent revocation or modification cannot take place unless a further period of 4 years has elapsed from the date of service of the first revocation or modification notice<sup>243</sup>. These restrictions do not apply to notices served by SEPA in pursuance of directions from the Scottish Ministers made to ensure compliance with EC or other international obligations (in relation to the EC dimension this is because of the supremacy of EC law) or to protect public health or flora and fauna dependent on the aquatic environment although it does apply to notices served by SEPA pursuant to a direction from the Scottish Ministers in consequence of any representations made to them or otherwise.

8.2.3 Primarily these powers must be directed to the maintenance of water quality objectives<sup>244</sup>. However, there may in some instances be a correlation between poor water quality and particular communities which means that SEPA's efforts to ensure that particular water quality objectives were achieved coincided with environmental justice concerns. Nonetheless it appears given the breadth of the powers to impose conditions given to SEPA (or indeed to refuse to grant a consent) or to revoke a consent or modify its conditions that in any case SEPA could legitimately consider issues such as the cumulative impact of a range of sources of water pollution on a particular community. With the forthcoming extension of SEPA's water resources controls to matters such as abstraction under the Water Environment and Water Services (Scotland) Act 2003 SEPA will be in a better position to estimate the dilution effect of particular rivers since it will have fuller information about abstractions. This should assist in setting emission standards in discharge consent on a surer scientific basis. The enhanced monitoring which will also be required under the new regime may also serve to assist identification of communities which are disproportionately affected by forms of pollution including water.

8.2.4 The legislative aims of the new water environment regime will arguably make it easier for SEPA to address environmental justice issues within that system. . Part I of the 2003 Act deals with protection of the water environment and provides a non-exhaustive definition of the purposes of protection of the water environment: (a) preventing further deterioration of, and protecting and enhancing, the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on those aquatic ecosystems, (b) *promoting sustainable water use* based on the long-term protection of available water resources, (c) aiming at enhancing protection and improvement of the aquatic environment through, amongst other things, specific measures for the progressive reduction of discharges, emissions and losses of priority substances and the cessation or phasing out of discharges, emissions and losses of the priority hazardous substances, (d) ensuring the progressive reduction of pollution of groundwater and preventing further pollution of it, and (e) contributing to mitigating

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<sup>242</sup> Ibid, s 37(2).

<sup>243</sup> Ibid, s 38(1).

<sup>244</sup> Ibid, s 30D(1).



the effects of floods and droughts, all of which are with a view to contributing to the achievement of specified aims (emphasis added)<sup>245</sup>. The specified aims are: (a) *the provision of a sufficient supply of good quality surface water and groundwater as needed for sustainable, balanced and equitable water use*, (b) a significant reduction in pollution of groundwater, (c) the protection of territorial and other marine waters, and (d) achieving the objectives of international agreements, including those which aim to prevent and eliminate pollution of the marine environment, in relation to which measures are adopted under EC Council Directive 2000/60, article 16 (emphasis added)<sup>246</sup>.

8.2.5 The general duties imposed by the Water Environment and Water Services (Scotland) Act 2003 are also worthy of note. To ensure compliance with the requirements of the directive, the Scottish Ministers, SEPA and the responsible authorities must exercise their functions or, in the case of the latter, their designated functions to secure such compliance<sup>247</sup>. In exercising such functions, all these bodies are placed under duties (i) *to have regard to social and economic impact of such exercise of those functions*; (ii) so far as is consistent with the purposes of the relevant enactment or designated function in question (a) to promote sustainable flood management, and (b) *to act in the way best calculated to contribute to the achievement of sustainable development*; and (iii) *so far as practicable, to adopt an integrated approach by co-operating with each other in order to co-ordinate the exercise of their respective functions* (emphasis added)<sup>248</sup>. A duty to have regard to the social and economic impact clearly provides a locus for considering environmental justice impact and, given that environmental justice is now regarded as a facet of sustainable development, the duty to act in the best way calculated to contribute to the achievement of sustainable development also provides such a locus. The duty to co-operate and hence adopt an integrated approach may serve to further both procedural and distributive environmental justice and serves to address some of the concerns expressed in the PFMR regarding the relationship between planning and environmental protection and possibly having single points of contact – albeit purely in the context of SEPA’s water environment functions<sup>249</sup>.

### 8.3 Pollution Prevention and Control regime

8.3.1 The Pollution Prevention and Control Act 1999 provides that the general purpose of section 2 (the regulation making power under which SSI 2000/323 etc have been made) is (a) the implementation of the IPPC Directive; “(b) regulating, otherwise than in pursuance of that Directive, activities which are capable of causing any environmental pollution; (c) otherwise preventing or controlling emissions capable of causing any such pollution”<sup>250</sup>. “Environmental pollution” is defined as “pollution of the air, water or land which may give rise to harm”<sup>251</sup>. “Pollution” is further defined as including pollution caused by noise, heat or vibration or any other kind of release of energy and “air” is defined as including air within buildings and air

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<sup>245</sup> Water Environment and Water Services (Scotland) Act 2003, s 1(2).

<sup>246</sup> Ibid, s 1(3).

<sup>247</sup> Ibid, s 2(1),(2). ‘Responsible authorities’ is defined as meaning such public bodies and office-holders, or public bodies and office-holders of such descriptions, as the Scottish Ministers may by order designate for the purposes of *ibid*, Pt I: *ibid*, s 2(8).

<sup>248</sup> Ibid, s 2(3),(4).

<sup>249</sup> See eg paras 4.5.5 and 4.5.6 above.

<sup>250</sup> Pollution Prevention and Control Act 1999, s 1(1).

<sup>251</sup> Ibid, s 1(2).

within other natural or man-made structures above or below ground. Significantly in the definition of “environmental pollution”, “harm” is defined as:

- (a) harm to the health of human beings or other living organisms;
- (b) harm to the quality of the environment including –
  - (i) harm to the quality of the environment taken as a whole,
  - (ii) harm to the quality of the air, water or land, and
  - (iii) other impairment of, or interference with, the ecological systems of which any living organisms form part;
- (c) offence to the senses of human beings;
- (d) damage to property; or
- (e) impairment of, or interference with, amenities or other legitimate uses of the environment (expressions used in this paragraph having the same meaning as in Council Directive 96/61/EC).<sup>252</sup>

Clearly then controls in regulations made under section 2 may be directed at preventing or minimising etc harm to human health, offence to the senses of human beings, impairment of, or interference with amenities, all of which have significance when considering distributive environmental justice. It is noteworthy that section 2 which bestows the Scottish Ministers with the power to make regulations expressly provides that such regulations “may make different provision for different cases, including different provision in relation to different persons, circumstances, areas or localities”.<sup>253</sup> Although this clearly does not relate to specific scope of this project it does indicate that the Scottish Ministers could directly address environmental justice concerns in regulations by making special provision for those or those areas which are disproportionately affected by environmental pollution.

8.3.2 Turning to the Pollution Prevention and Control (Scotland) Regulations 2000 (SSI 2000/323) which have been made under the 1999 Act. Considerable discretion is given to SEPA in the imposition of permit conditions. General principles which SEPA must take account of when determining permit conditions are (1) that the regulated installation or mobile plant should be operated in such a way that (a) all the appropriate preventative measures are taken against pollution, in particular through application of the best available techniques; (b) no significant pollution is caused; and (2) in relation to Part A installations and mobile plant that they should be operated in such a way that (a) waste production is avoided ..., but where waste is produced, it is recovered or, where that is technically and economically impossible, it is disposed of while avoiding or reducing any impact on the environment; (b) energy is used efficiently; (c) the necessary measures are taken to prevent accidents and limit their consequences, and that upon final cessation of activities, the necessary measures should be taken to avoid any pollution risk and to return the site of the installation or mobile plant to a satisfactory state<sup>254</sup>. Regulation 9 contains specific requirements as to permit conditions. At a general level such conditions must be imposed for the purpose of ensuring a high level of protection for the environment as a whole (in the case of Part A installations or mobile plant) or for the purpose of preventing or, where that is not practicable, reducing emissions into the air (in the case of Part B installations or mobile plant). Emission limit values must be included in particular to

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<sup>252</sup> Ibid, s 1(3).

<sup>253</sup> Ibid, s 2(3)(b).

<sup>254</sup> SSI 2000/323, reg 8.

deal with the pollutants listed in Schedule 5 to the regulations. Very significantly for the purpose of addressing distributive EJ concerns emission limit values “shall take account of the technical characteristics of the particular installation or mobile plant being permitted, and in the case of [an] installation[s] or a Part A mobile plant, its geographical location and *the local environmental conditions*” (emphasis added)<sup>255</sup>. This clearly suggests that variable emission limit values can be imposed depending on the prevailing local environmental conditions and thus that stricter emission limit values could be imposed to deal with high risk communities. That provision is subject to the requirement that where an environmental quality standard requires stricter emission limit values than would otherwise be imposed those stricter standards must be imposed<sup>256</sup>. This may also assist high risk communities in the sense that if there are already considerable emissions, for example, to air, impacting on a community an application for a new installation might potentially result in the applicable quality standard being breached. This might require the imposition of stricter emission limit values on the new installation and the variation of emission limit values applicable to existing installations to ensure that the overall quality standard is not breached. It should be noted that “environmental quality standard” here means “the set of requirements which must be fulfilled at a given time by a given environment or particular part thereof, as set out in Community legislation”.<sup>257</sup> Therefore it does not include any local quality standards set by SEPA or those mandated by domestic legislation alone but only those set by Community legislation.

8.3.3 SEPA is also under a duty to review permit conditions periodically, although SEPA may conduct such a review at any time<sup>258</sup>. Significantly, from an environmental justice perspective, a review of a permit must be carried out if the pollution from the installation is of such significance that the existing emission limit values need to be revised or new emission limit values included in the permit<sup>259</sup>. There are also provisions on permit variation<sup>260</sup>. A variation may result from a review or from an application by an operator or otherwise<sup>261</sup>. Given that local environmental conditions are a factor in relation to determining appropriate emission limit values, it would appear that environmental justice concerns could legitimately drive such reviews and variation of particular permit conditions.

#### **8.4 Integrated pollution control & local air pollution control: Environmental Protection Act 1990, Part I**

8.4.1 Given the progressive replacement of Part I by the PPC regime discussed above SEPA’s powers to impose conditions in authorisations under Part I is becoming less significant although given the long transitional period it is conceivable that some variations of authorisations might be made without triggering a switch to the PPC regime.

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<sup>255</sup> Ibid, reg 9(7).

<sup>256</sup> Ibid, reg 9(8).

<sup>257</sup> Ibid.

<sup>258</sup> Ibid, reg 11.

<sup>259</sup> Ibid, reg 11(2)(a). It may also be relevant in the EJ context that a review must be conducted where the operational safety of the activities carried on requires other techniques to be used: *ibid*, reg 11(2)(c).

<sup>260</sup> Ibid, regs 12-13.

<sup>261</sup> Ibid, reg 13(1).

8.4.2 Section 7 governs authorisation conditions. An authorisation must contain (a) such specific conditions as SEPA considers appropriate for achieving the objectives specified below (this is subject to (b)); (b) such conditions as are specified in directions given by the Scottish Ministers; and (c) such other conditions (if any) as appear to SEPA to be appropriate<sup>262</sup>. The objectives for the purpose of (a) above are: (a) ensuring that, in carrying on a prescribed process, BATNEEC will be used (i) for preventing the release of substances prescribed for any environmental medium into that medium or, where that is not practicable by such means, for reducing the release of such substances to a minimum and for rendering harmless any such substances which are so released; and (ii) for rendering harmless any other substances which might cause harm if released into any environmental medium; (b) compliance with any directions by the Scottish Ministers given for the implementation of any international or EC obligations relating to the environment; (c) compliance with any limits or requirements and achievement of any quality standards or objectives prescribed by the Scottish Ministers under any of the relevant enactments; (d) compliance with any requirements applicable to the grant of authorisation specified by or under a plan made by the Scottish Ministers under section 3(5) of the EPA 1990<sup>263</sup>. There is a general implied condition in every authorisation that BATNEEC must be used<sup>264</sup> although this is displaced where a specific condition is imposed<sup>265</sup>. Where the process is one designated for Local Air Pollution Control rather than Integrated Pollution Control, references to the release of substances into any environmental medium must be read as references to the release of substances into the air<sup>266</sup>. It is also expressly provided that without prejudice to the generality of the power to impose conditions, authorisation conditions may impose limits on the amounts or composition of any substance produced by or utilised in the process in any period; and require advance notification of any proposed changes in the manner of carrying on the process<sup>267</sup>. SEPA must have regard to any guidance issued by the Secretary of State/Scottish Ministers for the purposes of the application of BATNEEC under EPA s 7(2)<sup>268</sup>.

8.4.3 The ability to impose conditions for environmental justice purposes is less immediately apparent here but clearly conditions which require the release of substances to be prevented, reduced or rendered harmless may contribute to distributive justice<sup>269</sup>. Nonetheless there has been some litigation on the scope of conditions imposed under s 7 which is relevant to environmental justice. In *R v Secretary of State for the Environment and Peninsular Proteins, ex p Torrridge District Council* which involved an animal rendering process, there was a history of

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<sup>262</sup> Environmental Protection Act 1990, s 7(1).

<sup>263</sup> *Ibid*, s 7(2).

<sup>264</sup> *Ibid*, s 7(4).

<sup>265</sup> *Ibid*, s 7(6). The relevant enactments referred to are any enactments or instruments contained in or made under (a) the Clean Air Act 1968, s 2; (b) the European Communities Act 1972, s 2; (c) Part I of the Health and Safety at Work etc Act 1974; (d) Parts II, III or IV of the Control of Pollution Act 1974; (e) the Water Resources Act 1991; (f) EPA 1990, s 3; and (g) the Environment Act 1995, s 87.

<sup>266</sup> *Ibid*, s 7(5).

<sup>267</sup> *Ibid*, s 7(8).

<sup>268</sup> *Ibid*, s 7(11).

<sup>269</sup> It should be noted that the definition of 'harm' is "harm to the health of living organisms or other interference with ecological systems of which they form part and, in the case of man, includes offence to any of his senses or harm to his property; and 'harmless' has a corresponding meaning": EPA 1990, s 1(4).

odour nuisance from the plant with complaints from inhabitants despite modifications made by the operators to the plant<sup>270</sup>. The local authority opposed the application. At the subsequent appeal the local authority and operator agreed a set of conditions to subject to which the authorisation would be granted if the appeal succeeded. The relevant condition stipulated that air emissions be free of offensive odours outside the process boundary. The Secretary of State granted the appeal but failed to include the above condition. The local authority challenged the condition in judicial review proceedings. The court held that the Secretary of State in deciding not to impose the above condition had only had regard to the lack of close proximity of the plant to local residents and had hence concluded there were no exceptional circumstances justifying the imposition of the condition. The court quashed the Secretary of State's decision on the basis that he had failed to take account of all material considerations including the height of the emission, the prevailing wind, the lie of the land, the extent of the population affected and the degree of offensiveness of the smell and its frequency. Clearly some of these factors are highly relevant in the context of environmental justice. Furthermore McCullough J also made important points about the relationship between s 7(1)(a) and s 7(1)(c) in his judgment. He held that "Section 7(1)(c), however, not only empowers an enforcing authority, but obliges it, if it considers it appropriate, to impose a condition which prevents their release *even though this could not be achieved by BATNEEC*."<sup>271</sup> This indicates that although conditions are primarily designed to prevent or minimise pollution by means of BATNEEC, nonetheless it is possible to go beyond BATNEEC requirements where circumstances demand it. Again, this has considerable significance in the context of environmental justice. The starting point for SEPA officers considering an authorisation or variation thereof would need to be the employment of BATNEEC but if that in itself were not sufficient to address particular concerns, there is an obligation in section 7(1)(c) to consider what other conditions would be appropriate to ensure adequate environmental protection. It should also be noted that the reported cases mentioned above indicate that regulators already take this approach. It is simply that it has not been explicitly articulated previously as furthering environmental justice.

## **8.5 Waste management controls I: Environmental Protection Act 1990, Part II**

8.5.1 Although landfills are to be regulated under the Landfill (Scotland) Regulations 2003 and the Pollution Prevention and Control (Scotland) Regulations 2000, certain waste facilities such as transfer stations and certain recovery facilities will still be regulated under Part II of the 1990 Act.

8.5.2 Once again the regime is, in general terms, able to address environmental justice concerns. Firstly, there must either be planning permission in force for the use of the land as a waste facility or an established use certificate must be in force before any waste management licence can be granted under Part II (section 36(2)). This in itself

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<sup>270</sup> [1997] Env LR 557. *Procurator Fiscal v Seed Crushers (Scotland) Ltd* [1998] Env LR 586 raised an identical question about the competence and enforceability of the same condition in criminal proceedings relating to breach of the condition in Scotland. The High Court reached the same conclusions regarding the enforceability and competence of the questions as did court in the *Torrige* case. The validity of the guidance suggesting the imposition of this condition to animal rendering processes was also unsuccessfully challenged in *R (on the application of UK Renderers Association Ltd) v SSETR* [2002] Env LR 510.

<sup>271</sup> [1997] Env LR 557 at p 561.

suggests that if environmental justice is being adequately taken account of in the planning process (and, as argued above, SEPA can raise environmental justice concerns as a statutory consultee in the planning process) planning permission might be refused if there were a real problem of a community being disproportionately affected by a particular facility or extension thereto.

8.5.3 However, assuming planning permission were granted or an established use certificate were in force, SEPA has some discretion in deciding whether or not to refuse the licence. Section 36(3) provides that SEPA must not reject the application if it is satisfied that the applicant is a fit and proper person unless it is satisfied that rejection is necessary in order to prevent (a) pollution of the environment; (b) harm to human health; or (c) (where planning permission is not in force) serious detriment to the amenities of the locality. These provisions would appear to provide SEPA with a locus for rejecting an application on environmental justice grounds, for example, that it might give rise to harm to human health.

8.5.4 If SEPA considered that the impact of the facility could be adequately controlled by means of conditions, there is a wide power in section 35(3) available to SEPA. It provides that the licence is to be granted subject to such conditions as appear appropriate to SEPA. Such conditions may relate to the activities which the licence authorises and to the precautions to be taken and works to be carried out in connection with or in consequence of those activities. Thus, requirements may be imposed which must be complied with before the authorised activities commence or after they have ceased. Although the discretion granted by this provision is wide it must nonetheless comply with ordinary principles of administrative law, particularly the requirement that they must be related to the purpose of the legislation. In *Attorney-General's Reference (No 2 of 1988)* it was held that a condition prohibiting the creation of public nuisances of all kinds could not lawfully be imposed under section 6(2) of the predecessor legislation, COPA<sup>272</sup>. The purpose of that legislation (set out in COPA, section 5(3)) was seen as being to ensure that waste disposal took place without risk of water pollution or harm to public health. The purpose of the 1990 Act is arguably much wider and is to ensure that waste management takes place without (a) pollution of the environment; (b) harm to human health; or (c) (where planning permission is not in force) serious detriment to the amenities of the locality. This would seem to justify a wider range of permissible conditions. Clearly such conditions could address environmental justice concerns given the human health and amenity purposes of the legislation. The earlier legislative provision, COPA section 6(2), contained a list of specific matters to which conditions could relate without prejudice to the general power of the section: (a) duration of the licence; (b) supervision by the holder of activities to which the licence relates; (c) kinds and quantities of waste, methods of dealing with waste, and recording of information; (d) precautions to be taken on site; (e) steps to facilitate compliance with any relevant planning conditions; (f) hours of operation; and (g) works to be carried out before licensed activities could commence or while they were continuing. (b), (c), (d), (f) and (g) all appear to have the potential to address environmental justice concerns. Although there is no such list in section 35 of the 1990 Act such matters could certainly still form the subject matter of conditions under the new regime. Extensive guidance is also available on licence conditions, not least in Waste Management

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<sup>272</sup> [1989] 3 WLR 397.

Paper 4, The Licensing of Waste Facilities, Appendix A of which provides a checklist of conditions to be considered. The Environment Agency has also published extensive material on licensing much of which contains material on conditions<sup>273</sup>.

8.5.5 There are provisions relating to the variation, revocation and suspension of licences in sections 37 and 38 of the 1990 Act. Section 37 could be utilised, for example, to revise licences to address to a greater extent concerns of disproportionately affected by a facility or facilities. Where there are concerns that could not be addressed by variation, enforcement using the suspension or revocation or revocation provisions may be appropriate.

## **8.6 Waste management controls II: Landfill (Scotland) Regulations 2003**

8.6.1 Regulation 10 of the 2003 Regulations makes detailed provision for the imposition of conditions in landfill permits. Most of the provisions could indirectly relate to environmental justice but most directly regulation 10(2)(c), which requires the imposition of conditions which ensure that the landfill is operated in such a manner that the necessary measures are taken to prevent accidents and to limit their consequences and regulation 10(3)(a)(i) which requires that conditions are imposed to meet the general requirements of Schedule 3 and regulation 10(3)(a)(viii) which requires that conditions are imposed to deal with the requirements of regulation 17 (closure and after-care of landfills). Of particular note in Schedule 3 are requirements (1) that a landfill permit should only be issued (a) if the characteristics of the site taking into consideration various location-related requirements including the distance from the boundary to residential and recreational areas and the protection of the natural and cultural heritage in the area or (b) the corrective measures to be taken indicate that the landfill does not pose a serious environmental risk; (2) regarding leachate management to ensure that leachate is collected and treated to the appropriate standard so it can be discharged; (3) gas control measures which must be carried on in a manner which minimises damage to or deterioration of the environment and risk to human health; and (4) measures to minimise nuisances and hazards arising from the landfill in relation to (a) emissions of odours and dust; (b) wind-blown materials; (c) noise and traffic; (d) birds, vermin and insects; (e) formation of aerosols; and (f) fires; and equipment to ensure that dirt originating from the site is not dispersed onto public roads and the surrounding land. These provisions clearly enable environmental justice considerations to be factored in, for example, by means of refusing a permit taking account of the site's proximity to residential areas or by tailoring site-specific conditions to address potential nuisance concerns. The provisions relating to closure and after care clearly have a role in protecting communities from ongoing environmental risks from such sites following their closure.

## **8.7 Radioactive substances controls: Radioactive Substances Act 1993**

8.7.1 For the sake of brevity this statute is not considered in detail here. However, it should be noted that its provisions are directed at protecting human health from exposure to radiation so it would certainly be capable of addressing environmental justice concerns. There are provisions relating to the imposition of limitations and

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<sup>273</sup> See: [www.environment-agency.gov.uk/business/wasteman/wml](http://www.environment-agency.gov.uk/business/wasteman/wml) and [www.environment-agency.gov.uk/business/wasteman/landfill](http://www.environment-agency.gov.uk/business/wasteman/landfill)

conditions both in relation to the keeping and use of radioactive substances and in relation to the accumulation and disposal of radioactive waste. The same approach as has been used above should be employed to ascertain the extent to which powers to impose conditions may be used to address environmental justice concerns.

## **8.8 Can SEPA lawfully impose conditions requiring operators to enter into Good Neighbour Agreements to further distributive and/or procedural environmental justice?**

8.8.1 One way of increasing the accountability of industry to local communities and enhancing the participation of local communities in the ongoing environmental performance of industry is the use of Good Neighbour Agreements (GNAs). Although use of GNAs has principally been developed in the USA<sup>274</sup>, nonetheless SEPA and the Scottish Executive have contributed funding to a Friends of the Earth Scotland project which has studied whether GNAs could be adapted to address environmental injustice in Scotland<sup>275</sup>.

8.8.2 The use of GNAs is hinted at in the First Minister's keynote Environmental Justice speech<sup>276</sup> and would clearly be a way of ensuring better engagement between industry and the community in which it is located. There is a possibility that SEPA might have a role in promoting the use of GNAs. Love Thy Neighbour notes that in the USA key provisions of GNAs may include:

- community access to information about the facility
- right to inspect the facility
- right to participate in preparing emergency response procedures and accident preparedness plans
- company commitments to reduce pollution
- company commitments to local community development
- citizen group concessions such as agreeing to cease protest and/or legal action.

8.8.3 Love Thy Neighbour also notes that although some GNAs are verbal or non-binding, most are binding and legally enforceable. Enforceability is achieved either by making compliance with GNA a condition of the relevant permit(s) for a facility or using contract law to create a legally binding agreement between the company and community. The report also indicates that settlement agreements at the conclusion of litigation may contain GNAs which would thus also be enforceable by the court.

8.8.4 Love Thy Neighbour examines whether such GNAs could be implemented within the current legal framework in Scotland. It tentatively suggests that "It would be worth exploring the possibility of making GNAs legally binding by attaching them to SEPA authorisation permits" (3.3, p 30) and indicates that for certain applications

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<sup>274</sup> See eg Lewis & Henkels, 'Good Neighbor Agreements: A Tool for Environmental and Social Justice?' in Williams (ed), *Environmental Victims* (Earthscan, 1998) and Lewis, *The Good Neighbor Handbook: A Community-based Strategy for Sustainable Industry* (Apex Press, 1992).

<sup>275</sup> Friends of the Earth Scotland, *Love Thy Neighbour: The Potential for Good Neighbour Agreements in Scotland*, June 2004. See also Friends of the Earth Scotland, *Good Neighbour Agreements, Demanding Environmental Justice in Your Backyard*, December 2000.

<sup>276</sup> See para 4.1.2 above.



for new permits SEPA could require GNAs to be negotiated in advance with local communities. It also notes that since permit conditions are reviewed regularly conditions requiring GNAs could be subsequently added. However, Love Thy Neighbour does sound a note of caution that this might require amending legislation and that the SEPA might only be able to secure pollution prevention. It notes that new policy guidelines might be required under section 31 of the Environment Act 1995. It also notes that section 32(d) of the 1995 Act might provide a basis for promoting the use of GNAs. This provides that “in formulating or considering any proposals relating to any functions of SEPA ... to have regard to the social and economic needs of any area or description of area of Scotland”. The report does indicate that the involvement of SEPA in requiring GNAs etc might undermine community ownership and might create conflicts of interest for the regulator. It also notes that if a GNA were to become enforceable as a permit condition the procurator fiscal would ultimately be responsible for any prosecution resulting from non-compliance with the condition.

8.8.5 Unfortunately there are a number of difficulties in the approach taken by Love Thy Neighbour. First, there is no detailed analysis of the legal powers which SEPA has to impose conditions. This means that some of the arguments in the report are based on a shaky foundation. Secondly, the report does not clearly distinguish between SEPA requiring GNAs to be entered into and the promotion of GNAs. Thirdly, even if guidance were given to SEPA under section 31 to require GNAs as permit conditions, that would not necessarily mean that such a course of action was actually lawful under the legal framework. Guidance may be held unlawful by the courts if it does not conform to the parameters of the relevant legal regulatory regime. Finally, the duty in section 32(d) of the Environment Act 1995 only applies to “in formulating or considering any proposals relating to any functions of SEPA”. As noted above<sup>277</sup> this duty therefore does not apply to the actual exercise or discharge of SEPA’s functions but only to proposals relating to them. Thus, these provisions in themselves do not – and arguably could not - provide a legal basis for SEPA attaching GNAs to permit conditions. These criticisms are expanded on in more detail below.

8.8.6 The key legal problem if SEPA were to attempt to require a licence holder or applicant to enter into a GNA is that compliance with the condition is dependent on the willingness of a third party/third parties to enter into the agreement. There is planning case law on this point in relation to the imposition of planning conditions which clearly indicates that such conditions are unlawful because the applicant lacks the capacity to comply. The leading Scottish case is *British Airports Authority v Secretary of State for Scotland*<sup>278</sup>. Conditions were imposed in relation to 3 planning applications requiring the applicant, BAA, to control the direction of take off and landing of aircraft at Aberdeen Airport. However, that was an issue which only the Civil Aviation Authority could control. Lord Cameron stated:

“A condition imposed under the planning legislation can be enforced by enforcement orders in terms of [what was then] s.84 of the 1972 Act. Failure to comply with such an order involves exposure to substantial penal sanctions. In my opinion, it follows from this that the necessary assumption on which

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<sup>277</sup> See para 5.1.1 above.

<sup>278</sup> 1979 SC 200; 1979 SLT 197.

this structure of conditions and powers of enforcement rests, is that nothing shall be imposed upon a developer with which it is plain he does not possess the capacity to comply.”<sup>279</sup>

Thus an unenforceable planning condition is unreasonable and thus ultra vires. This reasoning would appear to apply with equal force to environmental licence conditions.

8.8.7 In planning law one way round this is to impose negative or suspensive conditions which are also known as *Grampian* conditions after the House of Lords decision which established their lawfulness<sup>280</sup>. The approach in such conditions is to provide that the development shall not commence unless and until something is done. This could include, for example, the closing of a road, the provision of infrastructure or the remediation of contamination. Such a condition is enforceable because (1) it does not specifically require the developer to close the road, provide the infrastructure etc, rather it simply indicates that this must be done without specifying who should do it; and (2) commencement of the development is within the developer’s control and hence if the developer did proceed with the development without the suspensive part of the condition being satisfied enforcement action could legitimately be taken. It is conceivable that SEPA might be able to impose a suspensive condition under a licensing regime, eg the plant is not permitted to emit or discharge any matter unless and until a GNA was entered into. It has also been held by the House of Lords a suspensive planning condition is legally valid even if there is no reasonable prospect of its fulfilment<sup>281</sup>. However, it still appears that even such a condition may be unlawful on the grounds that it is unreasonable. Essentially this is because there is a significant difference between a suspensive condition in planning which is designed to overcome a fundamental objection to a development (eg lack of access, lack of infrastructure etc) and the suggested suspensive condition in an environmental licence. In the latter context SEPA is not seeking to overcome a fundamental problem since it already has extensive powers to control emissions from the plant through conditions, carry out inspections and take enforcement action quite aside from the amount of environmental information about compliance with the licence which would be publicly available through the register. This suggests that the need for a GNA, while perhaps desirable to ensure better engagement with the local community, is hardly fundamental. For that reason it seems unreasonable to make the operation of the plant dependent on the signing of an agreement with the community. Even a condition requiring a licence applicant or holder to try to negotiate such an agreement is likely to be unlawful as it would again be unenforceable and hence ultra vires - eg what steps would a company need to take to satisfy the requirement “to try to negotiate an agreement”?

8.8.8 Even assuming the foregoing difficulty could be overcome SEPA would also need to point to a legal basis for the imposition of such a requirement in each statutory regime. As noted above the overarching aim of SEPA’s pollution control functions is set out in section 33 of the Environment Act 1995 (subject to the relevant objectives of the waste management regime). However, each regime has specific

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<sup>279</sup> 1979 SLT 197 at 210.

<sup>280</sup> *Grampian Regional Council v Aberdeen District Council* 1984 SLT 197, HL. See also *Strathclyde Regional Council & Renfrew District Council v Secretary of State for Scotland and Elcomatic Ltd* 1996 SCLR 625, IH.

<sup>281</sup> *British Railways Board v Secretary of State for the Environment* [1994] JPL 32, HL.

provisions governing the purposes for which conditions may be imposed. It is not immediately clear that these provisions would provide an unassailable basis for the requirement to enter into a GNA, even taking account of general provisions such as section 37 of the Environment Act 1995 which empowers SEPA to do anything which is incidental or conducive to the carrying out of its functions.

8.8.9 Furthermore, even assuming the foregoing legal difficulties were absent, there are also other legal problems with GNAs. Firstly, there is the issue of who can sign on behalf of the community which is by no means unproblematic. A subsidiary problem is how one defines a community and its members. Secondly, is the question of the legal status of such agreements and crucially their enforceability. Even assuming that the agreement were enforceable there would remain questions about which member(s) of the community could enforce it. Thirdly, if SEPA were a party to such an agreement and it purported to define the circumstances in which SEPA could take enforcement action or carry out inspections, that would be ultra vires as SEPA cannot fetter its discretion in these matters in this way.

8.8.10 However, having indicated that there appear to be insuperable legal hurdles to SEPA requiring licence applicants or holders to enter into GNAs, there is nothing to stop SEPA *promoting* the use of GNAs between licence holders and communities. This may satisfy some of those in the community who wish for closer engagement with the plant operators. However, the danger of using GNAs in this context is that they give rise to unrealistic expectations within the community although that could probably be addressed by means of ensuring the provisions of the GNA in turn are not unrealistic.

8.8.11 It would plainly be possible in theory for communities to enter into GNAs with operators as Love Thy Neighbour points out. However, there are also legal difficulties with this approach. The issue of the legal status of the community again immediately arises. Love Thy Neighbour indicates that formation of a community trust or limited company might be possible to give the community legal status but again the issue of what constitutes the community arises, how representative such bodies might actually be and whether enforcement of the obligations contained in the GNA would extend beyond authorised officers of the trust or company. There is also the issue that such agreements could not bind the operator to undertake obligations which conflicted in any way with its obligations under its permit from SEPA. This perhaps suggests that such agreements might relate to procedural matters such as direct disclosure of information to the community or liaison with the community rather than to more substantive issues.

## **8.9 Findings**

- SEPA may lawfully address environmental justice concerns in relation to new installations by means of, for example, imposing stricter emission limit values in the relevant licence.
- SEPA may lawfully address environmental justice concerns in relation to existing installations by means of, for example, making use of licence variation provisions to impose stricter emission limit values in the relevant licence. This is the case even where BATNEEC or BAT must be applied. There is still sufficient legislative discretion to go beyond BATNEEC or BAT

if required.

- The few reported cases on powers to impose conditions in environmental licences indicate that regulators already impose stricter conditions where local circumstances demand it. It is simply that the approach has not been explicitly articulated previously as furthering environmental justice.
- SEPA may not lawfully require an operator to enter into a Good Neighbour Agreement with a local community as a condition of a licence. However, there is nothing to prevent SEPA from promoting such agreements as long as they do not fetter SEPA's discretion in any way.

### 8.10 Recommendations

- Once SEPA has established a methodology for identifying communities subject to disproportionate levels of pollution and has identified such communities it ought to review existing environmental licences to establish whether varying the relevant licences by, for example, imposing stricter emission standards might reduce the pollution burden on such communities.
- Having again identified communities subject to disproportionate levels of pollution, SEPA ought to be guided by this information in determining new licence applications and imposing appropriate conditions.

## 9 ENVIRONMENTAL JUSTICE AND SEPA'S ENFORCEMENT FUNCTIONS

### 9.1 Powers, duties and structuring the exercise of enforcement discretion

9.1.1 SEPA has a very wide range of mechanisms which it can use to enforce its regulatory regimes. Primarily exercise of these mechanisms is at SEPA's discretion although in some cases SEPA is under a duty to act and may also be directed to act by the Scottish Ministers. Hence the service of enforcement notices under various regimes is a matter of discretion for SEPA<sup>282</sup> whereas the service of prohibition notices under Part I of the Environmental Protection Act 1990 or suspension notices under the Pollution Prevention and Control (Scotland) Regulations 2000 is mandatory when certain tests are met although it is clear that SEPA is given a discretion in deciding whether the tests are met by the wording of the provisions<sup>283</sup>. For example the 2000 Regulations provide "*If SEPA is of the opinion ... that the operation of the installation or mobile plant ... involves the risk of serious pollution, it shall ...*" (emphasis added)<sup>284</sup>. Increasingly SEPA is also placed under general duties in relation to enforcement. Thus, while a PPC or landfill permit is in force SEPA is placed under a duty "to take such action ... as may be necessary for the purpose of ensuring that the conditions of the permit are complied with"<sup>285</sup>. However, this duty is not absolute as is illustrated by the words "to take such action ... as may be

<sup>282</sup> See eg Control of Pollution Act 1974, s 49A; Environmental Protection Act 1990, s 13; Pollution Prevention and Control (Scotland) Regulations 2000, reg 19. However, the exercise of such discretion may serve to discharge more general duties in relation to enforcement.

<sup>283</sup> Environmental Protection Act 1990, s 14; Pollution Prevention and Control (Scotland) Regulations 2000, SSI 2000/323, reg 20.

<sup>284</sup> Pollution Prevention and Control (Scotland) Regulations 2000, reg 20(1).

<sup>285</sup> Ibid, reg 18. See also Environmental Protection Act 1990, s 42(1).

necessary”. These words give SEPA considerable discretion as to how it discharges the duty. The exercise of discretion where there are enforcement powers or qualified duties may certainly be structured by policy. Such policy ought to be informed by the range of general duties which SEPA must discharge under the Environment Act 1995<sup>286</sup>, statutory and non-statutory guidance given to SEPA by the Scottish Ministers, policy priorities decided on by the Scottish Ministers and more generally by applicable UK Government, Scottish Executive and self-developed policies. Thus, given the adoption of environmental justice as a policy objective, already it ought to be a material consideration in deciding on whether or not to take enforcement action<sup>287</sup>.

## **9.2 Enforcing conditions addressing environmental justice concerns**

9.2.1 However, addressing environmental justice is to some extent dependent on action taken in relation to licensing. If conditions are imposed which are designed to address environmental justice concerns, for example, by imposing strict emission limits because of possible cumulative impact, then using mechanisms such as enforcement notices to secure compliance with those conditions is unproblematic.

## **9.3 Targeting enforcement action**

9.3.1 Enforcement action could clearly be targeted towards plants impacting on communities that are already suffering disproportionately. Again this could be objectively justified. . In the US it has been argued that

“Community groups are not only focused on a permit’s terms and conditions, but they also frequently seek to ensure that a facility actually complies with those conditions. More visible EPA enforcement and regular facility inspections in these communities can help to provided this assurance. Once a permit is issued, EPA’s vigilance is important to establish credibility for the permitting process and to demonstrate that the agency has meaningfully incorporated environmental justice concerns into that process. EPA could devote greater inspection and enforcement resources toward monitoring facility performance in high-risk communities, thus increasing EPA’s presence”<sup>288</sup>.

## **9.4 Amending SEPA’s enforcement policy**

9.4.1 To facilitate a targeted approach based on environmental justice concerns, SEPA’s enforcement policy could be amended accordingly to indicate that such circumstances would be given a priority. SEPA’s publicly available Policy Statement on Enforcement does not currently contain any reference to environmental justice concerns. However, in the section “Principles of Enforcement” alongside Proportionality, Consistency and Openness, there is a paragraph headed “Targeting” which reads

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<sup>286</sup> Environment Act 1995, ss 32-34. See also section 5.1 above.

<sup>287</sup> See the discussion in section 5.2 above regarding the status of environmental justice as a material consideration.

<sup>288</sup> *Environmental Justice in EPA Permitting*, p 39.

“SEPA’s efforts are concentrated on those activities which cause the greatest environmental damage, pose the greatest threats to the environment or undermine the regulatory regimes parliament has created to protect and improve the environment and *prevent harm to human health*. Action is focused on those who break the law or those directly responsible for environmental damage or risk.” (emphasis added)

This would be the appropriate place for a reference to environmental justice issues to be made. For example, one possibility might be to include a statement such as “or disproportionately affect communities which suffer relatively high levels of pollution/a degraded environment” after “pose the greatest threats to the environment ...”. It is recognised that there may be difficulties with such a phrase since it perhaps suggests a failure by SEPA to address other sources of pollution. The significance of the Policy Statement on Enforcement is not simply as a document for those regulated by SEPA and the public (SEPA’s stakeholders) but it also serves as a material consideration for SEPA officers who are considering enforcement action. Inclusion of a reference to environmental justice concerns is therefore a means of ensuring that those concerns are addressed by SEPA officers when they are considering enforcement action.

## **9.5 Human rights and enforcement**

9.5.1 There may also be human rights grounds which might require enforcement action to be taken in cases where a Convention right is being or is about to be infringed<sup>289</sup>. Where Convention rights are engaged in this way SEPA’s powers to take various forms of enforcement action would arguably be converted into duties since SEPA is under a duty by virtue of section 6 of the Human Rights Act 1998 not to act incompatibly with Convention rights.

## **9.6 Providing feedback to communities on enforcement action**

9.6.1 An overlap between the distributive and procedural dimensions of environmental justice is actually informing communities what enforcement action has been taken. This is dealt with in more detail in chapter 11 below<sup>290</sup>.

## **9.7 Reserve Powers: Clean Air Act 1993 & Environment Act 1995, Part IV (Air Quality)**

9.7.1 SEPA also has two sets of reserve powers which may be characterised as enforcement provisions. These are its reserve powers under section 19 of the Clean Air Act 1993 and under section 85 of the Environment Act 1995. Both potentially have a significant environmental justice dimension.

9.7.2 Local authorities have powers to declare the whole or any part of their districts smoke control areas under section 18 of the Clean Air Act 1993. Such orders (a) may make different provision for different parts of the smoke control area; (b) may limit the operation of section 20 (prohibition of emissions of smoke) to specified classes of

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<sup>289</sup> See *Lopez Ostra v Spain* (1995) 20 EHRR 277

<sup>290</sup> See para 11.5.3.

building in the area; and (c) may exempt specified buildings or classes of building (which is to include any specified, or any specified classes of, fixed boiler and industrial plant) or specified fireplaces or classes of fireplace in the area from the operation of section 20, upon such conditions as may be specified in the order<sup>291</sup>. The order may be revoked or varied by a subsequent order<sup>292</sup>. Detailed provision is made in relation to the coming into operation of smoke control orders<sup>293</sup>. If, after consultation with a local authority, the Scottish Environment Protection Agency is satisfied- (a) that it is expedient to abate the pollution of the air by smoke in the district or part of the district of the authority; and (b) that the authority have not exercised, or have not sufficiently exercised, their powers under section 18 to declare a smoke control area to abate the pollution, SEPA may direct the authority to prepare and submit to it for its approval, within such specified period (which cannot be less than six months from the direction), proposals for making and bringing into operation one or more smoke control orders within such period or periods as the authority think fit<sup>294</sup>. SEPA may reject any proposals submitted to it or may approve them in whole or in part, with or without modifications<sup>295</sup>. Where a local authority has been directed by SEPA to submit proposals either fail to submit proposals to SEPA within the period specified in the direction; or submit proposals which are rejected in whole or in part, SEPA, with the consent of the Scottish Ministers may make an order declaring them to be in default and directing them for the purposes of removing the default to exercise their powers under section 18 in such manner and within such period as may be specified in the order<sup>296</sup>. While proposals submitted by a local authority and approved by SEPA under these provisions are in force, it is the duty of the authority to make such order or orders under section 18 as are necessary to carry out the proposals<sup>297</sup>. A failure to comply with this duty could presumably be enforced by SEPA in the Court of Session seeking specific performance of statutory duty under the Court of Session Act 1988, section 45(b) by means of the judicial review procedure. These provisions clearly could have a role to play in addressing environmental justice concerns where a community was being disproportionately affected by smoke emissions and the relevant local authority had failed to act. The trigger for SEPA exercising its reserve powers in this situation is not based – directly at least - on any monitoring but is actually consultation with the local authority concerned presumably in relation to air quality issues generally. Therefore, it would seem appropriate for SEPA to have a regular programme of planned meetings or other forms of formal consultation with local authorities on air quality issues at which smoke control issues under the Clean Air Act 1993 could form part of the agenda.

9.7.3 Part IV of the Environment Act 1995 provides for a system of local authority controls to improve local air quality. The principal target of the controls is the reduction of pollution from traffic emissions. Local authorities are placed under a duty to conduct reviews of air quality in their areas from time to time<sup>298</sup>. This must include a review of whether the applicable air quality standards and objectives are

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<sup>291</sup> Clean Air Act, s 18(2).

<sup>292</sup> Ibid, s 18(3).

<sup>293</sup> Ibid, s 18(4); Sch 1.

<sup>294</sup> Ibid, s 19(1).

<sup>295</sup> Ibid, s 19(3).

<sup>296</sup> Ibid, s 19(4). An order made under s 19 (4) may be varied or revoked by a subsequent order so made: *ibid* s 19(5).

<sup>297</sup> Ibid, s 19(6).

<sup>298</sup> Environment Act 1995, s 82(1).

being met<sup>299</sup>. If the air quality in part (or the whole) of the area does not meet the air quality standards and objectives over the relevant period the area concerned must be designated by the local authority as an air quality management area (AQMA)<sup>300</sup>. Where an AQMA is designated the local authority is placed under a duty to assess the respects in which the air quality is not or is not likely to meet air quality standards or objectives<sup>301</sup>. It must also prepare within 12 months of the designation an action plan of measures to ensure that the areas does meet the air quality standards and objectives<sup>302</sup>. Any of the local authority's powers may be used (including planning, statutory nuisance, road traffic regulation, clean air etc)<sup>303</sup>. This is of considerable significance in the context of distributive environmental justice since one might argue that the designation of an area as an AQMA might be an almost automatic indication that the community affected is a high-risk one. SEPA is given various reserve powers in relation to this regime under section 85 although none are exercisable without the approval of the Scottish Ministers<sup>304</sup>. Thus SEPA may itself conduct or make or may require another party to conduct or make (1) a review of air quality and likely future air quality within the relevant period of air within the area of any local authority; (2) an assessment of whether air quality standards and objectives are being achieved, or are likely to be achieved within the relevant period, within the area of a local authority; (3) an identification of any parts of the area of a local authority in which it appears that those standards or objectives are not likely to be achieved within the relevant period; or (4) an assessment of the respects in which it appears that standards or objectives are not being achieved, or are not likely within the relevant period to be achieved, within the area of a local authority or within a designated area<sup>305</sup>. If it appears to SEPA (i) that air quality standards or objectives are not or are not likely to be achieved within the relevant period, within the area of a local authority; (ii) that a local authority has failed to discharge any duty imposed on it by or under Part IV; (iii) that the actions or proposed actions of a local authority in purported compliance with the provisions of this Part are inappropriate in all the circumstances of the case; or (iv) that developments in science or technology, or material changes in circumstances, have rendered inappropriate the actions or proposed actions of a local authority, SEPA may give the directions to the local authority requiring it to take specified steps<sup>306</sup>. A non-exhaustive list of examples of steps which a direction may require are given. These include requiring a local authority (i) to cause a an air quality review to be conducted; (ii) to designate an AQMA; (iii) to revoke or modify an AQMA; (iv) to prepare or modify an action plan for an AQMA; (v) to implement any measures contained in an action plan<sup>307</sup>. There are provisions requiring copies of any direction to be made available to the public<sup>308</sup> which may be significant in terms of procedural environmental justice for ensuring the public that action is being taken. Significantly local authorities are placed under a duty to comply with any directions given to them<sup>309</sup>. A failure to comply with the direction could be enforced by SEPA in the

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<sup>299</sup> Ibid, s 82(2)-(3).

<sup>300</sup> Ibid, s 83.

<sup>301</sup> Ibid, s 84(1).

<sup>302</sup> Ibid, s 84(2).

<sup>303</sup> Ibid, s 84(2)(b).

<sup>304</sup> Ibid, s 85(1)(b).

<sup>305</sup> Ibid, s 85(2).

<sup>306</sup> Ibid, s 85(3).

<sup>307</sup> Ibid, s 85(4).

<sup>308</sup> Ibid, s 85(6)(a).

<sup>309</sup> Ibid, s 85(7).



Court of Session seeking specific performance of statutory duty under the Court of Session Act 1988, section 45(b) by means of the judicial review procedure. Clearly if SEPA had identified a problem and required a local authority to address it and the authority failed to do so, if the problem were resulting in the exposure of a high-risk community, then it would arguably be incumbent on SEPA to take steps to ensure compliance with the direction.

9.7.4 It is noticeable that SEPA has not adopted a policy on the use of these reserve powers (at least not one which is publicly available on its website) nor does it provide any details of these reserve powers in the “Regulation” section of its website. It is recommended that the proposed Environmental Justice Policy addresses the use of these reserve powers.

## **9.8 Enforcing remediation of contaminated land: Environmental Protection Act 1990, Part IIA**

9.8.1 It is worth briefly mentioning SEPA’s role in the contaminated land regime in the context of enforcement. Although the identification of contaminated land falls to local authorities<sup>310</sup>, if the authority identifies contaminated land which falls within the definition of a “special site”, ie one of the most contaminated sites, responsibility for enforcing remediation of the site falls to SEPA rather than the local authority<sup>311</sup>. In all cases SEPA must be notified that a site has been identified as contaminated land<sup>312</sup>. This should enable SEPA to factor in land contamination issues if it is dealing with possible environmental justice concerns in an area where it is responsible for the regulation of one or more facilities. Where a site has been designated a special site, SEPA is under a duty to ensure the sites’s remediation<sup>313</sup>. Although a remediation may not be served immediately (a provision designed to ensure voluntary remediation where possible) unless there is imminent danger of serious harm, after 3 months it is under a duty to serve such a notice to secure the remediation of the special site<sup>314</sup>. The fact SEPA is placed under a duty to act where land is identified as a special site means that environmental justice cannot be a trigger or factor for SEPA taking action. Nonetheless there may be a coincidence between a duty to act to deal with a special site and a community disproportionately affected by pollution but there will not necessarily be such a coincidence in every case.

## **9.9 Clean-up and pollution prevention powers**

9.9.1 SEPA has a wide variety of clean-up and powers to take preventive action to forestall anticipated pollution. These include regulation 21 of the Pollution Prevention and Control (Scotland) Regulations 2000 in relation to pollution from installations and mobile plant regulated under that regime (both preventive works and clean-up provided for); sections 27 (clean-up provided for) and 59 (clean-up provided for) of the Environmental Protection Act 1990 in relation to pollution from processes regulated under the IPC or LAPC systems and in relation to unlawful deposited waste

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<sup>310</sup> Environmental Protection Act 1990, s 78B(1).

<sup>311</sup> Ibid, ss 78C & 78E. The categories of special sites are set out in the Contaminated Land (Scotland) Regulations 2000, SSI 2000/178.

<sup>312</sup> Environmental Protection Act 1990, ss 78B(3), 78C(2).

<sup>313</sup> Ibid, s 78E(1).

<sup>314</sup> Ibid, s 78H.

respectively; and sections 46 - 46D (both preventive works and clean up provided for) of the Control of Pollution Act 1974 in relation to pollution of controlled waters. The powers take two forms. The first form involves SEPA itself carrying out the clean-up and recovering any costs reasonably incurred from the responsible party (regulation 21 of the 2000 Regulations, section 27 of the 1990 Act and section 46 of the 1974 Act – which may only be exercised in an emergency or where no recipient for a works notice under section 46A can be identified). The second involves SEPA serving a notice on the responsible party requiring that person to carry out specified works at his or her expense (section 59 of the 1990 Act and sections 46A-D of the 1974 Act). Failure to carry out the works is a criminal offence and also allows SEPA to carry out the works itself and recover any reasonably incurred costs. SEPA may also take such action if there is no-one to serve a notice upon or there is an emergency. It is known that SEPA and its predecessors have very rarely exercised these powers. Where the powers have involved SEPA or its predecessors taking action the lack of use of the powers has presumably been a question of resources and concerns about the likelihood of success of any subsequent cost recovery action. Although the circumstances in which these powers can be used vary they are normally exercisable where either SEPA considers that there is a risk of a pollution incident which would constitute an offence under the relevant regime or where SEPA identifies that a pollution incident has actually occurred. Clearly not all such incidents or risks thereof would impact on communities already disproportionately affected by pollution but there might be a coincidence in some cases. As with enforcement powers the exercise of the discretion which SEPA has in connection with these powers can be structured to some extent by policy. A policy for the exercise of these powers could therefore be developed which indicated that their exercise would be most likely, for example, in cases posing serious environmental risk or where a quality standard was likely to be breached or where the incident would impact or had impacted on a community already disproportionately affected by pollution.

### **9.10 Findings**

- SEPA is legally able to address environmental justice concerns in taking enforcement action where the statutory enforcement powers provide it with discretion.
- In some cases where there are anticipated or actual human rights infringements SEPA's powers may be transformed into duties to take enforcement action.
- SEPA has reserve powers under the Clean Air Act 1993 and the Part IV of the Environment Act 1995 which could be used in appropriate circumstances to address environmental justice issues.
- SEPA has a range of anti-pollution prevention and clean-up powers which could be used in appropriate circumstances to address environmental justice issues.

### **9.11 Recommendations**

- SEPA should amend its enforcement policy to indicate that enforcement action will also be targeted at dealing with pollution affecting communities disproportionately.

- SEPA should develop a policy on the use of its reserve powers under the Clean Air Act 1993 and the Part IV of the Environment Act 1995 which should address environmental justice issues.
- SEPA should develop a policy on the use of its anti-pollution prevention and clean-up powers which should address environmental justice issues.

## 10. HUMAN RIGHTS AND ENVIRONMENTAL JUSTICE

### 10.1 Introduction

10.1.1 It is now well known that human rights provisions can have a role to play in the context of environmental protection and a considerable literature has built up<sup>315</sup>. Indeed some of the only legal writings in the UK explicitly focusing on environmental justice have to date been in the field of human rights and environmental protection<sup>316</sup>. The significance of the human rights dimension domestically has obviously increased with the incorporation of the European Convention on Human Rights into domestic law in Scotland by virtue of the Scotland Act 1998 and the Human Rights Act 1998.

10.1.2 SEPA is clearly a public authority for the purposes of section 6 of the Human Rights Act 1998 and it is therefore unlawful for SEPA to act in a way which is incompatible with Convention rights although it would be a defence if SEPA were required by primary legislation to act in the way it did.

### 10.2 Relevant rights: Article 8 and Protocol 1, Article 1

10.2.1 Relevant substantive rights include Articles 2 and 8 and Protocol 1, Article 1. In relation to these rights, States are under positive obligations to ensure, for example, protection of life and adequate respect for a person's private and family life and home. In assessing whether there has been a breach of the state's positive obligations under the qualified rights, Article 8 and Protocol 1, Article 1, the key test is whether the right balance has been struck between the interests of the community and the protection of the individual's fundamental rights. Where this balance has been struck has been the key issue in the majority of environmental cases which have reached the Strasbourg court.

10.2.2 The European Court has adopted a wide interpretation of article 8, for example, extending its reach into the state's failure to control the impact of polluting activities on family life and home<sup>317</sup> and the state's failure to require disclosure of information by a chemical company which would enable neighbouring residents to assess the risks on their family and home life<sup>318</sup>. However, a generalised concern about pollution

<sup>315</sup> See eg Cook, "Environmental Rights as Human Rights" [2002] EHRLR 197; DeMerieux, "Deriving Environmental Rights from the European Convention on Human Rights and Fundamental Freedoms" (2001) 21 Ox Jo LS 52; Hart, "The Impact of the European Convention on Human Rights on Planning and Environmental Law" [2000] JPL 117; Thornton & Tromans, "Human Rights and Environmental Wrongs - Incorporating the European Convention on Human Rights: Some Thoughts on the Consequences for the UK Environmental Law" [1999] 11 JEL 35; and Upton "The European Convention on Human Rights and Environmental Law" [1998] JEL 315.

<sup>316</sup> See Cameron & MacKenzie, 'Access to Environmental Justice and Procedural Rights in International Institutions' and Du Bois, 'Social Justice and the Enforcement of Environmental Rights and Duties' in Boyle & Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford UP, 1996).

<sup>317</sup> *Lopez Ostra v Spain* (1994) 20 EHRR 277.

<sup>318</sup> *Guerra v Italy* (1998) 26 EHRR 357.

effects is insufficient<sup>319</sup>. Furthermore, even where there are impacts such as noise and dust from opencast mining and landfilling operations, these will not necessarily be serious enough to amount to an interference with Article 8<sup>320</sup>. This suggests that there is quite a high threshold for an infringement of Article 8. While enforcement action may clearly impact directly on a person's home (*Buckley v UK*), the above cases suggest that the failure of SEPA to investigate complaints and, where a breach of a Convention right is found or anticipated, to take enforcement action against unauthorised emissions which were having a nuisance type impact on neighbours might well also engage Article 8. This issue was raised although not developed in the context of statutory nuisance in *R (on the application of Anne) v Test Valley Borough Council* [2002] Env LR 538, QBD and has also been raised in *Magnohard v UKAEA & SEPA* 2003 SLT 1083.

10.2.3 Protocol 1, Article 1 provides protection against (1) deprivation of property; (2) control of the use of property and (3) a general protection against interference with peaceful enjoyment of possessions. The first point to note is that all interferences with the right must be lawful. Protocol 1, Article 1 is a qualified right and states may control the use of property in the general interest. Thus, in *Fredin v Sweden* (1991) 13 EHRR 784 the revocation of a permit to extract gravel from a site was justified on environmental grounds and was neither inappropriate nor disproportionate. A similar conclusion was reached in *Pine Valley Developments v Ireland* (1991) 14 EHRR 319 where planning permission was revoked in order to further environmental protection of the Dublin greenbelt. The *Pine Valley Developments v Ireland* case also illustrates that possessions in this context includes rights which have an economic value such as the legitimate expectation to carry out development pursuant to a grant of planning permission which was subsequently declared void. It is likely that environmental licences would be similarly treated. These cases suggest that the use of enforcement powers by SEPA based on environmental justice grounds might well be able to override rights to continue to make use of property in an environmentally damaging way. However, equally the grant of permission for opencast mining and landfilling operations which has an adverse impact on property values may clearly breach Protocol 1, Article 1, but may be nonetheless be justified in the community interest<sup>321</sup>. The use of clean-up or direct action powers under environmental regulation regimes may well interfere with a person's rights under Protocol 1, Article 1. However, use of such powers where a person fails to comply with a notice requiring clean-up are likely to be justifiable in the public interest if there is a potential environmental or health hazard<sup>322</sup>.

10.2.4 The key issues arising in the context of environmental justice from the above discussion are that if a community is disproportionately affected by pollution it is conceivable that an individual's Convention rights under, for example, Article 8, might be infringed. If that is the case, there may be a number of implications for SEPA. These could be that a review of existing licence conditions might be required to end the infringement. Alternatively it might require stricter conditions to be

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<sup>319</sup> *R (on the application of Vetterlein) v Hampshire County Council & Hampshire Waste Services Ltd* [2001] EWHC Admin 560; [2002] Env LR 198, QBD.

<sup>320</sup> *R v Leicestershire County Council, ex p Blackfordby & Boothorpe Action Group* [2001] Env LR 35.

<sup>321</sup> *R v Leicestershire County Council, ex p Blackfordby & Boothorpe Action Group* [2001] Env LR 35.

<sup>322</sup> *R (on the application of Langton & Allen) v DEFRA & Derbyshire County Council* [2002] Env LR 463, QBD.

imposed in licences for new installations (or indeed that such applications are refused). Finally, it might require enforcement action to be taken to end the infringement. In that context, SEPA's powers to take enforcement action might actually be transformed into duties by the operation of the Human Rights Act 1998.

### **10.3 Application of Article 14 (non-discrimination)**

10.3.1 Article 14 may be of considerable significance in the context of environmental justice. The article provides that

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Before turning to consider directly how this provision can be of relevance in the context of environmental justice several preliminary points ought to be noted. First, the article is not a free-standing anti-discrimination provision but can only be relied upon in conjunction with one or more of the substantive rights contained in the ECHR such as Article 8<sup>323</sup>. Secondly, it is possible that a measure may be compatible with the substantive Convention right which is engaged but nonetheless infringe article 14 as it is of a discriminatory nature<sup>324</sup>. Thirdly, as the wording “on any ground such as” clearly demonstrates the grounds of discrimination are illustrative only, not exhaustive. Clearly the US environmental justice concerns based on race, colour etc would be covered without difficulty. UK environmental justice concerns might obviously be linked to race to some extent but are also likely to be linked to issues of income and class. This might fall within the ambit of “property” or “other status”. Fourthly, the application of the article is dependent upon an assessment of the comparability of the situations in question. The persons alleging an infringement of article 14 must be in a “relevantly similar” situation<sup>325</sup> and the onus of establishing that rests with them<sup>326</sup>. Fifthly, a difference in treatment is not automatically discriminatory. Rather, the issue is whether the difference in treatment has an “objective and reasonable” justification<sup>327</sup>. The onus of establishing such a justification lies on the state<sup>328</sup>. A difference in treatment will only be regarded as discriminatory if it does not pursue a legitimate aim or if there is no “reasonable relationship of proportionality in practice between the means employed and the aim sought to be realised”<sup>329</sup>. In assessing proportionality the European Court seeks to strike a fair balance between protection of community interests and respect for the rights protected by the ECHR. The Court will also take account of the “living instrument” doctrine and will apply the margin of appreciation. Finally, in practice the European Court will not consider any alleged infringement of article 14 if it finds there has been a violation of the substantive right at issue which raises substantially the same issue. By virtue of the requirement in section 2 of the Human Rights Act

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<sup>323</sup> See eg *Botta v Italy* 1998-I, 412 in which it was held that there was no violation of art 14 since the lack of disabled access to a beach did not fall within the ambit of any substantive Convention right (at paras 37-39).

<sup>324</sup> See eg *Belgian Linguistics Case* (1968), A6; *Pine Valley Developments*

<sup>325</sup> See *National and Provincial Building Society v UK* 1997-VII, 2325, para 88.

<sup>326</sup> See eg *Fredin v Sweden* (1991) A 192.

<sup>327</sup> *Belgian Linguistics Case* (1968) A 6.

<sup>328</sup> See eg *Markcx v Belgium* (1979) A 31, paras 32-43.

<sup>329</sup> *Belgian Linguistics Case* (1968) A 6.

1998 domestic courts must take account of Strasbourg jurisprudence and should thus apply the foregoing principles. Although much of the development of Article 14 has been in relation to forms of gender or sexual orientation discrimination, there is no doubt that it could have a role in the environmental sphere. Those who have relied upon Article 14 in reported cases have been companies or individuals who have had forms of planning permissions revoked<sup>330</sup>. The claims of violation of Article 14 have thus been raised in the context of alleged infringements of Protocol 1, Article 1, the right to peaceful enjoyment of property. Thus in *Fredin v Sweden* the applicant's permit to extract gravel from his property was revoked on environmental protection grounds. The applicant failed to establish that he was in a "relevantly similar" situation to others whose permits had not been revoked and the revocation was also held to be justified on environmental protection grounds<sup>331</sup>. However, in *Pine Valley Developments v Ireland* the applicant company did establish that it was in a "relevantly similar" situation to other developers in the greenbelt whose planning permissions had not been revoked and as Ireland could not produce an objective and reasonable justification for this, the revocation was held to violate Article 14. The lessons for SEPA from this appear to be (1) that in imposing stricter conditions to address environmental justice concerns whether in a new or varied permit; or (2) in deciding to take enforcement action, the grounds for doing so must be objectively and reasonably justified. It is thought that SEPA could objectively and reasonably justify different treatment of permit applicants or holders on environmental justice grounds, eg the exposure of a particular community to a high level of emissions could in itself justify tighter controls over those emissions than were imposed on relevantly similar plants elsewhere which did not have the same impact on a community because of the applicable physical separation distance or impact of the wind on the pollution plume from a plant. Thus, Article 14 might be raised by regulated businesses which are the subject of licensing variation or enforcement action based on environmental justice concerns.

10.3.2 In terms of those suffering environmental injustice it is less clear that Article 14 could have a role since a claim based on the substantive right eg Article 8 might suffice. However, it is remotely conceivable that a person might challenge SEPA's failure to take enforcement action to address environmental injustice impacting on his or her home in combination with Article 14 if it could be demonstrated that SEPA had been targeting enforcement action in relevantly similar situations to higher income areas.

#### **10.4 Findings**

- There may be a coincidence between infringements of Convention rights and environmental justice concerns.
- Where there are environmental justice concerns which might or might be about to result in infringements of Convention rights SEPA may be required under the Human Rights Act 1998, on human rights grounds, review licence conditions, refuse or impose stricter emission limits in new licences or take enforcement action to avoid or end the infringement of Convention rights.

<sup>330</sup> See *Fredin v Sweden* (1991) A 192 (permit to extract gravel revoked on environmental grounds); *Pine Valley Developments v Ireland* (1991) 14 EHRR 319

<sup>331</sup> (1991) 13 EHRR 784

## 10.5 Recommendations

- SEPA should ensure that its licensing and enforcement procedures fully take account of the human rights dimension and also ensure that its licensing teams are aware of the potential for coincidence between Convention rights infringements and environmental justice issues.
- To avoid allegations of discrimination in the treatment of licence holders (1) in imposing stricter conditions to address environmental justice concerns whether in a new or varied permit; or (2) in deciding to take enforcement action, SEPA should objectively and reasonably justify any changes on the grounds which the relevant legislation enables it to consider.

## 11 PROCEDURAL ENVIRONMENTAL JUSTICE AND SEPA'S LICENSING AND ENFORCEMENT FUNCTIONS: ACCESS TO ENVIRONMENTAL INFORMATION

### 11.1 Introduction: access to environmental information

11.1 There are already extensive rights of access to environmental information partly by means of public registers of information which provide access to licence and licence enforcement related information<sup>332</sup> and partly by means of the right under the Environmental Information Regulations 1992 to more general information such as reports. The Scottish Pollution Release Inventory which derives from legislative requirements in the EC Integrated Pollution Prevention and Control Directive (IPPC) and implementing legislation provides an electronic map-based information resource<sup>333</sup>.

### 11.2 Research into access to environmental information

11.2.1 There has been considerable socio-legal research into how effective means of providing information to the public such as registers actually are or whether particular information was actually provided.<sup>334</sup> However, it is fair to say that the

<sup>332</sup> See eg Pollution Prevention and Control (Scotland) Regulations 2000, SSI 2000/323, regs 27-29 and Sch 9.

<sup>333</sup> See [www.sepa.org.uk/spri/index.htm](http://www.sepa.org.uk/spri/index.htm). The governing legislation can be found in Directive 9/61/EC on integrated pollution prevention and control, art 15; Pollution Prevention and Control (Scotland) Regulations 2000, reg 26(3).

<sup>334</sup> See for example G Bakkenist, *Environmental Information - Law, Policy and Experience* (Cameron May, 1994); P Birkinshaw, *Freedom of Information - The Law, The Practice and The Ideal* (3<sup>rd</sup> ed, Butterworths, 2001); Frankel, M & Ecclestone, *The Environmental Information Regulations and THORP*, Campaign for Freedom of Information, December 1993; E John, 'Access to Environmental Information: Limitations of the UK Radioactive Substances Registers' [1995] 7 JEL 11-30; M Poustie, 'Opening up Government: Paradise Postponed - Again?' in A Miller (ed), *Human Rights: A Modern Agenda* (T & T Clark, 2000), 67-97; Ramblers Association, *Green Balance, Open Door Planning: Access to Planning Application Documents*, 1993; Reid C T, Lloyd M G, Illsley B & Lynch B, 'Effective Access to Planning Information' [1998] JPL 1028-1034; Sanders A-M & Rothnie J, 'Planning Registers; Their Role in Promoting Public Participation' [1996] JPL 539-546; Scottish Consumer Council & Friends of the Earth Scotland, *Come Clean! Public Access to Information about Local Authority Air Pollution Control*, 1993. See also Bush J, Moffatt S, Dunn CE. *Keeping the public informed? Public negotiation of air quality information*. *Public Understanding of Science* 2001; 10: 1-17; Howel D, Moffatt S, Prince H, Bush J, Dunn CE. *Urban air quality in North-East England: Exploring the influences on local views and perceptions*. *Risk Analysis* 2002; 22: 121-130; ; Moffat S.

environmental justice dimensions of rights of access to information have largely been ignored<sup>335</sup>. Thus, there has been no attempt to identify whether the problems identified in the research impact on socially or environmentally deprived communities in particular. Given there is a legal requirement that anyone is entitled to inspect registers or otherwise obtain environmental information without the need to demonstrate interest, bodies holding the information do not generally record details about who is seeking the information and why. Where this has been recorded the authorities concerned have been subjected to criticism.<sup>336</sup>

11.2.2 Evidence on usage of registers in much of the research is based on estimates of proportion of types of user made by the relevant public body<sup>337</sup>. The general public simply form a single category of user without further distinction. Researchers have posed as 'ordinary members of the public'<sup>338</sup>, the implication being that all members of the public have the same experience, which is unlikely to be the case. More recently Haklay<sup>339</sup> has conducted research which demonstrates that the view of the public as a monolithic body is inadequate and should be replaced with the realisation of a multiple audience perspective.

11.2.3 Therefore, just as SEPA ought to establish clearly whether there are distributive environmental justice problems, it would appear that it might be useful to establish whether there are procedural environmental justice problems. The assumption is perhaps that poorer communities might participate less fully in environmental decision making processes and hence that might contribute to those communities becoming disproportionately affected by emissions from installations located in or near them. However, this assumption probably does need to be tested<sup>340</sup>. Therefore it may be worth (assuming this has not already been done) creating data on requests for information and where they come from eg by postcode<sup>341</sup>. That might

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(forthcoming) *A project investigating perception of air quality information*; Moxen J, McCulloch A, Williams D & Baxter S, *Environmental Information in Scotland: Access and Provision, a research report for the Scottish Office*, 1995; Scottish Consumer Council, *Access to Environment and Safety Information*, 1991.

<sup>335</sup> See K Lucas, G Walker, M Eames, H Fay & M Poustie, *Environment and Social Justice: Rapid Research and Evidence Review, Final Report*, Sustainable Development Research Network, September 2004.

<sup>336</sup> Scottish Consumer Council & Friends of the Earth Scotland, op cit, note 334 above.

<sup>337</sup> see e.g. Sanders & Rothnie op cit, note 334 above; Rowan-Robinson J, Ross A, Walton W & Rothnie J, 'Public Access to Environmental Information – A Means to What End?' [1996] 8 JEL 19-42

<sup>338</sup> Scottish Consumer Council & Friends of the Earth Scotland, op cit, note 334 above, Rowan-Robinson, Ross, Walton & Rothnie, op cit, note 337 above.

<sup>339</sup> M Haklay, *Public Access to Environmental Information - Challenges and Research Directions: a Review of Current Issues with Environmental Information Provision*, presented at the 4th International Conference on Integrating GIS and Environmental Modeling (GIS/EM4): Problems, Prospects and Research Needs. Banff, Alberta, Canada, 2 - 8 September 2000.

<sup>340</sup> It is understood that the Scottish Executive is about to publish in late 2004 details of research it commissioned into why people do not participate in the planning system. This research will undoubtedly be relevant in the context of non-participation in the environmental law system which is likely to be more pronounced because there tends to be more public knowledge of the planning system.

<sup>341</sup> It should nonetheless be noted that given no one requesting information needs to demonstrate an interest there is actually no legal basis for requesting a person's address. However, the supply of information may need to be by non-electronic means and indeed payment for a copy may need to be made by letter. So it may be possible to develop an approximate database relating to requests for information (subject to the requirements of the Data Protection Act 1998). Individuals requesting information could be asked if they were willing to disclose their address as part of a project to establish the communities from which such requests were emanating. Given much information (though not



assist analysis of extent to which persons/groups from various communities actually already participate in the permitting process. That could be compared with data on licence applications. Where there were a number of licence applications but few requests for information relating to an application that could not only (1) indicate that there was a procedural environmental justice problem, but also (2) provide the basis for judging where to target awareness raising campaigns by advertising or otherwise to enhance awareness of the existence of public rights of access to information and how to exercise them. Data protection issues arising out of such research would need to be carefully considered.

### **11.3 Problems identified with register usage and access to environmental information generally**

11.3.1 A number of separate but interlocking factors have been identified as influencing the use of registers in particular (some of these problems will also apply to more general requests for information under, e.g. the Environmental Information Regulations 1992) including: awareness, accessibility, copies and comprehensibility<sup>342</sup> Usage of rights of access to information is low partly because of lack of awareness and few attempts had been made at the time of the research to publicise the rights that did exist.

11.3.2 Accessibility was identified as a problem at a number of levels. Firstly, registers were often located in one authority office for an area necessitating lengthy journeys, in some cases. Secondly, offices were often only open during working hours and closed at lunch time, which might be the only time at which a working person could visit. Thirdly, visitor facilities for inspecting the information were often poor. Fourthly, very considerable problems of disabled access were identified. Although inspecting the various registers is free, reasonable costs may be charged for copies. Considerable variation in charges was identified by the research ranging from no charge to £5 per sheet with a minimum charge of £15. One authority charged £65 for queries arising from the planning register. Clearly these charges could be significant barriers to obtaining information in practice for low-income groups. The geographical accessibility problems were also pronounced for low-income groups because of their lower levels of access to a car and reliance on public transport which might either be infrequent or expensive in relative terms or both.

11.3.3 As for comprehensibility although certain registers such as the planning register were fairly non-technical, pollution control registers often contained technical monitoring data that was not easy to interpret without assistance. The availability and quality of assistance was variable. Reports were generally identified as being more comprehensible than register information. Haklay<sup>343</sup> also demonstrated the public

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register information) can be accessed electronically it will obviously be impossible to develop data on those who download information from the SEPA website unless, once again, some kind of programme were developed which would request anyone downloading information from the SEPA website to provide eg their postcode for the purposes of a research project (the nature of which would need to be outlined).

<sup>342</sup> See T Burton, 'Access to Environmental Information: The UK experience of water registers' [1989] 1 Journal of Environmental Law 192-208; Sanders & Rothnie, op cit, note 334 above; Rowan-Robinson, Ross, Walton & Rothnie, op cit, note 337 above.

<sup>343</sup> See M Haklay, "[Public Access to Environmental Information: Past, Present and Future](#)", [2003] 27 Computers, Environment and Urban Systems, 163-180.

interest in processed information. There was far less interest in access to "raw data" than to interpreted information yet much environmental information is provided in raw data form such as the monitoring data on pollution control registers. Moreover, Haklay's research found that audiences perceive environmental information in a holistic view and users expect to see a cumulative picture of the environment. Yet it is still the case that most environmental information is presented by sector (e.g. air pollution is presented differently from radioactive substances) and often in completely different formats that makes achievement of a cumulative picture and comparability very difficult. A recent study by the UK Environmental Law Association<sup>344</sup> (UKELA) also found that such sites as the Environment Agency and NetRegs were too specialised for the public to understand and that other sites, such as Citizen's Advice Bureau sites, did not contain enough information. The chairman of UKELA recommended that the average citizen involved in an environmental issue would not be able to gain access to the information they required to further their cause. However this is arguably unfair criticism of NetRegs since the intended audience for that site is actually the business community. This is confirmed by studies carried out for SEPANetRegs which indicated high levels of satisfaction with the site by the intended audience [supply reference]<sup>345</sup>. Nonetheless it remains the case that much environmental information is largely out of the reach for low-income sectors of the population, given lower levels of literacy, basic skills, access to computer technology and difficulties of comprehension when faced with uninterpreted raw data. However, Haklay's research<sup>346</sup> suggests that a move towards a more comprehensive, cumulative picture of pollution provided through an enhanced GIS-based system may be a more effective way of making environmental information genuinely accessible subject to caveats about those without access to the internet and possible ways of addressing that such as library-based assistance<sup>347</sup> ..

## **11.4 Recent improvements in provision of access to environmental information**

11.4.1 There have been a large number of policy interventions in this field although none has been specifically directed at socially or environmentally deprived communities. In recent years, policy interventions in this field have largely been driven by international and EC legal requirements. Some of these interventions have

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<sup>344</sup> R Rothwell, *Environmental law web sites breach convention* (2004) The Law Society Gazette, 24/06/04 p.9

<sup>345</sup> NetRegs Market Research, Influencers Research Report, abridged by Nicola Fulford, September 2004.

<sup>346</sup> M Haklay, *Public Environmental Information Systems: Challenges and Perspectives* <http://www.casa.ucl.ac.uk/muki/envinfo.htm>; M Haklay, *From Environmental Information Systems to Environmental Informatics - Evolution and Meaning*, CASA Working Paper no. 7, 1999, Centre for Advanced Spatial Analysis, University College London, London; M Haklay, *Public Access to Environmental Information - Challenges and Research Directions: a Review of Current Issues with Environmental Information Provision*, presented at the 4th International Conference on Integrating GIS and Environmental Modeling (GIS/EM4): Problems, Prospects and Research Needs. Banff, Alberta, Canada, 2 - 8 September 2000; M Haklay, *London Environment Online - User Requirement Study: Final Report*, CASA Special Report, 2000, Centre for Advanced Spatial Analysis, University College London, London; M Haklay, *Conceptual Models of Urban Environmental Information Systems - Toward Improved Information Provision*, *CASA working paper no. 38*, 2001, Centre for Advanced Spatial Analysis, University College London, London; M Haklay, "*Public Environmental Information - Understanding Requirements and Patterns of Likely Public Use*", [2002] 34(1) *Area*, 17-28; and M Haklay, "*Public Access to Environmental Information: Past, Present and Future*", [2003] 27 *Computers, Environment and Urban Systems*, 163-180.

<sup>347</sup> For a US perspective on this see Environmental Law Institute, *Libraries as a Community Resource for Environmental Information*, December 2000.

assisted, for example, accessibility by providing that information can be requested by letter, telephone or even e-mail instead of having to make a visit to the authority office concerned<sup>348</sup>. Variation in charges have also been addressed to some extent by the reduction in the number of register holders – for example, most pollution control registers are now held by SEPA and the Environment Agency. Accessibility is also being enhanced by making information available on-line<sup>349</sup>. In particular environmental reports are available on-line from the SEPA website although SEPA has not put its registers on-line. Further provision is being made in the planning system to facilitate electronic access to the planning register with an Order being made under the Electronic Communications Act 2000 in England<sup>350</sup>. A draft Order has also been made for Scotland in this regard<sup>351</sup>. The Aarhus Convention provides a further impetus to move progressively towards supplying information electronically<sup>352</sup>.

11.4.2 These interventions may be exclusionary to those who do not have access to electronic communications and/or the necessary skills to use them. This is particularly important in the case of low-income households and older people, who are identified by the E-Envoy as having very low access (less than 20% of low-income households and older people were identified as being able to access electronic information in a 2002 survey) to computer technology and very limited technical ability in this respect<sup>353</sup>. Arguably, with additional, training, staff support and financial resources, libraries and other community facilities might be able to assist those without access to computers and electronic communications. Haklay<sup>354</sup> demonstrates this in that although his studies identified that the Internet was a good medium for information delivery, this was not accepted uncritically, and environmental issues were connected to social equity ones. Participants in his studies voiced their concern about the exclusiveness of this medium.

## **11.5 Improvements to access to environmental information which could still be made**

11.5.1 The Aarhus Convention, the new Directive on Public Access to Environmental Information and the proposed implementing regulations contain provisions which should improve access to environmental information. These developments were discussed in detail above and include the progressive provision of environmental information by electronic means<sup>355</sup>.

11.5.2 However, regardless of these forthcoming obligations, there is already scope for making information relating to licences and enforcement available electronically. For example, public registers “may be kept in any form” under current legislation<sup>356</sup>.

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<sup>348</sup> Environmental Information Regulations 1992, reg 5.

<sup>349</sup> See [www.sepa.org.uk](http://www.sepa.org.uk).

<sup>350</sup> The Town and Country Planning (Electronic Communications)(England) Order 2003, SI 2003/956.

<sup>351</sup> See: Scottish Executive Development Department, *Removal of Legal Impediments to E-Planning, Consultation Paper*, August 2003.

<sup>352</sup> See para 4.10.1.6 above and the Aarhus Convention, art 5(3), (9).

<sup>353</sup> Office of the e-Envoy (2002) *UK online annual report 2002*, Office of the e-Envoy, Cabinet Office, London

<sup>354</sup> *ibid*

<sup>355</sup> See paras 4.10.1.1 – 4.10.1.8 and EC Directive 2003/4, art 7(1).

<sup>356</sup> See the Environmental Protection Act 1990, ss 20(8)(IPC and LAPC), 64(7)(waste management licences); Radioactive Substances Act 1993, s 39(4) (“The copies of documents required to be made

Although the UK Government's preference is for enhanced electronic provision of public services to be underpinned by an Order made under the Electronic Communications Act 2000 (ECA 2000) there appears to be scope for taking certain steps without the need for such an order<sup>357</sup>. There are parallels with developments in the planning system in this context. Given there are no restrictions in the legislation on making the planning register available electronically many planning authorities have made such provision in advance of any Order under the ECA 2000<sup>358</sup>. Registers could thus be put on-line. This would be particularly valuable in enabling members of the public to access licence applications. Library staff could be trained in finding such information for members of the public who lacked access to their own computer or were unable to use a computer.

11.5.3 However, Haklay's findings<sup>359</sup> and evidence from the US EPA's experience of operating a GIS based electronically accessible information system and an online system providing information on compliance and enforcement<sup>360</sup>, arguably suggest that the best method of providing detailed information on the licensing and enforcement system electronically would be through an enhanced Scottish Pollutant Release Inventory (SPRI). The SPRI could be enhanced without legislative amendment to include further environmental information presented in an interpreted form. Thus, instead of simply providing emissions data, the system could interpret the data to confirm whether actual releases complied with mandated limits (entries could simply read "compliant" or "non-compliant") and also indicate what enforcement action had been taken where standards or other licence conditions were breached (ie information which must already be included on the public registers extracted from the Register). In effect the SPRI would become the user friendly version of the register. Ultimately the scope of emissions covered by the SPRI could be extended and the, if a cumulative impact methodology is established, interpreted

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available to the public by this section *need not be kept in documentary form*" (emphasis added)(registrations of radioactive substances and radioactive waste accumulation and disposal authorisations); Controlled Waste (Registration of Carriers and Seizure of Vehicles) Regulations 1991, reg 3(2)(waste carriers); Waste Management Licensing Regulations 1994, regs 18(9)(waste management licensing exemptions), 20(7) and Sch 5, para 2(2)(waste brokers); Pollution Prevention and Control (Scotland) Regulations 2000, reg 27(4). It should be noted that there is no provision in the Control of Pollution Act 1974, s 41 (water pollution discharge consent etc registers) enabling the registers to be kept in any form. Section 41 of the 1974 Act is silent on that point. It is suggested that this silence is not the equivalent of a prohibition especially when viewed in the context of provisions governing other registers which SEPA administers. There are no direct requirements on SEPA under the Control of Major Accident Hazard Regulations 1999 to make information available to the public. Rather, the obligation is upon the operator to provide information to the public (reg 14).

<sup>357</sup> The Pollution Prevention and Control (Scotland) Regulations 2000 are unusual in that they have been designed from the outset to allow for electronic submission of applications (reg 5(1), Sch 4, para 1), electronic notification of decisions by SEPA and the Ministers (Sch 4, para 15 by virtue of reg 35(1)), the service of notices by electronic means (reg 35(1)), the keeping of the register in electronic form (reg 27(4)). The approach taken is quite straightforward. In the case, for example, of applications, SEPA may require the application to be in writing or in an electronic form acceptable to SEPA (reg 5(1), Sch 4, para 1). Notices served or given under the Regulations by SEPA or the Scottish Ministers must be "in writing (or in electronic form)" (reg 35(1)).

<sup>358</sup> See eg <http://citydev-portal.edinburgh.gov.uk/portal/portal.jsp>.

<sup>359</sup> See para 11.3.3, note 346 above.

<sup>360</sup> See Environmental Justice in EPA Permitting, pp 73-74. See also US EPA, Window to My Environment, available at [www.epa.gov/enviro/wme/](http://www.epa.gov/enviro/wme/), and US EPA, Enforcement and Compliance History Online (ECHO), available at [www.epa.gov/compliance/](http://www.epa.gov/compliance/) and US EPA, Office of Policy, Economics and Innovation, Engaging the American People: A Review of EPA's Public Participation Policy and Regulations with Recommendations for Action (December 2000),

cumulative impact data could be provided. The Partnership Agreement indicates that an electronic pollution inventory should be developed for every community<sup>361</sup>. Providing information on what enforcement action was taken where a breach of conditions was identified would also arguably help provide feedback to a local community that SEPA was dealing with problems effectively. Aside from using the SPRI for such feedback, the local media and/or a community liaison officer might be used<sup>362</sup>. This would be equally important where no action or no formal action was taken to explain why no steps or no formal steps were seen as being required by SEPA. The provision of feedback to communities might also serve to enhance their awareness of SEPA's functions and, hopefully, confidence in SEPA. It may also, possibly, bring a sense of closure to a particular issue rather than simply leaving uncertainty as to what steps have or have not been taken and why. However, if no action was being taken against a polluter which regularly failed to comply with standards and no adequate explanation was forthcoming from SEPA the availability of information to the public on the point could facilitate complaints to SEPA which might trigger action or explanations or indeed might form the starting point for action by an individual or NGO.

11.5.4 As has been noted above, SEPA will also normally be obliged to disclose the justification for its licensing decisions to the public<sup>363</sup>. Such licensing decisions and justificatory background reports could obviously be made available electronically. The disclosure of such information should also serve to enhance public confidence in SEPA's regulatory activities.

## **11.6 Findings**

- Although there are considerable public rights of access to environmental information, socio-legal research has identified that those existing rights suffer from a number of problems in practice including lack of awareness, accessibility, comprehensibility of the available data and charges imposed for copies. However, no research has been conducted into whether these problems impact particularly on those in disadvantaged communities although it may be fair to assume that they do.
- There have been a considerable number of legislative improvements which have largely been the result of EC or international obligations. These have included measures to ensure that information can be requested by a variety of means to obviate the need to visit the register and the greater standardisation of charges which has resulted from the establishment of SEPA since it now holds most of the pollution control registers in Scotland. From 2005 when the domestic measures implementing the new EC Directive on access to environmental information (2003/4) which in turn implements the Aarhus Convention (1998) provisions on access to environmental information there will, for example, be additional duties imposed on SEPA to assist those applying for information and to make information progressively available by electronic means.

<sup>361</sup> See para 4.6.3 above.

<sup>362</sup> As to the possible role of such officers, see also para 12.5.4 below.

<sup>363</sup> See eg para 4.10.1.8 above.

- Although recent non-legal research has identified that many are still unable to access information electronically, nonetheless separate research has identified that electronic GIS-based systems are the most accessible to those who have access to computers. This is reinforced by the experience of the US Environmental Protection Agency.
- There is research from the US which suggests that provision of information in libraries may be most useful particularly for those who lack computing skills or access to computers.
- Non-legal research has also identified that the public are less interested in raw data than processed or interpreted data and indeed cumulative data or at least data that is comparable between sectors.
- SEPA is not legally precluded at present from making its registers available electronically although the UK Government's preferred approach is for this to be achieved by means of an Order made under the Electronic Communications Act 2000.
- SEPA is not legally precluded from presenting a wider range of information extracted from public available register information on the Scottish Pollutant Release Inventory.
- SEPA will be required to make available on request its decisions on licence applications and the reasons and considerations which underpin those decisions.

### **11.7 Recommendations**

- SEPA should endeavour to establish participation baselines both to establish whether there are procedural environmental justice problems and also to enable targeting of awareness raising measures on rights of access to environmental information.
- As a minimum step SEPA should endeavour to make its public registers electronically available.
- SEPA should also extract information from the public registers and make it available via the Scottish Pollution Release Inventory in a more user friendly format (particularly by means of interpreting raw data to indicate eg whether or not a licensed facility is complying with licence conditions or not) and details of what enforcement action if any was taken by SEPA.
- SEPA should provide feedback on enforcement action taken either via the local media, the SPRI or via community liaison officers to ensure communities received feedback on what is done to address their concerns.
- SEPA should consider making information regarding specific licence applications available in libraries to assist those who do not have computer skills – or at least providing guides for library staff on accessing environmental information electronically so they might assist those lacking computer skills.
- SEPA should consider and publicise how it will make available decisions on licence applications and the reasons and considerations which underpin those decisions.

## **12 PROCEDURAL EJ AND SEPA'S LICENSING AND ENFORCEMENT FUNCTIONS: PUBLIC PARTICIPATION**

### **12.1 Introduction**

12.1.1 Public participation in the licensing regimes administered by SEPA primarily consists of opportunities to make written representations follow the advertisement of a licence application<sup>364</sup>. SEPA is under a duty to take account of any such representations made<sup>365</sup>. Participation opportunities in the enforcement regime are largely limited to making complaints to SEPA about pollution problems.

### **12.2 The effectiveness of current public participation mechanisms**

12.2.1 There has been little research conducted into the effectiveness of such participation mechanisms generally let alone specifically in the context of environmental justice. The comments made above in relation to SEPA ascertaining the extent to which the access to information provisions are utilised by different groups apply with equal force to public participation<sup>366</sup>. Research for the Environment Agency specifically in the context of consultation on licence applications recommended that more time needed to be spent planning public consultation processes, that the public should be involved earlier in the process, that the consultation process needed to be evaluated to ensure that objectives were being met, that there should be better links with statutory consultees such as planning and health authorities, that the Agency should try to build better relationships with communities through public meetings and general awareness raising of its role, that there should be more training of and guidance for Agency staff on consultation processes and that specialist expert in-house expertise on consultation should be developed<sup>367</sup>. Although similar research has not been undertaken in Scotland, it is likely that similar recommendations might well result. Key issues for SEPA to consider therefore include (1) defining the purpose of consultation, (2) recognising that a number of methods of consultation may be required to ensure effective engagement with communities; (3) development of criteria to measure the effectiveness of participation; (4) pro-active provision of more advice – perhaps electronically on SEPA's role and the respective roles of other bodies such as planning authorities; (5) earlier notification of licence applications if possible before a public advertisement is published; (6) holding public meetings on licence applications; and (7) staff training and development of expertise in consultation processes.

### **12.3 US Experience**

12.3.1 Research in the US has found that formal participation procedures such as legal notices in newspapers and permit information held in government offices are

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<sup>364</sup> See eg Pollution Prevention and Control (Scotland) Regulations 2000, SSI 2000/323, Sch 4, para 5.

<sup>365</sup> Ibid, Sch 4, para 12.

<sup>366</sup> See para 9.4 above.

<sup>367</sup> Gray, Luscombe, Delbridge & Petts, Evaluating Methods for Public Participation, A Report for the Environment Agency 2002. There is now also some research in Scotland in the context of the planning system: PPS Local & Regional Ltd, Planning and Community Involvement in Scotland, Scottish Executive Social Research, 2004.



ineffective as means of engaging the public<sup>368</sup>. The National Environmental Policy Commission in the US has recommended that

“Resources should be made available for culturally competent outreach, including language translation and explanation of scientific and technical issues, meetings scheduled for times most available to the affected community, longer comment periods for major or high-risk or technically complicated sources, all with a goal of more meaningful public participation.”<sup>369</sup>

Other suggestions have included radio and television public service announcements, talk shows, news stories, newspaper advertisements (not simply legal notices), public meetings, meetings with neighbourhood and community organisations, and provision of information through churches and libraries rather than government offices<sup>370</sup>. Clearly many of these recommendations could apply equally to enhancing public participation in Scotland.

## **12.4 Impact of the Aarhus Convention**

12.4.1 Although on the face of it the Aarhus Convention does not make significant changes to the present system of public participation in Scotland, there are some important differences. Thus there is an emphasis on reasonable time-frames for participation procedures, provision for early public participation, provision for encouraging licence applicants to identify the public concerned to enter into discussions and to provide information regarding the objectives of their application prior to the actual application being submitted, the provision of a non-technical summary of key information in the application, the provision to the public of the decision along with the reasons and considerations on which the decision is based, and the application of such measures in the case of licence variations<sup>371</sup>.

## **12.5 Possible improvements to current public participation mechanisms**

12.5.1 Consideration could be given to early notification of licence applications in advance of the submission of the application if the applicant were agreeable to this and were able to provide SEPA with sufficient information at an early stage. This could enable longer consideration of applications by the public.

12.5.2 Consideration could be given to provision of information about the licence application not only by means of the public register (whether electronically available or not) but also in the library(ies) in the vicinity of the application site.

12.5.3 As a minimum measure to facilitate the submission of representations on applications, provision could be made for making representations/objections to

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<sup>368</sup> Environmental Justice in EPA Permitting, p 73.

<sup>369</sup> National Environmental Policy Commission, *Report to the Congressional Black Caucus and Congressional Black Caucus Foundation Environmental Justice Braintrust*, September 2001, p 48.

<sup>370</sup> [www.network-democracy.org/epa-pip/archive/seq00242.html](http://www.network-democracy.org/epa-pip/archive/seq00242.html). See also US EPA Office of Policy, Economics and Innovation, *Engaging the American People: A Review of EPA's Public Participation Policy and Regulations with Recommendations for Action*, December 2000; E Mullin, *The Art of Commenting: How to Influence Environmental Decisions with Effective Comments*, 2000; Environmental Law Institute, *Libraries as a Community Resource for Environmental Information*, December 2000.

<sup>371</sup> Aarhus Convention, art 6. See also para 4.10.1.9 above.



licence applications electronically. Once again the UK Government's policy is that this requires an Order made under the Electronic Communications Act 2000 but in fact there is nothing to stop this being done under current legislation. Many planning authorities already accept electronic objections and no Order has yet been made in Scotland in relation to delivering planning services electronically. This would clearly only benefit those who had access to information technology.

12.5.4 Additional means of engaging with communities to ascertain their views on particular applications could be considered. Many of the mechanisms recommended in the US<sup>372</sup> might have a role in this regard but as a minimum there are perhaps two possibilities. First, SEPA might consider the designation and training of community liaison officers within each SEPA region, or indeed at each local office. Although such officers could be entirely new appointments it may make better use of resources if existing environmental protection officers could receive training in communicating and engaging with the public. Such officers could attend public meetings to explain SEPA's role and to feedback to SEPA views of communities on licensing applications and variations (and possibly enforcement issues). A more pro-active role might be for such officers to organise public meetings or local focus groups into controversial or significant licence applications to explain what SEPA can and will do within its powers to protect the community. It is possible that such officers could work closely with local authorities also to help further community planning obligations. A key aspect of their role could also be to bridge the gap between the perceptions of risk in communities and SEPA's perceptions. Although this would be a difficult task it may serve to enhance confidence in SEPA's regulatory approach and it is understood that at present no such pro-active measures to engage with communities' perceptions of risk are undertaken. Secondly, there is no reason why SEPA could not within its current legislative framework hold oral hearings into particular licence applications. Although there is no legal requirement to do this – and indeed no human rights requirement under Article 6<sup>373</sup>, there is nothing to prevent this. This could be done where there was considerable public interest in an application. Many local authorities have adopted this practice in relation to planning applications<sup>374</sup>. Within the context of proposed reforms to the planning system, the Scottish Executive is considering imposing a requirement on planning authorities to hold oral hearings into certain types of planning applications as an alternative to establishing a third party right of appeal<sup>375</sup>. Clear criteria could be publicised as to the circumstances in which oral hearings would be conducted. The criteria might relate to the type of application eg all PPC applications or might be by level of concern. Oral hearings could be held in front of SEPA's Regional Boards given the PFMR in particular recommended that their core role becomes engagement with the local community<sup>376</sup>.

12.5.5 Advice on making representations/objections and the kinds of issues that will be considered to be material/non-material could be placed on SEPA's website and made available in paper form in libraries.

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<sup>372</sup> See para 12.3 above.

<sup>373</sup> *R (on the application of Adlard) v Secretary of State for Transport, Local Government & the Regions* [2002] 1 WLR 2515.

<sup>374</sup> See eg The City of Edinburgh Council, Development Control Charter, p 8, [www.edinburgh.gov.uk/](http://www.edinburgh.gov.uk/).

<sup>375</sup> Scottish Executive Development Department, Rights of Appeal in Planning, April 2004, paras 6.7.1 – 6.7.3.

<sup>376</sup> See para 4.5.4 above and PFMR paras 3036-3044.

12.5.6 In line with the recommendations in the PFMR a single point of contact (telephone, e-mail) could be established (and advertised) encompassing local authority and SEPA environmental services. Trained staff could direct calls to appropriate offices/officers. This could be seen as a community planning initiative under the Local Government in Scotland Act 2003 to better co-ordinate the delivery of public services and presumably could be a joint project between SEPA, local authorities and other relevant bodies such as Scottish Water.

12.5.7 In general advertising of these enhanced participatory and information rights would be required so that the public actually became aware of them.

## **12.6 Public participation at strategic level**

12.6.1 Although in one sense strategic public participation (eg at SEPA Main Board level or in the preparation/modification of the National Waste Strategy etc) is beyond the scope of the report, nonetheless it is recommended that some consideration should be given by SEPA to this in the context of licensing and enforcement since in any event such participation is required by the Aarhus Convention and implementing measures<sup>377</sup>. These remarks are also applicable to SEPA's involvement in development planning<sup>378</sup>. It is conceivable that engagement at strategic level over, for example, types of waste management and their relative merits in the context of modifying or preparing a new National Waste Strategy may enable a fuller and more comprehensible public debate than a specific application which might involve considerable technical detail. The advantage of early and pro-active engagement also means that disputes over particular licence applications may be reduced. Similar 'front-loading' proposals are currently being promoted in the planning system<sup>379</sup>. The process of involving the public may also be facilitated by the strategic environmental assessment regime<sup>380</sup>.

## **12.7 Findings**

- Although there are considerable rights of public participation in the domestic environmental law framework there has been little research into their effectiveness let alone in the context of their effectiveness from the perspective of those in communities disproportionately affected by pollution.
- Research conducted for the Environment Agency has found that consultation exercises needed to be better planned, that there should be earlier public involvement, that a variety of mechanisms should be employed, that better links should be made with other relevant public bodies, that better relationships

<sup>377</sup> Aarhus Convention, art 7; Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L156, 25.6.03, p 17), art 2, Annex I.

<sup>378</sup> See also para 7.1.1 above.

<sup>379</sup> See eg Scottish Executive Development Department, *Your Place, Your Plan, A White Paper on Public Involvement in Planning*, March 2003; ODPM, *Community Involvement in Planning: The Government's Objectives*, 2004.

<sup>380</sup> See the Environmental Assessment Plans and Programmes (Scotland) Regulations 2004; and Scottish Executive Environment Group, *Strategic Environmental Assessment – A Consultation on the Proposed Environmental Assessment (Scotland) Bill*, Paper 2004/12, September 2004.

should be forged with communities and that there should be mechanisms to evaluate the effectiveness of the public participation.

- Experience in the US suggested that formal notice and representation provisions were largely ineffective and that a range of measures to ensure more effective engagement were necessary.
- The Aarhus Convention reinforces the need for early participation and also enhances accountability through its requirement that reasons and considerations underlying decisions should be made publicly accessible.
- SEPA is not legally precluded from encouraging representations to be made electronically.
- SEPA may lawfully hold hearings into licence applications although this is not required by Article 6 of the European Convention on Human Rights.
- SEPA may also lawfully undertake a range of other means of engaging with the community.

### **12.8 Recommendations**

- SEPA should endeavour to establish participation baselines both to establish whether there are procedural environmental justice problems and also to enable targeting of awareness raising measures on rights of participation in decision-making.
- SEPA should consider some of the recommendations of the research on public participation conducted for the Environment Agency including (1) defining the purpose of consultation, (2) recognising that a number of methods of consultation may be required to ensure effective engagement with communities; (3) development of criteria to measure the effectiveness of participation; (4) proactive provision of more advice – perhaps electronically on the agency’s role and the respective roles of other bodies such as planning authorities; (5) earlier notification of licence applications if possible before a public advertisement is published; (6) holding public meetings on licence applications; (7) ensuring that the effectiveness of participation is evaluated; and (8) staff training and development of expertise in consultation processes.
- SEPA should provide on its website and in paper form in libraries advice about how to make representations in relation to its licensing activities.
- SEPA should facilitate the making of representations electronically.
- SEPA should consider holding hearings into licence applications in defined circumstances. The circumstances should be clearly explained on SEPA’s website.
- SEPA should also consider other means of engaging with local communities including the possibility of designating and training community liaison officers.
- SEPA should consider establishing with local authorities (and the Scottish Executive) a single point of contact environmental hotline within each local authority area (or even nationally) so that the public can readily direct their concerns and complaints to a well known single source which would pass them to the correct body.

## **13 FINDINGS**

### **Chapter 5: Integrating environmental justice concerns into SEPA's functions generally**

- SEPA can legitimately address environmental justice issues. This arises partly through its general duties under the Environment Act 1995 and partly by reason of the guidance on sustainable development issued to SEPA under section 31 of that Act to which SEPA must have regard in carrying out its functions and which is currently being revised to make explicit references to environmental justice. It also arises partly by means of general administrative law principles whereby public bodies must take account of relevant government policy documents or statements.
- As a result of a number of the policy developments identified in chapter 4, by reason of general administrative law principles, environmental justice is already a material consideration in SEPA's licensing and enforcement functions.
- Nonetheless the implications of the environmental justice agenda for SEPA's day to day licensing and enforcement activities remain relatively undefined.

### **Chapter 6: Establishing whether there is a problem**

- SEPA must conduct an adequate amount of monitoring to ensure that water quality standards are not breached, otherwise SEPA is free to conduct monitoring subject to the restriction that the monitoring must be for the purpose of the pollution control regimes administered by SEPA.
- SEPA's monitoring requirements in relation to the water environment will be significantly extended from 2006.
- SEPA can make use of air quality data gathered by local and national monitoring networks to fully inform its views on whether a particular community is being disproportionately affected by air pollution.
- SEPA can rely on local authority identification of contaminated land.
- Where the impact of pollution is infringing a Convention right and SEPA is responsible for regulating the offending emission or discharge and is not currently monitoring it or monitoring it adequately, a legal duty to conduct monitoring or adequate monitoring may arise under the Human Rights Act 1998.
- The use of quality standards may help in the identification of communities which are disproportionately affected and indeed in setting emission limit values for installations within such areas although such standards do have limitations including the need for considerable monitoring and the fact that currently applicable quality standards do not deal with cumulative impacts, only impacts within one particular medium such as air or water.
- It is likely that limit values in quality standards derived from EC legislation are enforceable by individuals using the "direct effect doctrine".

## **Chapter 7: SEPA and the planning system**

- The planning system is primarily responsible for siting decisions for polluting installations.
- SEPA is nonetheless a statutory consultee in the development planning and development control process and can therefore influence siting decisions and may be able to draw a planning authority's attention to potential disproportionate or severe cumulative environmental impacts at an early stage.
- SEPA may have difficulties assessing the impact of a particular development given the time constraints for responding to notifications of planning applications and given the lack of explicit linkage between the planning and environmental law systems.

## **Chapter 8: Distributive environmental justice and SEPA's licensing and functions**

- SEPA may lawfully address environmental justice concerns in relation to new installations by means of, for example, imposing stricter emission limit values in the relevant licence.
- SEPA may lawfully address environmental justice concerns in relation to existing installations by means of, for example, making use of licence variation provisions to impose stricter emission limit values in the relevant licence. This is the case even where BATNEEC or BAT must be applied. There is still sufficient legislative discretion to go beyond BATNEEC or BAT if required.
- SEPA may not lawfully require an operator to enter into a Good Neighbour Agreement with a local community as a condition of a licence. However, there is nothing to prevent SEPA from promoting such agreements as long as they do not fetter SEPA's discretion in any way.

## **Chapter 9: Distributive environmental justice and SEPA's enforcement functions**

- SEPA is legally able to address environmental justice concerns in taking enforcement action where the statutory enforcement powers provide it with discretion.
- In some cases where there are anticipated or actual human rights infringements SEPA's powers may be transformed into duties to take enforcement action.
- SEPA has reserve powers under the Clean Air Act 1993 and the Part IV of the Environment Act 1995 which could be used in appropriate circumstances to address environmental justice issues.
- SEPA has a range of anti-pollution prevention and clean-up powers which could be used in appropriate circumstances to address environmental justice issues.

## **Chapter 10: Human rights and environmental justice**

- There may be a coincidence between infringements of Convention rights and environmental justice concerns.
- Where there are environmental justice concerns which might or might be about to result in infringements of Convention rights SEPA may be required under the Human Rights Act 1998, on human rights grounds, review licence conditions, refuse or impose stricter emission limits in new licences or take enforcement action to avoid or end the infringement of Convention rights.

## **Chapter 11: Procedural EJ and SEPA's licensing and enforcement functions: access to information**

- Although there are considerable public rights of access to environmental information, socio-legal research has identified that those existing rights suffer from a number of problems in practice including lack of awareness, accessibility, comprehensibility of the available data and charges imposed for copies. However, no research has been conducted into whether these problems impact particularly on those in disadvantaged communities although it may be fair to assume that they do.
- There have been a considerable number of legislative improvements which have largely been the result of EC or international obligations. These have included measures to ensure that information can be requested by a variety of means to obviate the need to visit the register and the greater standardisation of charges which has resulted from the establishment of SEPA since it now holds most of the pollution control registers in Scotland. From 2005 when the domestic measures implementing the new EC Directive on access to environmental information (2003/4) which in turn implements the Aarhus Convention (1998) provisions on access to environmental information there will, for example, be additional duties imposed on SEPA to assist those applying for information and to make information progressively available by electronic means.
- Although recent non-legal research has identified that many are still unable to access information electronically, nonetheless separate research has identified that electronic GIS-based systems are the most accessible to those who have access to computers. This is reinforced by the experience of the US Environmental Protection Agency.
- There is research from the US which suggests that provision of information in libraries may be most useful particularly for those who lack computing skills or access to computers.
- Non-legal research has also identified that the public are less interested in raw data than processed or interpreted data and indeed cumulative data or at least data that is comparable between sectors.
- SEPA is not legally precluded at present from making its registers available electronically although the UK Government's preferred approach is for this to be achieved by means of an Order made under the Electronic Communications Act 2000.

- SEPA is not legally precluded from presenting a wider range of information extracted from public available register information on the Scottish Pollutant Release Inventory.
- SEPA will be required to make available on request its decisions on licence applications and the reasons and considerations which underpin those decisions.

## **Chapter 12: Procedural EJ and SEPA's licensing and enforcement functions: public participation**

- Although there are considerable rights of public participation in the domestic environmental law framework there has been little research into their effectiveness let alone in the context of their effectiveness from the perspective of those in communities disproportionately affected by pollution.
- Research conducted for the Environment Agency has found that consultation exercises needed to be better planned, that there should be earlier public involvement, that a variety of mechanisms should be employed, that better links should be made with other relevant public bodies, that better relationships should be forged with communities and that there should be mechanisms to evaluate the effectiveness of the public participation.
- Experience in the US suggested that formal notice and representation provisions were largely ineffective and that a range of measures to ensure more effective engagement were necessary.
- The Aarhus Convention reinforces the need for early participation and also enhances accountability through its requirement that reasons and considerations underlying decisions should be made publicly accessible.
- SEPA is not legally precluded from encouraging representations to be made electronically.
- SEPA may lawfully hold oral hearings into licence applications although this is not required by Article 6 of the European Convention on Human Rights.
- SEPA may also lawfully undertake a range of other means of engaging with the community.

## **14 RECOMMENDATIONS**

### **Chapter 5: Integrating environmental justice concerns into SEPA's functions generally**

- SEPA should make an explicit commitment to environmental justice in its management priorities/statement. This would provide a link between top-level Executive policy commitments and SEPA.
- SEPA should consider the adoption of a general policy on environmental justice. This would explain at a general level how environmental justice issues were to be addressed in SEPA's licensing and enforcement activities.
- Specific policy amendments (eg to the Policy Statement on Enforcement) could be made to incorporate a commitment to addressing environmental justice (see also below).
- More detailed guidance could be provided to licensing teams and enforcement officers.
- SEPA should ensure that the fact that environmental justice issues are or are not taken into account and the weight attached thereto are recorded in the licensing or enforcement decision-making process.

### **Chapter 6: Establishing whether there is a problem**

- SEPA should develop or adopt an existing methodology for assessing the communities which are disproportionately affected by pollution. The EHS3 project may provide a possible route although it may require further development. Where necessary qualitative research looking at the perceptions of those living in communities which may be so affected should be conducted – possibly in collaboration with other relevant bodies.
- SEPA should develop a monitoring programme in collaboration with other relevant bodies such as local authorities to establish which communities are disproportionately affected by pollution.
- Monitoring efforts should thereafter be targeted in part by reference to environmental justice criteria.
- An appropriate policy document should be drawn up explaining the methodology, the programme and the basis for monitoring priorities.
- Potential breaches of quality standards (where these are applicable) may be used to justify licensing and/or enforcement decisions in relation to installations operating in areas which are disproportionately affected by pollution.

### **Chapter 7: SEPA and the planning system**

- Once SEPA has identified communities disproportionately affected by pollution it should – where it has sufficiently full information - raise environmental justice concerns (eg regarding cumulative impact caused by the emissions from a new development) when consulted in the planning process.
- SEPA should consider entering into memoranda of understanding with local authorities about twin-tracking planning and environmental licence



applications or at least better co-ordinating such applications which would serve both to enhance the comprehensibility of the process for members of the public but would also arguably provide SEPA with more timely information on environmental impact which could enable SEPA to make more informed representations in the planning process which in turn may enable environmental justice concerns to be more fully addressed

#### **Chapter 8: Distributive environmental justice and SEPA's licensing and functions**

- Once SEPA has established a methodology for identifying communities subject to disproportionate levels of pollution and has identified such communities it ought to review existing environmental licences to establish whether varying the relevant licences by, for example, imposing stricter emission standards might reduce the pollution burden on such communities.
- Having again identified communities subject to disproportionate levels of pollution, SEPA ought to be guided by this information in determining new licence applications and imposing appropriate conditions.

#### **Chapter 9: Distributive environmental justice and SEPA's enforcement functions**

- SEPA should amend its enforcement policy to indicate that enforcement action will also be targeted at dealing with pollution affecting communities disproportionately.
- SEPA should develop a policy on the use of its reserve powers under the Clean Air Act 1993 and the Part IV of the Environment Act 1995 which should address environmental justice issues.
- SEPA should develop a policy on the use of its anti-pollution prevention and clean-up powers which should address environmental justice issues.

#### **Chapter 10: Human rights and environmental justice**

- SEPA should ensure that its licensing and enforcement procedures fully take account of the human rights dimension and also ensure that its licensing teams are aware of the potential for coincidence between Convention rights infringements and environmental justice issues.
- To avoid allegations of discrimination in the treatment of licence holders (1) in imposing stricter conditions to address environmental justice concerns whether in a new or varied permit; or (2) in deciding to take enforcement action, SEPA should objectively and reasonably justify any changes on the grounds which the relevant legislation enables it to consider.

#### **Chapter 11: Procedural EJ and SEPA's licensing and enforcement functions: access to information**

- SEPA should endeavour to establish participation baselines both to establish whether there are procedural environmental justice problems and also to enable targeting of awareness raising measures on rights of access to environmental information.

- As a minimum step SEPA should endeavour to make its public registers electronically available.
- SEPA should also extract information from the public registers and make it available via the Scottish Pollution Release Inventory in a more user friendly format (particularly by means of interpreting raw data to indicate eg whether or not a licensed facility is complying with licence conditions or not) and details of what enforcement action if any was taken by SEPA.
- SEPA should provide feedback on enforcement action taken either via the local media, the SPRI or via community liaison officers to ensure communities received feedback on what is done to address their concerns.
- SEPA should consider making information regarding specific licence applications available in libraries to assist those who do not have computer skills – or at least providing guides for library staff on accessing environmental information electronically so they might assist those lacking computer skills.
- SEPA should consider and publicise how it will make available decisions on licence applications and the reasons and considerations which underpin those decisions.

## **Chapter 12: Procedural EJ and SEPA’s licensing and enforcement functions: public participation**

- SEPA should endeavour to establish participation baselines both to establish whether there are procedural environmental justice problems and also to enable targeting of awareness raising measures on rights of participation in decision-making.
- SEPA should consider some of the recommendations of the research on public participation conducted for the Environment Agency including (1) defining the purpose of consultation, (2) recognising that a number of methods of consultation may be required to ensure effective engagement with communities; (3) development of criteria to measure the effectiveness of participation; (4) pro-active provision of more advice – perhaps electronically on the agency’s role and the respective roles of other bodies such as planning authorities; (5) earlier notification of licence applications if possible before a public advertisement is published; (6) holding public meetings on licence applications; (7) ensuring that the effectiveness of participation is evaluated; and (8) staff training and development of expertise in consultation processes.
- SEPA should provide on its website and in paper form in libraries advice about how to make representations in relation to its licensing activities.
- SEPA should facilitate the making of representations electronically.
- SEPA should consider holding hearings into licence applications in defined circumstances. The circumstances should be clearly explained on SEPA’s website.
- SEPA should also consider other means of engaging with local communities including the possibility of designating and training community liaison officers.
- SEPA should consider establishing with local authorities (and the Scottish Executive) a single point of contact environmental hotline within each local authority area (or even nationally) so that the public can readily direct their

concerns and complaints to a well known single source which would pass them to the correct body.