

Case ID: IESS.23.005

Description: Consideration of the requirements to designate new bathing waters in Scotland

Case Summary – 04 December 2023

<p>What was the issue?</p>	<p>Scottish Ministers designate bathing water sites in Scotland, with the application process administered by the Scottish Environment Protection Agency (SEPA). Designation requirements are set out in the Bathing Waters (Scotland) Regulations 2008, and include consideration of whether “a large number of people” are expected to bathe at a location. A Non-Governmental Organisation (NGO) submitted a representation to Environmental Standards Scotland (ESS), asserting that the Scottish Government (SG)’s interpretation of a large number of bathers (150 beach users) is, compared to other United Kingdom (UK) nations, unnecessarily high. The NGO further contends that other requirements of the application process are overly onerous or unwarranted.</p>
<p>What did ESS do?</p>	<p>ESS accepted the case for pre-investigation, which involved researching the background to the case and comparing Scotland’s policies and performance to the rest of the UK. ESS also engaged with SG to gather information and to agree on informal resolution of selected matters.</p>
<p>What was ESS’ conclusion?</p>	<p>ESS concluded that SG’s interpretation of a large number of bathers has not affected Scotland’s comparative performance in designating new bathing water sites. However, ESS requested that SG revise the application and internal designation procedures to reflect its policy that 150 users is not a rigid requirement. ESS also requested that SG change the application to allow more forms of evidence of user counts and to allow user counts from organised events. SG has agreed in principle to address these issues. ESS will monitor SG’s implementation of the changes required.</p>

Background

The first European bathing water legislation, Directive 76/160/EEC Concerning the Quality of Bathing Water ('the 1976 Bathing Waters Directive'), was introduced in 1976 to safeguard human health and protect against pollution in coastal and inland waters used by a large number of people. The Directive established uniform quality standards and monitoring requirements.

In 2006, the 1976 Bathing Waters Directive was repealed and Directive 2006/7/EC Concerning the Management of Bathing Water Quality ('the 2006 Bathing Waters Directive') was adopted. This update revised the designation criteria and sought to simplify the management requirements set out in the 1976 Directive. It established four quality classifications for bathing waters: 'poor', 'sufficient', 'good' and 'excellent', which are based on faecal bacteria concentrations. This directive also placed additional responsibilities to inform the public about the water quality at designated bathing waters.

The 2006 Bathing Waters Directive was transposed into Scots law through the Bathing Waters (Scotland) Regulations 2008 ('the 2008 Regulations'). In Scotland, the 2008 Regulations give Ministers the power to designate new sites while SEPA is responsible for most of the monitoring and management requirements. Local authorities are also given duties in the 2008 Regulations.

Designation responsibilities are set out in Section 3(3) of the 2008 regulations:

The Scottish Ministers must–

(a) designate an area of surface water as a bathing water if–

(i) they expect a large number of people to bathe there, having regard to past trends and infrastructure or facilities provided, or other measures taken, to promote bathing; and

(ii) permanent advice against bathing there has not been introduced;
and

(b) determine for each bathing water the period during which large number of bathers are expected there as the bathing season.

The responsibilities above directly reflect the requirements and definitions given in the 2006 Bathing Waters Directive. Neither the 2008 regulations or European Union (EU) legislation define what comprises 'a large number of people'. A study¹ from 2019 places the large number interpretation across the EU between 10 and 300 bathers. The figure of 150 beach users in Scotland was set by Scottish Ministers in 2004 in preparation for the 2006 Bathing Waters Directive coming into force. This process was supported by surveys, aerial photography, and public consultations.

Though the decision to designate Scottish bathing waters rests with Scottish Ministers, the application process is administered by SEPA and new applications are reviewed by the Bathing Water Review Panel, a multi-stakeholder group chaired by SEPA. This panel makes recommendations to Scottish Ministers, who make and issue the ultimate decisions.

Any organisation or individual can apply for bathing water designation in Scotland. The form is available on SEPA's website, and requires certain details and evidence to support the application. The application form was revised in April 2023. The changes included:

- removal of a statement that a minimum of 150 beach users are required for the application to be considered
- the number of days of survey information increased from three to 10 days
- user count evidence changed from dated photographic/video evidence or car/people counts verified by an official body to aerial photography/drone footage
- a requirement was added to provide a letter of support from the landowner and from the local authority (issued by someone with an appropriate level of seniority)

¹ Support to the assessment of Member States' compliance with the Bathing Water Directive 2006/7/EC (Bathing Waters Directive) – Final EU Overview Report. Milieu Consulting SPRL, March 2019

- a new requirement was introduced for the applicant to hold a local consultation and provide copies of all responses to that consultation

In response to ESS' request, SG provided details of the number of bathing water applications which had been made in the last five years and the outcomes of these. SG provided information for the period 2017-2023. In summary of the information provided:

- seven applications for six sites were made in the last five years (one site has had two applications)
- two years (2018 and 2021) had no applications. On the years where applications were made, the number varied between one and three
- three applications were approved the same year of application
- Lower Largo (Fife) was refused in 2019, but approved on a second application in 2022
- Almondell (West Lothian) was refused in 2022
- Wardie Bay (Edinburgh) was refused in 2020, but was re-considered in 2023 and approved
- Fisherrow (East Lothian) has recently been re-designated as SEPA has lifted the permanent advice against bathing

Therefore, of six unique sites with applications in the last five years, the only location ultimately refused, with no indication for re-consideration, is Almondell.

Concerns raised in the representation

The NGO which submitted the representation provided their concerns both before and after the application form was revised in April 2023. The NGO's main concerns are summarised as follows:

- SG's interpretation of "a large number of bathers", set as 150 beach users, is unlawful, the highest threshold in the UK by a significant margin, and "makes Scotland the most difficult part of the UK to have a bathing water designated"

- the application process unlawfully fetters SG's discretion by limiting the types of evidence which an applicant may use to support their application
- some of the new application requirements have no basis in the 2008 Regulations and others are unnecessary/overly onerous

In October 2023, the NGO wrote to ESS with further, more detailed, concerns over the newly-introduced application requirements to obtain consent from the landowner/local authority and to hold a local consultation. The NGO considers these to be irrelevant considerations, as these are not included in the conditions to grant bathing water designation in the 2008 Regulations.

In summary, the NGO considers SG's interpretation leads to difficulty in designating new bathing waters due to setting the threshold too high, especially at rivers and smaller coastal beaches. Prior to submitting the representation to ESS, the NGO wrote to SG with their concerns and received a Ministerial response with assurances that the figure of 150 beach users is not a rigid policy.

Assessment

At the time of the representation to ESS, the application for designation of bathing water (prior to April 2023) stated that a minimum number of 150 beach users was required for the application to be considered. In contrast, the Minister's response to the NGO characterised the figure of 150 as a decision-making aid to ensure consistency, and explained that their policy allows for exceptions to be made when there are fewer bathers.

The 2006 Bathing Waters Directive allows authorities to interpret what constitutes a large number of bathers and does not purposely define or give guidance on this. Accordingly, ESS does not consider that SG applying a figure of 150 users as a non-rigid decision aid is non-compliant with the 2008 Regulations. ESS notes that authorities across the UK and Europe have different approaches to determining what constitutes a large number of bathers, with some having higher indicative thresholds than Scotland.

Scotland's performance in designating bathing water sites, in comparison to the other UK nations, does not demonstrate that the regime for designation in Scotland

is significantly falling behind. In this connection, ESS notes that the number of bathing water sites per capita in Scotland, while below Wales, is higher than England and Northern Ireland. Additionally, in the period of 2017-2023, Scotland added five new bathing waters. The table below compares this to other UK nations.

Nation	Number of bathing water sites 2023	Number of bathing water sites in 2017	Number of sites added 2017-2023
Scotland	89	84	5
England	424	413	11
Wales	109	104	5
Northern Ireland	26	26	0

Taking into account Scotland's size and population relative to England, the comparative amount of bathing waters added in Scotland in this period does not appear concerning. Since 2017, Scotland has had the largest relative increase in the number of bathing water sites despite the other UK nations having either no set numeric figure or lower indicative bather thresholds for designating new sites. The approval rate of applications in Scotland appears significantly higher than in England, although this is based on a small number of applications.

Although the number of bathing water applications made in Scotland is relatively low, the evidence does not suggest any issues in respect of how past applications were processed and considered. However, there are some aspects of the regime, concerning the way SG implements the 2008 Regulations, which could impact the number of applications made, namely:

- a lack of clarity within the bathing waters application form and supporting information in respect of SG's interpretation of a large number of bathers, and the Cabinet Secretary's stated position that the figure of 150 users is not a rigid policy
- the application form being explicit in limiting the allowable evidence of user surveys to drone/aerial imagery

- the exclusion of organised events from survey information
- the lack of written procedures to support the bathing water designation process

Reference to the 150 users policy

The current application process does not visibly align with the Cabinet Secretary's following statement to the NGO that the 150 users is not rigid policy:

“Within this policy, the number of 150 bathers aids Ministers in their decision making and ensures some degree of consistency in designations. But it is not a rigid policy and it allows for consideration of exceptions if bathers are below that number.”

The previous application form did not reflect the policy as set out by the Cabinet Secretary. ESS understands this policy to mean that there is a discretion available to decision makers, where the application indicates less than 150 users. The previous application form did not indicate this discretion could apply and was explicit in requiring this minimum threshold. Now, the application and supporting guidance make no reference to the figure of 150 users, nor whether exceptions can be made.

The stated policy of flexibility around 150 users is considered to align with Ministers' designation duties given in the 2008 Regulations, which requires Ministers to consider both whether there are a large number bathers expected and to have regard to infrastructure, facilities, and other measures taken to promote bathing. However this discretion is not made clear in the publicly available information. If the public are not aware that discretion exists, nor how this discretion applies in practice, this could discourage applications for bathing water designation.

Requirement for drone footage/aerial imagery

The wording of the application appears to limit the acceptable evidence to drone or aerial imagery. This could place a financial burden on applicants to have such equipment deployed on the required ten survey days, or dissuade applications being made. Also, there are legal restrictions to drone use in Scotland, e.g. these cannot be flown within one kilometre of an airport, five kilometres of a heliport, within 50

metres of a “congested area,” or within 50 metres of a person who is not participating in the operation of the drone.

Exclusion of organised events

The 2008 Regulations require Ministers considering designation of new sites to have regards to past trends, infrastructure or facilities provided or ‘other measures taken to promote bathing’. In ESS’ view, it is appropriate to consider an organised event as a measure taken to promote bathing, therefore such events should be admissible for consideration. No other UK nation excludes organised events from survey data.

Lack of written procedures and transparency

While SG indicate that the past refusals were straightforward (e.g. Almondell having too few bathers and lack of facilities/infrastructure), more nuanced or complicated applications may be forthcoming.

SEPA has indicated that SG has not provided updated procedural documents to guide the work of the Bathing Water Panel since the change of the application process and, as far as ESS can ascertain, no written internal procedure exists of how bathing waters applications are assessed.

The system of reviewing and deciding new applications needs to be robust, transparent, and fair. To this end, in ESS’ view SG should create and make public a clear procedure setting out how bathing waters applications will be assessed, including practical measures on how to apply discretion with regards to 150 users.

Invitation to informal resolution

In June 2023, ESS invited SG to address the first three issues above by revision of the application form and supporting documentation. ESS additionally requested that SG provide new written procedures ahead of the Bathing Water Panel convening to decide on 2023 applications. On 17 July 2023, SG agreed in principle to address the raised issues.

In October 2023, ESS sought an update on progress and were informed by SG the work was underway. At the time of reporting, the meeting date of the Bathing Water

Panel has yet to be scheduled, and ESS will continue to monitor the implementation of the changes required and will report on the outcome at that time.

In respect of the further concerns raised in October 2023 by the NGO (whether certain new application requirements are irrelevant considerations), ESS will explore these issues further with SG.

This summary report has been published ahead of a full report for this case. The full report will provide additional details on the background, information reviewed, our assessments, and the outcomes achieved.