

Shivali Fifield

8 August 2024

Dear Shivali

Thank you for sending me a copy of ERCS' draft report summarising its experience to date of making eleven representations to ESS. Also, thank you, and Lloyd, for meeting Richard and I to discuss the report. We found it a constructive discussion and welcome ERCS' intention to act as a "critical friend" of ESS. It was also timely as ESS is beginning work to develop its next strategic plan. More widely, we discussed some of the current challenges facing the environmental sector and the ongoing development of environmental governance in Scotland following the UK's exit from the European Union and the establishment of ESS.

The draft report covers four areas where ERCS has concerns:

1. ESS' refusal to investigate a significant proportion of ERCS' representations.
2. Significant and unreasonable delays in ESS' handling of these representations.
3. A failure by ESS to use its statutory powers to enforce environmental laws.
4. Poor decision making and failure to engage with material legal issues.

I have addressed each of these areas below. I have also responded to the recommendations contained in the draft report.

1. Refusal to investigate

The first area of concern relates to ESS' decisions not to investigate five of ERCS' representations.

ESS conducted substantive work on all of these representations. It concluded, for various reasons, that it would not take them forward. Detailed explanations for each of these decisions have already been provided, either at the initial stage or through requests for review or complaints made by the ERCS. These reasons included:

- the availability of suitable alternative remedies
- ongoing work to resolve environmental failures by other relevant agencies
- the issues not meeting ESS' significance criteria
- the absence of evidence of an environmental failure

This context is important as, without it, the draft report presents an incomplete picture of how ESS works when representations are received and how ESS' approach is aligned with its strategic plan which, in turn reflects the requirements of the Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ("the 2021 Act"). While ESS and ERCS may disagree over the decision made on individual representations, it is for ESS, as the independent environmental governance body to reach a decision on which matters it decides to take forward.

2. Delays

The second area of concern relates to the length of time which ESS has taken to process and resolve the concerns raised within ERCS' representations.

Considering the eleven representations received from ERCS, for the cases which ESS decided not take forward, ESS' review of these demonstrates that these were dealt with, on average, in under two months. In the six cases which ESS did take forward, it has taken ESS on average, around nine months from receipt of the representation to close the case. This time period includes the following steps:

- the time taken to identify an environmental failing
- the time taken to reach resolution
- the time taken to write up, quality assure and publish the report

ESS has taken, on average, around six months from receipt of a representation to identify an environmental failing (in other words, the time taken to invite the public authority to informal resolution). This period includes the time taken to assess the representation, make enquiries of the relevant public bodies (this can include multiple exchanges), provide them an opportunity to respond, seek legal advice and consider the evidence gathered.

In the two cases where ESS has issued a summary report with monitoring, these were dealt with in four and five months respectively. While I accept that there have been delays by the public authority in taking forward some of the steps set out in ESS' summary reports, I can assure you that ESS closely monitors any developments and regularly engages with public bodies with a view to assessing whether any further action is necessary. ESS will consider whether there is more that it can do to improve the transparency of this ongoing monitoring work.

Where there are improvements to how it operates that can be made, ESS will make them. However, the implication that ESS' work is beset by significant delays is not merited.

3. Use of enforcement powers

The third area of concern relates to ESS' approach to how it remedies environmental failures.

The 2021 Act requires ESS to set out how it intends to engage with the public authorities it investigates with a view to swiftly resolving matters "so far as possible" without recourse to its formal enforcement powers. ESS' strategic plan sets out its approach to informal resolution and is clear that working constructively with public bodies can often be the most effective way of securing a swift resolution of environmental failures.

The draft report notes ERCS' concerns that ESS relies exclusively on the use of informal resolution. It is correct that ESS has not exercised its statutory powers (i.e. issuing a compliance notice, improvement report or applying for judicial review) following representations from ERCS. It is incorrect to say that ESS relies exclusively on informal resolution. Following ESS' investigations into Scotland's compliance with air quality legal limits and local authorities' delivery of their climate change duties, ESS laid improvement reports in the Scottish Parliament.

A theme that has appeared throughout ERCS' communications with ESS is that, because ESS has formal enforcement powers, it must always use them to the fullest extent. This is not the case. In addition to the requirement to try and resolve issues without recourse to formal enforcement powers, the 2021 Act requires ESS to act proportionately in how it exercises its functions. ESS will always consider the nature and significance of issues brought to it in representations before deciding what action to take. ESS makes the final decision on what actions are necessary and over what timescale. With respect to the outcomes of informal resolution work, it is true that some of the remedial actions in a number of cases have yet to be implemented by the public bodies concerned. For the avoidance of doubt, the timescales for future implementation will have been agreed between ESS and the public body, ESS will always monitor the implementation of these recommendations. As we discussed when we met and, noted above, I will consider whether there is more information that ESS can make public to explain our ongoing monitoring work.

Finally, any compliance notice issued by ESS must include the period within which the required steps are to be taken by the public body. Accordingly, it may be the case that the period set out in the compliance notice would be similar to that agreed through informal resolution.

4. Decision making

The fourth area of concern relates to ESS' decision making.

The draft report states that ESS' decision making is poor and fails to engage with the relevant legal issues. You feel that this restricts ESS' ability to effectively address the policy and legal issues raised in representations and has led to unsatisfactory outcomes. Three examples of this are cited, each of which is discussed below.

ESS.22.027

The representation concerned SEPA's alleged failure to enforce licences issued under the Water Environment (Controlled Activities) (Scotland) Regulations 2011 ("the CAR Regulations"). The background to the alleged failure related to sewage pollution witnessed by the public around waste water treatment works (WWTW). Photographs of the pollution were supplied to ESS which, in ERCS' view, appeared to indicate that several of the descriptive conditions of the WWTWs CAR licences had been breached on numerous occasions. The outcome sought was for ESS to carry out an investigation with a view to taking enforcement action against SEPA.

ESS noted that Regulation 32 of the CAR Regulations states that SEPA **may** issue an enforcement notice where it considers that an activity 'has caused, is causing or is likely to cause **significant** adverse impacts on the water environment or any part of it' (my emphasis). ESS decided to look into how SEPA assesses the significance 'test' within Regulation 32. ESS did not undertake this work to evaluate any particular regulatory decision, but to assess whether any systemic issues arose from how SEPA implements its responsibilities.

ESS found that the guidance provided to SEPA's staff on how it categorises (and therefore deals with) reports of pollution could be clarified and improved and it invited SEPA to informal resolution. In ESS' view, the changes made by SEPA to its guidance will provide greater clarity for its staff responding to such reports of pollution and enhance the accountability for the decisions taken by SEPA in this connection.

It appears that ERCS' dissatisfaction is rooted in the discretion that is available to SEPA on how it enforces the CAR Regulations. SEPA employs a range of regulatory tools to achieve environmental outcomes, ranging from advice and guidance through to prosecution. It has publicly stated that advice and guidance will continue to be its main route to securing compliance. ESS has previously informed ERCS that, if it has evidence that SEPA is taking no enforcement action in the face of its own guidance – or the type of enforcement action taken by SEPA is not compliant with its legal duties – it is open to it to contact ESS at that point. ESS can also respond if it finds such evidence.

The approach taken by ESS in this case is consistent with its statutory role and the issues identified had a clear connection to the matters raised within the representation, engaging clearly with the relevant legal issues.

ESS.23.032

Your concern relates to the informal resolution ESS reached with SEPA on its compliance with its duty to maintain a public register, namely:

- the implementation plan is vague and lacks specificity

- the implementation plan does not give specific deadlines for the completion of certain tasks by SEPA
- the lack of clarity within the implementation plan makes it difficult to hold SEPA to account for any slippage in implementation
- there is no reason given for why ESS gave SEPA so long to comply with its legal duties

The decision making in this case is set out fully in the report which ESS published in January 2024. This report acknowledged the impact of the December 2020 cyber-attack experienced by SEPA and accepted that the recovery of public register information has been, and continues to be, a major undertaking for SEPA. Given the significant number of registers which SEPA is required to maintain, and the number of related documents, ESS considered the implementation plan to be a proportionate and realistic pathway to achieving compliance.

While ESS recognises that the ERCS may disagree with the approach taken in this case and the time afforded to SEPA, I consider that the the relevant legal issues were well assessed, well understood and ESS reached an independent conclusion on what it considered proportionate in the circumstances, as it must under the 2021 Act. ESS has committed to publishing regular updates on SEPA's progress after agreed milestones.

ESS.23.012

This representation was received from a member of the public who was unhappy with the investigations conducted into the use of lead shot in his locality and the consequent risks to his private water supply and the surrounding environment. SEPA had taken no action as, in its view, the lead concentration levels were well below the allowable threshold. Aberdeenshire Council considered the contamination to be ongoing and therefore did not take any action under Part IIA of the Environmental Protection Act 1990 ('the EPA 1990').

The reason for why this case was not taken forward was because the decisions at issue were individual regulatory decisions. However, when providing signposting assistance, the Senior Investigations Officer provided the following commentary:

"I see you have already raised a service complaint to Aberdeenshire Council regarding their decision to not investigate the land under EPA 1990, who have upheld their decision. This may also be elevated to the SPSO if you disagree, but again I note **the intention of the EPA 1990 is to deal with legacy contamination.**"

ERCS' position is that the statement in bold has no legal basis. ESS' commentary was intended to assist and to reflect the approach taken by numerous local authorities, what is set out in the Scottish Government's statutory guidance and the ESS member of staff's previous professional experience in the field. The council's interpretation of its duties under the EPA 1990 had no bearing on ESS' decision not to take the case forward.

In a separate case brought by ERCS (IESS.23.035), ESS conducted detailed research to establish the extent of Part IIA of the EPA 1990. ESS explained that there did not appear to

be any provision in Part IIA which would confine the duties of local authorities to historical contamination only. However, no view was taken on the lawfulness of any policy distinction and the decision not to investigate was based upon the protection available under other regimes and the consequent significance of the issue.

ERCS' recommendations

The draft report sets out a number of recommendations. Annex 1 sets out ESS' response to each of these recommendations.

Concluding comments

My overriding view is that the high level statements expressed in the draft report do not accurately or fairly reflect ESS' approach. For example, the draft report states that ESS has fallen short of its mission statement yet does not acknowledge the breadth of work ESS has completed, such as its work on air quality, climate change, its broader analytical work and its recently launched investigations. Drawing such a wide ranging conclusion after a relatively short period of time, without taking into account the full breadth of ESS' work, provides a very partial perspective on ESS' work.

At our meeting, you reiterated your support for ESS as Scotland's independent environmental governance body. Thank you for also confirming at this meeting that your intention in preparing this report was not to undermine ESS or its staff. There will always be decisions that ESS makes that stakeholders, including ERCS, and the public bodies ESS scrutinises, disagree with. That is inherent in any scrutiny role.

I welcome the feedback from ERCS on how ESS has operated during its first three years of existence. ESS will always look to improve and refine how it operates and the development of its second strategic plan presents a critical and important opportunity to do that. There are immediate areas where we can go further regarding the transparency of our work and will look to take this forward over the next few months.

I am, of course, always open to further discussion on this matter or any aspect of ESS' work.

Yours sincerely

Mark Roberts
Chief Executive

Annex 1: Responses to draft recommendations

Recommendation 1: ESS should introduce reasonable and specific timescales for the handling of representations at all stages. Those timescales should specify when the person or organisation which made the representation will be updated.

Response: ESS has service standards, which set out the timescales by which it will complete work fully within ESS' control (for example the decision on whether to accept the case for pre-investigation should be made within 20 working days of receipt of the representation).

In terms of updates, ESS expects to update those making representations on progress every six weeks. However, ESS will not provide a detailed running commentary or enter into a negotiation about its handling of any case. To do so, would undermine its independence. ESS' guidance on updates and timescales states:

“In general, updates should be brief but contain sufficient information to keep the relevant parties reasonably informed as to the progress of the investigation. Generally, the information conveyed should be confined to procedural rather than substantive matters. In other words, SIOs should avoid telling relevant parties anything that could give an indication of what ESS' decision on the investigation might be. Where relevant parties request an indication of the likely outcome of their case, they should be told that they must await the formal decision on the matter.”

Recommendation 2: ESS should ensure that full and clear reasons are given to those who have made representations when timescales are not met or need to be changed.

Response: Where timescales have previously been provided, ESS should absolutely provide reasons for any change. ESS will review its guidance to ensure that its staff are clear of this requirement.

Recommendation 3 – ESS should review and improve any internal processes which may be contributing to delays in handling representations as a matter of urgency. More information should be made public on internal decision-making processes within ESS.

Response: This recommendation is closely connected to the recommendation 1. However, I confirm that ESS intends to publish its operational guidance.

Recommendation 4: ESS should be more transparent about the procedures and criteria it uses when deciding whether to investigate representations. This will assist those considering making representations to ESS and will provide more clarity on how ESS is approaching its functions.

Response: As noted in response to recommendation 3, ESS intends to publish its operational guidance.

Recommendation 5: Where ESS decides not to investigate a representation, it should publish a statement of reasons to justify its decision. Decisions against investigating a representation should be justified with reference to both ESS's statutory functions and its strategic plan.

Response: ESS' decisions not to investigate are fully reasoned. ESS publishes a list of all the representations it receives and the outcomes of the case. As noted above, I confirm that ESS intends to publish its operational guidance. ESS will also consider publishing anonymised decision letters for all representatons.

Recommendation 6: ESS's current strategy covers the period from 2022 to 2025, meaning that ESS is due to consult on a new strategy in the near future. ESS's new strategy should adopt a more robust approach to enforcement. The new strategy should clarify the circumstances in which informal resolution is an appropriate starting point, rather than automatically using informal resolution in all cases (as appears to be ESS's current policy).

Response: ESS will consider its approach to enforcement during the development of its next strategic plan in the light of its experience to date. This will, of course, have to be done within the context of the 2021 Act. ESS will consult on its next draft strategic plan during 2025.

Recommendation 7: Where ESS uses informal resolution, ESS's new strategy should set out clear criteria which are to be used for ESS to escalate from informal resolution to the use of compliance notices and/or judicial review. Those criteria should include circumstances where there are (a) failures by public authorities to engage with ESS, (b) failures by public authorities to provide information requested and/or (c) delays by public authorities in taking agreed steps to ensure compliance with environmental laws.

Response: These are the circumstances in which ESS will consider taking formal enforcement action should informal resolution fail. It should be noted that ESS has not yet encountered any of these scenarios. As part of the development of its next strategic plan, ESS will review its criteria set for taking formal enforcement action.

Recommendation 8: Where ESS 'resolves' a representation by way of an agreement with a public authority, those agreements should be specific, measurable, relevant and time-bound. Agreements with public authorities should be made public.

Response: ESS agrees. The resolutions ESS has reached meet all of the above requirements.

Recommendation 9: ESS should ensure that its existing staff handling representations have adequate training in Scottish environmental law and that any new staff employed to handle representations have suitable experience and qualifications in Scottish environmental law.

Response: ESS' staff have a range of professional backgrounds all of which contribute to its work. ESS has an in-house solicitor and access to external providers of legal advice which it draws on on a regular basis. ESS places significant emphasis on the training and development of its staff.

Recommendation 10: ESS should establish a stakeholder forum which meets regularly. This will help ESS to better understand the needs and expectations of its stakeholders, and to give stakeholders the opportunity to directly raise any concerns about ESS. An example of a similar initiative is the Department for Planning and Environmental Appeals' Stakeholder Forum.

Response: ESS may consider this option but its preference is to continue to engage with its very diverse range of stakeholders on a bilateral basis. A stakeholder forum could be very broad, potentially including non-governmental organisations, industry representative bodies and community groups. ESS may consider establishing stakeholder groups for specific pieces of work in the future. In addition, ESS has an ongoing community engagement programme and seeks the views of all who engage with it. ESS' approach to engaging with stakeholders will be considered during the review of the current strategic plan.