

The Designation of Bathing Waters in Scotland

Case Reference IESS.23.005

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1. Executive summary

1.1 Bathing waters are designated areas of natural water bodies (including both coastal and inland waters) which are used for recreational bathing by a large number of people. In order to protect bathers, designated bathing waters are subject to water quality monitoring and are assigned quality classifications based on monitoring data; this information is made available to the public.

1.2 Scottish Ministers designate bathing water sites in Scotland, with the designation process administered by the Scottish Environment Protection Agency (SEPA). Under the Bathing Waters (Scotland) Regulations 2008 ('the 2008 Regulations'), Scottish Ministers must designate an area of water as a bathing water if they expect a large number of people to bathe there and no permanent advice against bathing there has been introduced. While it is normally local authorities that will propose the designation of a particular bathing water, any individual or group can suggest to Scottish Ministers that a bathing water should be designated.

1.3 Environmental Standards Scotland (ESS) received a representation from a non-governmental organisation (NGO), concerning the way that the Scottish Government (SG) was implementing the bathing water designation process. Specifically, the NGO asserted that the requirements set out in the 'Bathing Waters Application Form' in order to 'qualify' for designation were overly onerous and not justified by the terms of the 2008 Regulations.

1.4 On reviewing the evidence, ESS determined that a number of the concerns raised within the representation were well founded and invited the SG to take measures to improve the proposal process and decision-making criteria. For the reasons set out in this report, ESS considers that the actions taken by the SG are reasonable. ESS accordingly considers that informal resolution has been achieved.

2. Background

European Union and Scottish bathing water legislation

2.1 The main driver of law and policy relating to designation of bathing waters in Scotland are EU Directives that have been transposed into Scots law. The first European bathing water legislation, Directive 76/160/EEC concerning the quality of bathing water ('the 1976 Directive'), was introduced to safeguard human health and protect against pollution in coastal and inland waters used by a large number of people. This Directive established uniform quality standards and monitoring requirements. Classifying bathing water quality was a simple pass or fail against those standards.

2.2 In 2006, based on World Health Organisation (WHO) recommendations, the 1976 Directive was repealed and replaced by Directive 2006/7/EC concerning the management of bathing water quality ('the 2006 Directive'). This Directive 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', based on concentrations of faecal indicator organisms. The 2006 Directive also placed additional responsibilities on public authorities to inform the public about water quality at designated bathing waters and aimed to enhance public participation in the designation process.

2.3 The 2006 Directive was transposed into Scots law through the Bathing Waters (Scotland) 2008 Regulations ('the 2008 Regulations'). The 2008 Regulations place a duty on Scottish Ministers to designate new sites if 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 at that site (and provided no permanent advice against bathing there has been introduced). The 2008 Regulations also impose duties on SEPA in relation to certain monitoring and management requirements, including making certain information available to the public, and on local authorities, including in relation to publicly-accessible signage, beach management and the provision of appropriate infrastructure.

2.4 It is important to note that the principal objective of the bathing waters regime is the protection of human health at locations where large numbers of people bathe during the bathing season. Not all surface and coastal waters in Scotland meet the

criteria for bathing water status. There are distinct regimes with protection and/or improvement of environmental quality as their primary aim (e.g. the Water Environment (Controlled Activities) (Scotland) Regulations 2011 and River Basin Management Plans).

Designation duties

2.5 Designation responsibilities are set out in Regulation 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 numbers of bathers are expected there as the bathing season.

2.6 Regulation 3(3) of the 2008 Regulations is intended to reflect the terms of the 2006 Directive, which provides that 'a large number' of bathers means a number that the competent authority considers to be large having regard, in particular, to past trends or to any infrastructure or facilities provided, or other measures taken, to promote bathing. The 2006 Directive does not assign a reference number of bathers; instead, discretion is afforded to Member States within the development of implementing legislation and taking into account the stated indicative factors. A report¹ from 2019 found that differences in approach exist, across Member States, as to how 'a large number of people' is determined. Some have specified – in law, guidance or practice – the meaning of 'large number' by providing a reference number of bathers (ranging from between 10 and 300 bathers). Others take a more

¹ Milieu Consulting SPRL, 'Support to the Assessment of Member States' Compliance with the Bathing Water Directive 2006/7/EC (Bathing Waters Directive) – Final EU Overview Report (March 2019): healthservices.gov.mt

discretionary approach, with no numerical indicator, but taking account of factors such as the BWD criteria, national laws and local knowledge. In Scotland, no specific numeric threshold is provided by the 2008 Regulations, but an indicative figure of 150 beach users has been consistently referenced in the SG's guidance. This figure was chosen by Scottish Ministers in 2004 in preparation for the 2006 Directive coming into force and was supported by surveys, aerial photography and public consultations.

Proposals for new bathing waters

2.7 While it is normally local authorities that will propose the designation of a particular bathing water, any organisation or individual can propose to Scottish Ministers that a bathing water should be designated. The form for doing so is available on SEPA's website and requires certain details and evidence to support the proposal.

2.8 Although the decision to designate Scottish bathing waters rests with Scottish Ministers, the process is administered by SEPA and new proposals are reviewed by the Bathing Water Review Panel (BWRP) – a multi-stakeholder group chaired by SEPA. The BWRP makes recommendations to Scottish Ministers, who ultimately make and issue the decision to designate new bathing waters.

2.9 The form was revised in April 2023 (during ESS' involvement in this matter) and therefore differed from that in place at the time of the representation being submitted. Table 2-1 below presents a summary of the evidence and supporting information required before and after the April 2023 revision.

Table 2-1 – Comparison of requirements

	Pre-April 2023	Post-April 2023
Number of bathers required	150 beach users (not needed to be in the water to be counted)	Not stated
Number of surveys of users	Three days in three different months of the bathing season	Ten days during the bathing season, at peak use times (e.g. weekends and bank holidays), at the time of day when the highest numbers of users would be expected
Evidence of bather numbers	Dated photographic or video evidence of the general bathing water in use or car counts or people counts verified by official bodies (e.g. SEPA or the local authority)	Survey with a breakdown of with number of bathers/paddlers, other water users and beach users User counts 'should be well-evidenced by aerial photography/drone footage'
Evidence of facilities, infrastructure and access	Information on facilities, access, nearby features, description of use, evidence if the water has been promoted for swimming	Details on facilities at the site, evidence of past trends of use
Local authority/ landowner support requirements	Contact details for the local authority co-ordination officer	Letter of support from the local authority and landowner (if applicable). Local authority support must be at an appropriate level of seniority, for example the CEO and it must state that they accept the responsibilities of the proposal form

	Pre-April 2023	Post-April 2023
Consultation	Not stated	The proponent must hold a 'local consultation' and provide copies of all responses to that consultation Additional requirements introduced, e.g. showing 'how you ensured a cross-section of opinions were captured'
Exclusion of organised events from survey data	Not stated in the proposal form, but correspondence from the SG in relation to a proposal stated that any surveys 'should not be undertaken when one off organised events are taking place'	A requirement to exclude spot surveys on days where atypical, organised events, such as beach festivals are planned

3. The representation

The initial representation

3.1 The focus of the initial representation was the SG's interpretation of what constitutes a 'large number of people' (150 users) and a concern that this would constrain designation of new bathing water sites. The NGO argued that the SG's interpretation was the most prescriptive and contained the highest threshold in the UK by a 'significant margin', making Scotland the most difficult part of the UK to have a bathing water designated. The NGO considered the SG's interpretation of 'a large number of people' to be contrary to the 2008 Regulations.

3.2 In addition to challenging the SG's interpretation of what constitutes a large number of people, the NGO sought outcomes where the SG would:

- address inconsistencies in its form regarding the number of survey days required (the NGO considered the form to be self-contradictory on whether one or three days were required)
- remove the requirement for survey data falling over three months
- remove the exclusion of bather survey data arising from organised events

3.3 The NGO submitted supporting information with their representation, including correspondence it had in late 2022 with the then Cabinet Secretary for Environment and Land Reform.

3.4 ESS considered this case to be within its remit, due to the following factors:

- the representation relates to a public authority
- the representation relates to environmental law – the 2008 Regulations
- overly onerous or unwarranted designation requirements, as set out in the representation, may constitute a failure to comply with environmental law or a failure to implement or apply environmental law effectively

3.5 ESS also considered the matters raised were significant as overly onerous requirements on designating new sites could increase the risks to the public who bathe at non-designated sites.

Supplemental concerns

3.6 After the April 2023 revision to the bathing water process, the NGO was invited by ESS to provide comment on the changes. The NGO maintained their concerns regarding the SG's interpretation of what constitutes a large number of people and the exclusion of organised events. It was satisfied that the inconsistency of the number of survey days required had been resolved in the new proposal document.

3.7 The NGO raised the following supplemental concerns with the revised process:

- that the process had been made more onerous on proponents through:
 - increasing the survey requirement to ten days
 - the requirement of obtaining landowner/local authority approval
 - constraining the allowable evidence of the number of beach users to aerial/drone footage
 - the requirement to hold a local consultation
- that there was no basis in the 2008 Regulations for the new requirements to hold a local consultation and to obtain landowner/local authority consent
- that the removal of specific reference to the 150 bathers in the proposal form and supporting information, while still applying it as an indicative figure in decision making, represented an unpublished policy, which was unlawful
- that the use of numeric thresholds was, of itself, inconsistent with the purposes of the 1976 Directive based on a previous decision of the European Court of Justice (ECJ)

4. Engagement with the Scottish Government

4.1 Following preliminary review of the representation, ESS engaged with the SG on the matters raised. Under Section 23(1) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021, ESS sought information from the SG including relevant designation policies, written procedures and past decisions.

4.2 The SG confirmed that it did not have written procedures for reviewing and deciding on bathing water proposals. In terms of process, the SG explained that a submission is prepared for the relevant Minister with a summary of bathing water legislation, key proposal information and the recommendations of the BWRP. The Minister thereafter decides on designation based on the information provided.

4.3 The SG confirmed that Scottish Ministers' interpretation of what constitutes a 'large number of people' was based on past trends, infrastructure or facilities provided or other measures taken to promote bathing, and that this had not changed despite being removed from the proposal form and supporting documents in April 2023.

4.4 The SG also provided the details and outcome of all bathing waters proposals made in the past five years, which are summarised in Table 4-1 below.

Table 4-1 – Bathing water proposal details, 2017-2023

Year	Details
2017	Gairloch Beach, NW Highlands – designated Sand Beach, NW Highlands – designated
2018	No proposals
2019	Lower Largo, Fife – not designated until 2022. At the time, photographic evidence submitted with the proposal did not support user number surveys and an independent survey was conducted. Scottish Water also conducted a water quality improvement feasibility study as SEPA predicted bathing water quality would be poor.

Year	Details
2020	Wardie Bay, Edinburgh – not designated, however, under consideration for designation in 2023 following recent City of Edinburgh Council support (the SG subsequently informed ESS that Wardie Bay beach had been designated as a bathing water).
2021	No new proposals
2022	<p>River Almond at Almondell, West Lothian – not designated as very low bather survey numbers, no evidence of past trends, no infrastructure/facilities provided and no promotion of bathing.</p> <p>Barassie, Ayrshire – designated</p> <p>Lower Largo, Fife – designated</p>
2023	No new proposals as of May 2023

4.5 Following ESS' assessment of the representation and the information provided by the SG, ESS identified issues with the way the SG implemented the 2008 Regulations. Accordingly, ESS invited the SG to resolve these issues informally; the details of this are set out in Section 5.

5. Analysis and resolution of issues

Assessment of compliance with environmental law

Interpretation of a large number of people and the use of numeric thresholds

5.1 The representation alleges the SG's interpretation of a 'large number of people' (150 users) is non-compliant with the 2008 Regulations for the following reasons:

- the use of a strict numerical minimum threshold precludes any consideration of past trends and infrastructure or facilities provided, or other measures taken, to promote bathing, which is inconsistent with the duties set out in Regulation 3(3) of the 2008 Regulations
- the use of a strict numerical minimum threshold amounts to a fettering of the SG's discretion to designate bathing waters
- the 150 people minimum threshold is far in excess of any reasonable definition of a 'large number' in the 2008 Regulations

5.2 As noted above, the 2006 Directive does not specify a reference number of bathers and instead, discretion is afforded to Member States as to what might be considered a 'large number' taking into account past trends, infrastructure and facilities and promotion of bathing. Some Member States have approached this by providing a reference number of bathers within national legislation, with a range of thresholds applied throughout Europe, whereas others operate a more discretionary approach. While Scotland has a higher indicative threshold than the rest of the UK in terms of the minimum number of bathers, ESS notes that other EU member states interpret what constitutes a large number of people differently, with some states having higher indicative thresholds than Scotland.¹

5.3 ESS notes that the SG's position is to apply flexibility around the 150 indicative threshold. In a November 2022 letter to the NGO, the then Cabinet Secretary for Environment and Land Reform's following explanation to the NGO stated that the figure of 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.”

5.4 In terms of the requirements of the 2008 Regulations, the determination of whether a ‘large number’ of bathers is to be expected is based on the factors outlined in Regulation 3(3)(a). Provided the decision is not being taken solely on the basis of a strict numeric limit, with disregard for past trends or existing infrastructure and facilities, ESS’ position is that this approach is not contrary to the terms of the 2008 Regulations.

5.5 To demonstrate how the stated flexibility on the indicative threshold would be applied in practice, ESS requested that the SG produce written procedures for the designation of bathing waters, including practical measures on how to apply discretion with regards to the indicative threshold of 150 bathers. The SG is in the process of producing these documents.

5.6 The NGO was also of the view that the use of numeric thresholds is, of itself, inconsistent with the purposes of the 1976 Directive based on a previous decision of the ECJ (Commission v UK C-56/90).² The key message in this case was that numeric thresholds cannot be the only measure of whether a bathing water is designated, where past trends or the presence of infrastructure or facilities, as a matter of fact, constitute evidence of the area being frequented by a large number of bathers. ESS does not, however, consider it authority for the position that the use of indicative bather numbers, as an aid to decision making, is inconsistent with the Bathing Waters Directive or the 2008 Regulations.

5.7 For these reasons, ESS took no further action in respect of use of the indicative threshold of 150 users.

² European Court reports, ‘Judgment of the Court of 14 July 1993. - Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland. - Directive 76/160/EEC - Bathing water. - Case C-56/90’ (July 1993):

eur-lex.europa.eu

Assessment of effectiveness in implementing environmental law

5.8 The representation alleged that multiple aspects of the bathing water proposal process are unjustified or overly onerous, each of which are assessed later in this section. However, in light of the NGO's contention that Scotland is the most difficult part of the UK to have a bathing water designated, ESS considered whether the data³, at a high level, points towards issues with the effectiveness of the way in which the 2008 Regulations have been implemented.

The number of existing bathing waters across the UK nations

5.9 ESS has compared the number of bathing waters per 1 million population of each UK nation. Scotland has 16.3 bathing water sites per million people, England has 7.6, NI has 14.5 and Wales has 34.7.

The number of new bathing waters designated

5.10 The total number of bathing water sites in each UK nation in 2023 compared to 2017 is as follows:

Table 5-1 – Bathing water sites per nation

Nation	2017	2023	# increase	% increase
Scotland	84	89	5	6.0
England	413	424	11	2.7
Wales	104	109	5	4.8
Northern Ireland	26	26	0	0.0

5.11 Over this period, Scotland had the highest percentage increase in the number of designated bathing water sites, despite having the highest indicative threshold in the UK. Northern Ireland, which uses a lower beach user threshold, has not increased the number of designated bathing waters in this period. ESS has also

³ ESS completed these assessments in 2023 in response to the representation; the information presented in this section was therefore based on data available in 2023.

considered the situation in Ireland, which is a country with a similar maritime climate to Scotland. Six bathing water sites were added in the last five years, which represents a 4% increase. Ireland has lower indicative thresholds than Scotland.

Designation acceptance rate

5.12 As noted in Section 4, ESS requested from the SG details of all bathing water proposals made in the past five years and the outcomes. ESS notes that for the six unique sites proposed in this period, the only location not ultimately designated (with no indication of re-consideration) is Almondell. ESS observed that, on reconsideration, Lower Largo and Wardie Bay were ultimately designated.

Conclusions on high-level effectiveness

5.13 While caution has to be given when comparing data from different regimes, in ESS' view the data considered does not point towards high level ineffectiveness, nor does it support the contention that Scotland is the most difficult part of the UK to have a bathing water designated.

Assessment of specific concerns relating to the proposal form

Absence of policy statement on user counts and discretion

5.14 As noted above, the position of the SG, as outlined in the letter from the then Cabinet Secretary for Environment and Land Reform confirmed to the NGO, was that the figure of 150 users was not rigid policy and that exceptions could be made, depending on circumstances, even if the number of bathers was less than this.

5.15 However, the pre-April 2023 form did not reflect this position and instead stated: "to qualify for designation a minimum of 150 people **must** have been counted or calculated as using the beach or bathing waters over the course of a single day during daylight hours or beach opening hours".

5.16 The post April 2023 form and supporting guidance made no reference to the figure of 150 users, nor whether exceptions could be made. However, the SG confirmed to ESS that the indicative threshold of 150 users continued to apply.

5.17 In ESS' view, this approach did not provide sufficient transparency or reassurance that this figure was indicative, as opposed to a rigid limit. Following ESS' further engagement with the SG on this issue, the SG revised the bathing

water proposal form and supporting information, which is available on SEPA's website.⁴ These documents now clearly advise that Scottish Ministers can apply discretion where the indicative threshold of 150 users is not met.

Limiting the types of evidence allowable for user surveys

5.18 The wording of the April 2023 form appeared to limit the acceptable evidence to drone or aerial imagery. In ESS' view, this placed an unreasonable burden, both practically and financially, on proponents and could result in them being unable to gather supporting information for proposals. Further, there are legal restrictions to drone use in Scotland, e.g. these cannot be flown within 1km of an airport, 5km of a heliport, within 50m of a 'congested area', or within 50m of a person who is not participating in the operation of the drone.

5.19 ESS considered that the decision to confine evidence of user numbers to drone or aerial footage indicated poor implementation of environmental law. Following further ESS' engagement with the SG on this issue the SG revised the bathing water proposal form to make clear that non-aerial photographs were suitable as evidence.

Extent and distribution of survey data

5.20 A comparative review of the UK s' bathing water proposal processes indicates that Scotland's new requirement for 10 days of bather surveys is still half of that required in England and Wales. The SG has indicated to ESS that both peak and normal usage is considered in deciding on proposals and reasonable data collection is required to support this. ESS considers this position reasonable, as extra data on bather counts will better inform the SG on past trends and whether a large number of bathers can be expected in the future.

Exclusion of organised events

5.21 The 2008 Regulations require Scottish Ministers considering designation of new sites to have regards to past trends, infrastructure or facilities provided or **other measures taken to promote bathing**. ESS considered that an organised event constitutes a measure taken to promote bathing and that such events should be taken into account.

⁴ SEPA, 'Scotland's Bathing Waters': [bathingwaters.sepa.scot](https://www.sepa.gov.uk/bathingwaters)

5.22 Accordingly, excluding these events from user surveys in the proposal process did not align with the 2008 Regulations and indicated poor implementation of environmental law.

5.23 Following ESS' engagement with the SG on this issue, the SG amended the proposal process, which now allows for events and beach festivals to be included in the spot surveys.

Irrelevant considerations in new proposal criteria

5.24 In respect of the NGO's concerns over the requirements for proponents to obtain consents and hold consultations, following ESS' engagement the SG decided to modify the requirements and presented ESS with proposed revisions to the proposal form and supporting documents. The changes indicated that holding a consultation and obtaining consents would now be optional, but desirable to include.

5.25 In ESS' view, these changes did not go far enough as, while positive, the proposal process continued to indicate that designation was contingent on landowner and/or local authority consent. The 2008 Regulations do not require a proponent (or Scottish Ministers) to obtain the explicit consent of the landowner and/or local authority, nor is there any requirement that designation must be supported by the landowners. For these reasons, ESS recommended that the SG remove references to the support of landowners and the local authority being a requirement for designation.

5.26 The SG carried out further revisions and the proposal form now makes clear that there is no requirement for proponents to contact local authorities or landowners. It is noted however that, given the responsibilities of local authorities and landowners in relation to designated bathing waters, it may be helpful when proposing a bathing water for designation if the proponent can confirm whether the proposal has the support of local authority or a landowner. This however is not a requirement.

5.27 As regards the requirement to hold a 'public consultation', SG advised that the intention was to reflect the fact that there is a duty on Scottish Ministers under the 2008 Regulations to ensure opportunities to participate are provided and that it is therefore helpful to understand what consultation has already taken place and the outcome of this.

5.28 As worded, the form continued to imply that there was a requirement on anyone proposing the designation of a bathing water to undertake a local consultation (involving fairly onerous criteria such as demonstrating that a ‘cross-section of opinions’ was captured). While ESS recognises that there is a duty on SG to facilitate public participation in the establishment, review or revision of bathing waters, this does not extend to the imposition of a duty on anyone proposing designation to undertake a local consultation. ESS considered it to be a more accurate reflection of the Regulations, and would satisfy SG’s stated objective, to simply ask whether local consultation has taken place and, if so, for details of this to be provided.

5.29 The SG therefore made changes to the form to make clear that it may be helpful for any person proposing a bathing water for designation to provide information about any consultation which has already been undertaken and the details of that consultation, but that this is not essential.

Lack of written procedures

5.30 The system of reviewing and deciding new proposals needs to be robust, transparent, and fair. To this end, ESS recommended that the SG should create and make public a clear procedure setting out how bathing waters proposals will be assessed. ESS has identified Ireland’s decision-making framework⁵ and public advice documents⁶ as a positive example of achieving these goals. ESS considers that these documents should:

- set clear procedures setting out how bathing waters proposals will be assessed, so that consistency is maintained between proposals
- ensure consistency in approach when there are any staff changes in the SG and BWRP participants

⁵ Ireland Environmental Protection Agency, ‘A Framework to Assist Local Authorities in the Assessment of Submissions for the Identification of New Bathing Waters’ (July 2016): www.beaches.ie

⁶ Ireland Environmental Protection Agency, ‘Public Advice on the Identification of New Bathing Waters (July 2016): www.epa.ie

- include practical measures on how discretion will be exercised and applied with regards to the indicative figure of 150 bathers
- specify the approach to be taken when optional information is not submitted (e.g. a local consultation, obtaining local authority/landowner views)

5.31 The SG provided ESS with a draft of its proposed procedures document in July 2024. ESS will continue to work with the SG as it progresses and finalises this document.

6. Conclusion

6.1 The process for designation bathing waters must be compliant with the 2008 Regulations, fair to proponents, transparent and not unnecessarily onerous.

6.2 ESS considered that the 2008 Regulations were not being adequately implemented with respect to certain proposal requirements and the lack of written procedures for determining proposals.

6.3 Following ESS' engagement, the SG agreed to implement the following changes:

- clearer public information that Scottish Ministers can apply discretion where the indicative threshold of 150 users is not met
- removal of the requirement to obtain consent and carry out public consultations
- the inclusion of organised events in user surveys
- expanding the scope of allowable evidence
- the introduction of written procedures

6.4 In ESS' view, these improvements will remove unnecessary burdens on those wishing to propose a bathing water, ensure consistency of decision making and increase transparency. Accordingly, ESS considers that informal resolution has been achieved.

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