

Senior Investigation Officer
Environmental Standards Scotland
Ìrean Àrainneachdail na h-Alba

ENVIRONMENTAL
Standards Scotland
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via email

02 March 2023

Dear [REDACTED],

I would like to thank you for submitting your representation to ESS. I have given careful consideration to the points you have made in your representation, which I have understood as follows:

- You observed contractors placing aggregate to construct a new bike path adjacent to a Site of Special Scientific Interest (SSSI), and you were concerned about the presence of plastics and other demolition-type material visible in the aggregate.
- You raised concerns to Angus Council and then to SEPA. Both authorities initially did not see an issue with the quality of the aggregate, but after your efforts to press the matter further, SEPA inspected the yard of the aggregate recycler and requested this party carry out improvements.
- You have expressed to ESS your concerns that:
 - the materials may represent a contamination risk;
 - the public authorities are not taking the public's concerns seriously and were not sufficiently thorough with their investigations and response to you;
 - local authorities are not monitoring their construction projects sufficiently; and

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- there is a lack of regulation on aggregate producers who do not meet required standards.

In response to your representation, I have carried out preliminary research into the regulatory framework and policies relating to aggregate recycling and waste duty of care. I approached SEPA to seek clarifications of their powers and approach to regulating aggregate recyclers. I have concluded it would not be suitable for ESS to investigate these matters further, for the reasons discussed below.

Aggregate producers are typically private companies, and for the NCN1 project, the construction contractors and the party overseeing the project on behalf of Angus Council [REDACTED] are also private companies. We can therefore not investigate these entities with regards to the concerns you have raised in your investigation. ESS can only investigate public authorities, their compliance with environmental law, and the effectiveness of environmental law.

With regards to how Angus Council and SEPA managed the concerns that you submitted to them, if you continue to have concerns over this, ESS would recommend that you raise a formal complaint to these organisations. Please see the links below for how to initiate this process:

- https://www.angus.gov.uk/council_and_democracy/complaints_and_comments/make_a_complaint_about_our_services
- SEPA service complaints: <https://www.sepa.org.uk/about-us/complaints-handling-procedure/>

If you are unsatisfied with their response to your complaint, you are then able to bring the matter to the Scottish Public Services Ombudsman (SPSO). The SPSO can review individual cases and decisions by public authorities, and determine whether these parties have acted appropriately in their handling of your individual case. Presently, without sufficient evidence to indicate a large scale problem I do not believe that progressing your case is in line with ESS' strategic outcome to prioritise and investigate the most important matters of concern.

Regarding your concerns that the Council did not effectively monitor and ensure the compliance of contractors they employed to complete a construction project for the Council, this is also a matter which could also be raised as a formal complaint to the Council, which could be elevated to the SPSO.

In regards to the outcomes you are seeking, commentary on these is given below.

Your suggestion of considering designating the cycleway as contaminated land is not an outcome ESS could pursue on your behalf. Prior to my role in ESS, I worked in contaminated land risk assessment for 20 years. The legal process of designating sites as contaminated land requires extensive contamination testing and assessment. Designation is rarely used and reserved for instances where the contamination is demonstrated to represent “Significant Possibility of Significant Harm” (SPOSH); i.e. unacceptably toxic to human health or the environment. While the inclusions of plastics, ceramics, metal objects, wood, rope, and cloth may represent unsuitable use of waste, these would not be anticipated to be particularly toxic. These inclusions would be highly unlikely to meet the standard of SPOSH.

With regards to your preferred outcome of sanctions being placed on companies who knowingly supply recycled aggregate which do not meet quality standards, this led me to research whether there may be a systemic issue in how SEPA regulates these sites. SEPA has provided me with an overview of their regulatory approach and enforcement powers in this instance:

- SEPA considers recycled aggregate as important in contributing to the circular economy. They have issued guidance on how to prevent recycled aggregate from being classed as waste - <https://www.sepa.org.uk/media/162893/production-of-recycled-aggregates.pdf>
- SEPA carries out routine inspections of aggregate recyclers and if they find non-compliance with waste regulations, they would undertake enforcement in line with their Enforcement Policy (<https://www.sepa.org.uk/media/219244/enforcement-policy.pdf>)
- SEPA has confirmed that aggregate that does not meet the requirements of their guidance is considered waste, and processing waste without a Waste Management

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License or exemption is an offense under Section 33 of the Environmental Protection Act 1990.

- Following their Enforcement Policy, SEPA would typically first advise and work with the operator to bring them into compliance. Their enforcement options include the ability to issue an enforcement notice to have the waste materials removed and monetary penalties. A Section 33 offense can also be referred to the Procurator Fiscal for potential prosecution.

Due to the above, it appears the existing regime is able to enforce penalties on non-compliant producers. SEPA has discretion in when to apply these powers, and in the instance of the Carnie Loan site, they are pursuing informal resolution for the issues they have identified on site, which appears in line with their Enforcement Policy.

The actions of this one site, which you have flagged to ESS, are potentially concerning. However, in my preliminary research, I have not uncovered any evidence of wider trends of aggregate recyclers producing unsuitable materials or of SEPA not carrying out sufficient regulation of this industry. If in the future ESS receives further evidence of wider, concerning trends in this regard, then we could consider investigation of the matter and use the information you have submitted as part of this. If you have additional evidence of wider issues relating to the aggregate recycling industry, I would welcome you to contact ESS again.

I appreciate you may find it disappointing we cannot presently progress investigation work in response to your representation. If you do progress formal complaints with SEPA and Angus Council, and believe there may residual issues after this process is complete, I believe the SPSO would be the appropriate party to contact with your concerns.

Yours sincerely,



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