

# **Process for considering third party representations under the Environmental Authorisations (Scotland) Regulations 2018**

**Policy Statement**

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**Scottish Government**  
Riaghaltas na h-Alba  
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## 1. INTRODUCTION

The Regulatory Reform (Scotland) Act 2014 provides for the introduction of regulations establishing a framework of environmental authorisations. [The Environmental Authorisations \(Scotland\) Regulations 2018](#) (“EAR 2018”) introduce a framework of common procedures relating to the authorisation of activities concerning water, waste management, radioactive substances and pollution prevention and control. The purpose of EAR 2018 is to set out the steps that the Scottish Environment Protection Agency (“SEPA”) must apply in determining whether to grant the authorisation, variation or surrender of a regulated activity.

This Policy Statement supports the wider environmental justice agenda by ensuring third party interests in the environment can be fully considered during SEPA’s determination process, and outlines the way in which SEPA will give consideration to third party issues raised during that process.

It also describes how Scottish Ministers may choose to call in an application for their own determination, and outlines the criteria Scottish Ministers will use to help decide whether they wish to exercise that power in any given circumstances.

We expect SEPA to publicise these procedures to ensure all third parties are aware of these opportunities.

## 2. GENERAL DISCUSSION

In the course of its regulatory activities SEPA must aim to protect and improve the environment; and in determining how, and to what extent this should be done, it must take account of the social, economic and environmental interests of others who depend on the quality of that environment for their livelihood or health and well-being.

We expect that SEPA will make the vast majority of regulatory decisions, taking due account of relevant third party interests. However, there may be some circumstances where third parties raise significant concerns about a regulatory decision because of its potential impacts on their interests. In these cases it may be more appropriate for Scottish Ministers to determine the relevant application. It is for this reason that Ministers have the power under paragraph 19 of Schedule 1 of EAR 2018 to “call in” any application for authorisation, variation or surrender for their own determination; although we expect its use to be limited to a minority of cases.

The process set out in this paper is intended to refer to any representations made by **third parties only**. Third parties include other operators, local communities, public authorities and those having an interest in the environment generally, such as NGOs. Any concerns from operators about SEPA’s regulatory decisions should be taken forward through the appeals process set out in schedule 4 of EAR 2018.

### **3. DETAILED PROCEDURE FOR CONSIDERING THIRD PARTY REPRESENTATIONS**

#### **3.1 Use of consultation process**

SEPA's consultation process will allow third parties with an interest in the proposed activity to make any representations to SEPA, who will then be obliged to take any such issues into consideration in determining the application.

SEPA will consult on those applications for permits, substantial variations to existing permits and surrenders of permits which due to their nature and/or location could pose a significant risk to the environment or the interests of third parties.

How and when SEPA will engage with third parties as part of its determination process is set out in SEPA's public participation statement.

#### **3.2 SEPA's determination procedure**

When SEPA consults it will publicise the application and provide information to third parties on the application itself, on how to submit a response, and the deadline for representations. SEPA must consider any representations it receives from third parties within the consultation period (of at least 28-days). SEPA may also ask third parties for further information relating to their comments or objections.

SEPA must consider any third party issues raised during the consultation period when making its determination, for example through discussions with the applicant and the relevant third parties. SEPA will notify both the applicant and any third parties who have made representations concerning an application, variation or surrender of its determination of an application. If they feel the determination leaves any significant issues outstanding, third parties will then have a further 21 days, by virtue of Schedule 1, paragraph 22 of EAR 2018, in which to request that Ministers determine the case themselves. During this time, SEPA cannot issue its determination.

This period does not count towards the normal time limits for determining a case established by Schedule 1, paragraph 10. Paragraph 12(1)(c) of Schedule 1 makes that clear.

### **3.3 Ministerial consideration procedure**

In the interests of achieving a balance between giving such cases due consideration and providing business certainty, we have introduced a three-stage process, as follows:

#### Stage 1

If Scottish Ministers receive representations from third parties within the 21-day period, they will carry out an initial screening process against the first five criteria set out in section 4 below, and where any representations do not fulfil the criteria for giving the case further consideration, they will inform SEPA, any relevant third parties and the applicant that they do not intend to call the case in.

This will enable SEPA to make and publish its final determination; and, if relevant, issue a new or varied authorisation for the activity, or accept the surrender of the authorisation, as the case may be.

Ministers will aim to do this initial screening exercise within 14 days.

#### Stage 2

Where Ministers decide that a case meets the first five criteria, they may seek such further information as they may need regarding the application to enable them to decide whether to direct SEPA to refer a case for their determination. Ministers will have a further 14 days for this stage. Ministers will therefore have 28 days in total in which to carry out the initial screening exercise and obtain any required information and reach their decision.

This period also does not count towards the normal time limits for determining a case established by Schedule 1, paragraph 10.

At the end of this 28-day period Ministers will inform SEPA, any relevant third parties and the operator of their decision:

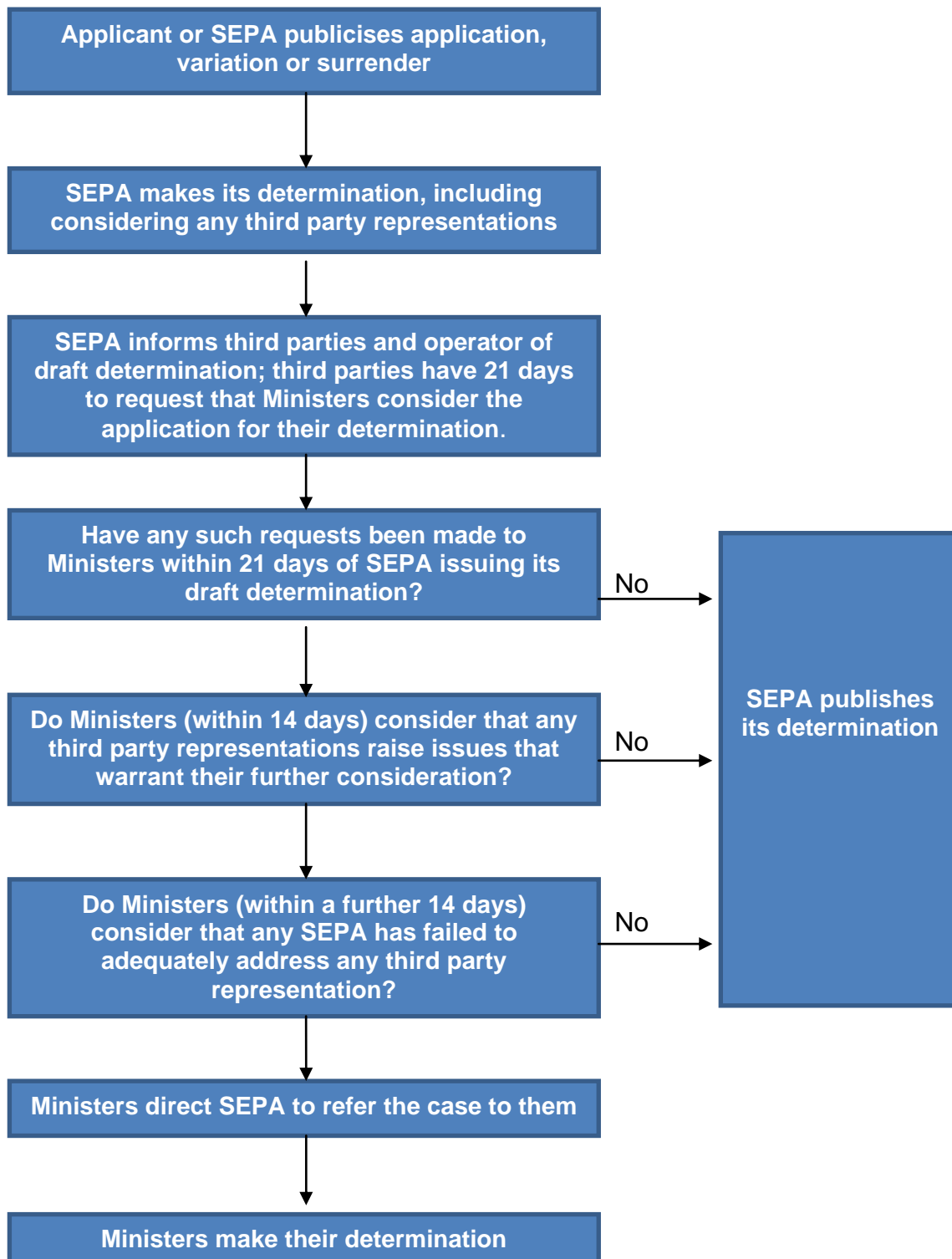
- that SEPA should refer the case to them for their determination based on one of the further criteria set out in section 4 below; or
- that any representations do not fulfil any of the criteria for a referral for their determination. In this case, Ministers will inform SEPA that they do not intend to call the case in, thus enabling SEPA to make and publish its final determination; and, if relevant, issue a new or varied authorisation for the activity, or accept the surrender of the authorisation, as the case may be. If Ministers do not inform SEPA within the 28-day period, then SEPA may proceed to make and publish its final determination.

#### Stage 3

If Ministers direct SEPA to refer the case to them for their determination, any subsequent time taken by Ministers for determining a case will not count towards the

normal time limits established by Schedule 1, paragraph 10. In due course Ministers will advise SEPA, the operator and the relevant third parties of their determination. SEPA will then issue a new or varied authorisation for the activity, or accept the surrender of the authorisation, as the case may be, as directed by Ministers.

The process for considering third party representations regarding new applications, variations and surrenders is shown in the diagram below.



#### **4. CRITERIA FOR MINISTERIAL CONSIDERATION**

In order to ensure Ministers focus on significant cases, there is a strong presumption that Scottish Ministers will, on receiving representations from a third party, exercise their discretion to call in a case for their own determination only when **all of the following five criteria are met**:

- 1. the objection relates to a matter which is directly relevant to SEPA's determination under EAR 2018, and not a matter which more properly falls to be considered under the planning system or other regime;**
- 2. the third party made relevant representations to SEPA within the consultation period and the subject and nature of the objection has not substantially altered;**
- 3. the objection relates to a matter of substance that is a material consideration in the determination of the case;**
- 4. the objection is not an objection to the appropriate use by SEPA of current principles, policies, methodologies or standards that have been subject to public consultation by a relevant Government body or Ministerial direction; and**
- 5. the representations made to Scottish Ministers makes clear the reasons for objection and provides suitable scientific, technical or other factual evidence to substantiate the objection.**

In addition, **one or more** of the following must normally be met for an application to be called in for a Ministerial determination under Schedule 1, paragraph 19:

- 1. the third party is a public authority and its objection raises issues of significance for the delivery of national, local or regional policy priorities or compliance with international obligations; or**
- 2. the third party's objection is that either its own, or wider interests which it represents, will be directly and significantly adversely affected by a proposed activity; or**
- 3. the objections raise issues of significance for the social, economic or environmental well-being of those objecting.**

#### **5. CONCLUSIONS**

We wish to ensure that there is a transparent process by which third parties can make representations to SEPA and to Ministers, and by which these may be considered.

This Policy Statement describes how SEPA will take third party representations into account in making its determination of an application for authorisation, variation or surrender; and sets out the circumstances under which Ministers may choose to call in such an application for their own determination.



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