



TRANSPORT AND THE ENVIRONMENT COMMITTEE

AGENDA

4th Meeting, 2003 (Session 1)

Tuesday 18 February 2003

The Committee will meet at 9.45 am in the Chamber to consider the following agenda items:

1. **Telecoms Developments (in private):** The Committee will consider possible lines of questioning for witnesses.
2. **Items in private:** The Committee will consider whether to take agenda item 8.
3. **Telecoms Developments:** The Committee will take evidence from—
 - Douglas Murray, Secretary, Association of Scottish Community Councils
 - Timothy Parker, Depute Secretary, Church of Scotland General Trustees
 - Findlay Turner, Member, Scottish Churches Committee
 - Graham U'ren, Director, Royal Town Planning Institute in Scotland
 - Nigel Hooper, Planning Manager, East Dunbartonshire Council
 - David Banford, Area Planning Manager (Nithsdale), Dumfries and Galloway Council.
4. **Petition PE 377: Polluting Activities in Built-up Areas:** The Committee will consider responses from the Scottish Executive, SEPA and CoSLA to a paper from the reporter on the petition.
5. **Highlands and Islands Ferry Services:** The Committee will consider the Scottish Executive's response to a paper from the reporters on the draft service specification for Highlands and Islands Ferry Services.

At approximately 11.30 am

6. **Subordinate Legislation:** Allan Wilson (Deputy Minister for Environment and Rural Development) to move motion S1M-3895—

that the Transport and the Environment Committee recommends that the Nitrate Vulnerable Zones (Grants) (Scotland) Scheme 2003, (SSI 2003/52) be approved.

7. **Subordinate legislation:** The Committee will consider the following negative instrument—

The Action Programme for Nitrate Vulnerable Zones (Scotland) Regulations 2003, (SSI 2003/51).

8. **Telecoms Developments:** The Committee will consider the evidence it has taken on telecoms developments.

Callum Thomson
Clerk to the Transport and the Environment Committee
Room 3.5, Committee Chambers

e-mail Callum.Thomson@scottish.parliament.uk

The following papers are attached for this meeting:

Note from SPICe on Telecoms Developments (private paper) (<i>Agenda item 1</i>)	TE/03/4/1
Submission from the Association of Scottish Community Councils (<i>Agenda item 3</i>)	TE/03/4/2
Submission from the Scottish Churches Committee (<i>Agenda item 3</i>)	TE/03/4/3
Submission from the Royal Town Planning Institute in Scotland (<i>Agenda item 3</i>)	TE/03/4/4
Submission from East Dunbartonshire Council (<i>Agenda item 3</i>)	TE/03/4/5
Submission from Dumfries and Galloway Council (<i>Agenda item 3</i>)	TE/03/4/6
Reporters' Paper on Petition PE 377 including responses (<i>Agenda item 4</i>)	TE/03/4/7

Paper on Scottish Executive's response to reporter's paper on Highlands and Islands Ferry Services (<i>Agenda item 5</i>)	TE/03/4/8
Covering note on the Nitrate Vulnerable Zones (Grants) (Scotland) Scheme 2003, (SSI 2003/52) (<i>Agenda item 6</i>)	TE/03/4/9 (to follow)
Copy of the instrument (plus executive note) (<i>Agenda item 6</i>)	TE/03/4/10
Covering note on the Action Programme for Nitrate Vulnerable Zones (Scotland) Regulations 2003, (SSI 2003/51) (<i>Agenda item 7</i>)	TE/03/4/11 (to follow)
Copy of the instrument (plus executive note) (<i>Agenda item 7</i>)	TE/03/4/12
Paper on telecoms developments (private paper) (<i>Agenda item 8</i>)	TE/03/4/13

ASSOCIATION OF COMMUNITY COUNCILS SUBMISSION TO THE TRANSPORT AND THE ENVIRONMENT COMMITTEE

TELECOMS INQUIRY

The following submission is based on comments received from Argyll & Bute, Aberdeenshire, Angus, Fife and Stirlingshire. No comments have yet been received from any of the densely populated Urban areas, but efforts will continue to elicit some feedback.

Decision making process

- Applications for most telecoms equipment are included on the weekly planning lists supplied to Community Councils
- A general impression has been gained that only in exceptional cases will a Community Council object. This may possibly occur when a number of applications are made over a period of time and within the same community.

Relationships with Telecom Operators and Planning Authorities.

- There appears to be little or no contact from Telecom Operators to Community Councils, and when objections are made to Planning Authorities, these have been disregarded. No specific case history has been made available, but probably refers to health fears when additional masts are being applied for in the same confined areas.
- The new regulations implemented in July 2001 have increased community awareness through the Planning system and have obviously substantially lessened conflict that previously occurred when masts were being erected under the Permitted Development Regulations without general notifications.
- One comment has been made that complaints re telecom masts 'have gone quiet' since the introduction of the July 2001 regulations.

Able to influence the Planning system

- The few comments made on this subject are to the effect that objections are disregarded
- The ASCC could possibly issue some general advice/update, on the revised regulations to further increase awareness of what can be erected, and of valid/invalid objections, under the revised planning criteria.
- The question of Thirty Party Right of Appeal was raised
- The same respondent also raised the necessity for the Loch Lomond and Trossachs National Park Authority to regard Community Councils as Partners when determining planning applications.

Views on Existing Guidance and possible changes.

- Given the limited responses received to date, it would be difficult to raise specific issues apart from the following:
- Third Party Right of Appeal (which has wider implications than only for Telecom Masts)
- More research into health matters and to ensure that data from regular monitoring of existing sites is made widely available
- Inclusion of possible sites in the local Community Planning process, or even ask communities to identify preferred sites.
- Yearly updates and listing of existing equipment within each LA area available on each web site.
- Local Authorities currently advise Scottish Ministers where they have a pecuniary interest (eg. Rent from mast siting), but should this information also be available to their communities when planning decisions are being sought to ensure transparency?
- Stricter guidance on ensuring that mast sharing is seriously considered, particularly when there will need to be a substantial increase in the number and wider location of masts between now and the end of 2007 under the licensing regime for 3G mobiles.

On a more general note, (and which should not need planning legislation), has been the suggestion that each Local Authority should actively produce Supplementary Planning Guidance on their policy for Telecoms in addition to overall policy contained in Local Plans.

In addition, the increased and widespread usage of mobile communications, places individuals and communities in the position of having to balance the need for such facilities, against their local environment, and of whatever, if any, health risk or otherwise that may arise in the future.

It is possible that concerns generated by telecom masts a few years ago, are now being replaced with more serious concerns over the siting of Wind Farms. At least most of these developments are being taken to communities before consideration by Planners, and detailed consultations are being held between Developers, Planners and Communities. Naturally there are substantial differences in scale and effect, but any development, however minor to some, may have more cause for concern depending on the size of the community in which it is proposed.

Douglas Murray
Secretary
Association of Scottish Community Councils
21 Grosvenor Street
Edinburgh
EH12 5ED

Tel/fax 0131 225 4033
Direct Tel. 01356 623330

11 February 2003

THE SCOTTISH CHURCHES COMMITTEE

TELECOMS INQUIRY

- The Scottish Churches Committee has representatives from the major Christian denominations in Scotland as detailed below and a link with the Jewish Community via the Scottish Council of Jewish Communities. The Committee as such has no stated common policy with regard to telecommunications masts and there are also differing views within the individual denominations.
- The comments of the various denominations on the procedures relative to the obtaining of Planning Consent for masts have been canvassed but none of those which have responded has indicated that these have caused any difficulty. It should be noted, however, that some denominations have no buildings with masts on them. In some cases this will be as a result of a policy decision.
- The Church of Scotland is the denomination with by far the largest number of buildings with masts and the remaining comments in this paper are based largely on that Church's experience.
- The following is the procedure followed in connection with approaches to the Church of Scotland by Mobile Phone Companies.
 - Approaches are channelled through Tim Parker, the Depute Secretary of the Church of Scotland General Trustees ("the General Trustees").
 - Contact is made by him with the congregation concerned and a decision on whether or not the matter is to be taken further is made by the local Church office bearers. Unless they and the Presbytery concerned are favourably disposed negotiations do not proceed.
 - Assuming that the local Church office bearers are well disposed negotiations with the Company proceed and detailed proposals in respect of the proposed work at the building are invited. These are scrutinised by the local office bearers, by the Presbytery, by the General Assembly's Committee on Artistic Matters and by the General Trustees. Two of the General Trustees and a representative of the Committee on Artistic Matters liaise in that regard and have built up a great deal of expertise in the field. Advice is also obtained from a firm of Structural Engineers on the possible effect of the mast on the building in question.
 - Most of the cases involve buildings which have a tower or steeple and which are listed under the Planning Acts. Alterations requiring planning consent, proceed following the usual rules. However, under the ecclesiastical exemption, alterations at listed churches do not require Listed Building Consent. However, a pilot scheme is currently in operation under which the denominations represented on the Committee have voluntarily agreed to consult with and take into account the views of local planning authorities and Historic Scotland in the case of external alterations at listed

churches. Regardless of this, it has been the policy of the General Trustees for some years to insist that operators must clear their proposals with the Local Authority and with Historic Scotland.

- With reference to consultation with the Community, in Church of Scotland cases the extent of this has been left to the local Church authorities and it is understood that the approach has varied from case to case. Some congregations have held public meetings – it is understood the operators are prepared to send representatives – and one at least departed from the proposal in the light of opposition from the Community. In another case, however, a congregation continued with the project in spite of vociferous opposition from local residents.
- Danger to health, which is not a consideration in relation to the obtaining of planning permission, is an aspect which has been closely considered by the General Trustees who studied the Stewart Report and are continuing to monitor research in the field. They reported on the matter to the General Assembly of 2000 when a motion to the effect that there should be no further masts on Church of Scotland buildings was defeated. In recent negotiations the General Trustees have made provision for facilities for monitoring emissions in individual cases.
- The Scottish Churches Committee has no quarrel with the planning controls which have been introduced and is unaware of any difficulties having arisen from them. They have the merit of ensuring that members of the public who live in close proximity to buildings where masts are to be erected have prior warning of the proposal and an opportunity to object. As indicated, however, it has been the practice in Church of Scotland cases to require operators to ensure that both the Planning Authority and Historic Scotland were satisfied with details of the proposed work. It is the perception that the controls and the Ten Commitments published by the Mobile Operators Association have gone some way to allay public concern.

The Committee represents the major Christian religious denominations in Scotland in relation to temporal matters affecting the churches themselves. These denominations are the Church of Scotland, the Roman Catholic Church in Scotland, the Scottish Episcopal Church, the Free Church of Scotland, the Baptist Union, the United Free Church, the Free Presbyterian Church, the Methodist Church, the United Reformed Church and the Associated Presbyterian Church

THE ROYAL TOWN PLANNING INSTITUTE

Memorandum of Evidence to the Transport and Environment Committee of the Scottish Parliament on its Inquiry into Planning Procedures for Telecommunications Developments February 2003

The Role of the RTPI

- 1 The Institute is the chartered body representing professional planners in the UK. It sets standards for education, training and conduct for its 18,000 members and also discharges its charter and charity obligations to serve the public interest by promoting its views on the planning system. The RTPI in Scotland has delegated responsibility for dealing with matters concerning the Scottish planning system. The Institute represents professional planners in all sectors which have a role in planning for telecommunications as well as other matters, i.e. central government, local government, planning consultancy, industry representative bodies, environmental NGOs etc.
- 2 The views of the Institute expressed in this paper are based upon its wider views on planning policy and on a very limited anecdotal survey of members working in the local government and planning consultancy sectors.

Background

- 3 The Committee's investigation concerns the operation of planning control of telecommunications developments since the introduction of a new regime in 2001. This regime comprises:-
 - a) Amendments to the General Permitted Development Order to substitute an alternative Class 67 (Development by Telecommunications Code System Operators) and amend Class 68 (Other Telecommunications Development) to restrict the range of development permitted under these classes without express planning permission being granted.
 - b) An amendment to the General Development Procedure Order to require that applications for planning permission involving telecommunications antennas are accompanied by a declaration that the development is designed to comply with the public exposure guidelines of the International Commission on Non Ionising Radiation Protection (ICNIRP).
 - c) A new National Planning Policy Guideline, NPPG 19 on Radio Telecommunications.
 - d) A new Planning Advice Note, PAN 62 on Radio Telecommunications.

Developments since the Introduction of the New Regime

- 4 Considering the importance of some of the issues debated prior to the introduction of the regime and the significance of the divergence from arrangements in England, there have been remarkably few policy and legal developments in the interim period. There may be some variations of interpretation between planning authorities and operators over the use of some terms in the GPDO but there have been no legal tests of the wording.
- 5 Although the conclusions of the Stewart Report were "that the balance of evidence indicates that there is no general risk to the health of people living near to base stations" but that "the possibility of harm from exposures insufficient to cause heating of tissues cannot yet be ruled out with confidence", the ongoing research programme currently being undertaken by

the DTI, the Radiocommunications Agency and the operators has so far concentrated on the impact of the use of mobile phones themselves and not on radiation from base stations. There is no new planning case law on health effects and the extent to which the precautionary principle can be used still remains unclear from the latest relevant case in 1999 which established that refusal of planning permission on the basis of unsubstantiated fears could be invalid.

- 6 As far as planning policy review is concerned, the Scottish Executive appear to have no current intentions for review beyond the original programme to revisit NPPG 19 in 2008 in the context of the cycle of conversion of NPPGs to Scottish Planning Policies (SPP) as indicated in the annex to the conclusions report on the Review of Strategic Planning in June 2002.

Current Issues

- 7 Current issues for planning control of telecommunications equipment include the following: -
- a) Planning policies for dealing with telecommunications equipment do not seem to have changed greatly in local plans in the last year but there has perhaps been further development in the production of supplementary planning guidance with regard to the detailed standards required in siting and design and in procedures notes for the handling of applications. The Institute would strongly support such developments as these but it is clear that resources of staff and skills for this work is very variable across planning authorities.
 - b) The opportunity for giving a well considered view of operators' network development plans is even more restricted by resources available and by uncertainty over the scope for the use of the precautionary principle in relation to health matters.
 - c) The health issue remains a major concern for elected members faced with objections from constituents. While there has been no recent case of expenses being awarded, the number of successful planning appeals against refusals of planning consent which are clearly based upon concerns about health, is running at a relatively high level. Many of the decisions to refuse consent are contrary to advice of professional officers. Not only have the facts concerning the health effects of telecoms antennas not been satisfactorily established but it is also unclear that the planning system would have a locus even if it were. The planning regime is not the only regulatory regime for telecommunications equipment and of all such regimes, it is concerned more with the establishment of the principle of development than with ongoing consequences of that development. Decisions are made on the basis of the relative weighting of factors for and against development. Accordingly, in the event that health effects may be established, an alternative licensing regime to planning would be appropriate. The Institute's view is that the requirement to produce a declaration of compliance with ICNIRP guidelines is all that should be required of the planning system on this matter.
 - d) Improvements are continuing to be made with regard to the design of telecommunications equipment and the identification of unobtrusive siting options. In the circumstances of the 3G roll-out, it seems it is not the design and siting options for individual pieces of equipment which is becoming the issue but the inability of planning authorities to secure the

rationalisation of the number of individual masts in the countryside or the clutter of individual installations on buildings in urban areas. There does not appear to be any effective system for securing mast sharing nor for securing the reduction of clutter on prominent buildings through the adoption of the design principles of PAN 62. This requires further co-operation of both the operators and building owners.

- e) While it appears that most major operators secure the services of planning consultants for site finding and submission of planning applications, opportunities for alternative sites or for alternative treatments, particularly landscaping, on any chosen site, are often restricted by the clients. Supporting information provided tends to be highly technical justification for the option chosen. Planning authorities are unable to pay for specialist consultancy advice to interpret this information.
- f) A number of authorities maintain a policy not to dispose of or lease their property for telecoms installations. Although this significantly affects the overall availability of sites in some areas, this is not a matter which is material to the statutory planning system.
- g) Within the designated safeguarding area of airports the Civil Aviation Authority is a statutory consultee under the safeguarding regime which has recently been changed to pass this role to the appropriate airport operator. The apparent rigid opposition of the CAA to telecoms masts is likely to be compounded by the more self interested and less experienced operators in planning matters.
- h) There is some evidence that operators are taking advantage of the 28 day rule to permit urgent temporary installations to establish permanent sites.

Transport and the Environment Committee
Tuesday 18 February at Committee Chambers, George IV Bridge, Edinburgh.

Written submission by Nigel Hooper, Bsc (Hons); MCD; Dip LAM; MRTPI., East Dunbartonshire Council Planning Manager, representing the Scottish Society of Directors of Planning. The views expressed in this paper are those of the author but in preparing them consultation has taken place with colleagues in other (particularly urban) local authorities.

1. How has the relationship between the industry and planning authorities developed over the last few years? Is there a common picture throughout Scotland? If not, are there any reasons why this relationship may be different in different parts of the country?

1.1 In general the relationship between operators, their agents and planning authorities is considered to have significantly improved since the introduction of new planning legislation. Operators and their agents appear to be paying more attention to the requirements of the ten commitments by submitting roll out plans, conducting pre-application discussions and recognising that genuinely held community concerns exist. This awareness is considered to be still developing as there have been instances where operators proceed with proposals despite strongly expressed community concerns. The community can find this difficult to reconcile with an opening Planning process. In East Dunbartonshire it is considered however that the improved relationship has been aided by the appointment of a specific planner to deal with telecoms applications, the successful development and maintenance of a GIS based telecommunications database and by responding to pre-application enquiries with an in-depth analysis of proposals (see example appendix 1) against Council policy.

1.2 There are differences on the way that this relationship has developed across Scotland. Some authorities are understood not to have been able to allocate resources to provide detailed written feedback on pre-application discussions, and few have 'dedicated' telecoms planners as points of contact.

1.3 There are also differences in the way that the relationship has developed depending on the agents used by different operators. Some consultancies have few qualified planners, choosing instead to use surveyors or engineers and experience suggests that most procedural difficulties arise in such circumstances. Some are locally-based and therefore have a knowledge of the area, whereas others are based in England and agents may never have visited the sites in question. In these circumstances it is difficult to envisage how the operators can effectively engage with Community sensitivities.

2. What evidence exists that individual operators are co-operating in respect of identifying potential sites for masts?

2.1 The most recent experience suggests that few mast-sharing applications are submitted without prior Council encouragement at pre-application stage. The continuing secrecy and unwillingness between operators to liaise over sites

and long term plans is however thrusting an undue burden on local authority staff to facilitate this liaison. Difficulties over different time scales required for erection of the apparatus, legal issues to be resolved and conflicts over which operator and associated agent will lead the application commonly hamper attempts to persuade Operators to mast or site share.

- 2.2 It is also worth noting that although mast and site sharing may reduce the number of new sites being sought, shared sites involve larger masts with greater environmental impact because they have to accommodate more equipment with minimum vertical separation distances between antennas. Cases have arisen where planning committees have advocated site sharing only to find the resulting scale of the structure unpalatable.

3. To what extent have hierarchies for preferred locations been established by planning authorities?

- 3.1 East Dunbartonshire Council has developed a telecoms policy, now included in the finalised draft of the East Dunbartonshire Local plan, which outlines a typology of 'preferred locations'. These are listed in local plan guidance (See attached appendix 2) and include both rural and urban areas. This policy has been objected to by operators and will be addressed through the East Dunbartonshire Local Plan Public Inquiry.

- 3.2 A crude zonation of a Local Authority area into a “hierarchy of acceptability” is almost certainly technically problematic and likely to raise community stress levels. In addition such an approach might quickly fall out of date as the needs of the industry and developments in technology advance.

4. How widespread is the submission of annual roll-out plans by individual operators? How are such plans viewed by planning authorities? What status do they have when decisions are being made in respect of individual planning applications?

- 4.1 Rollout plans are being submitted to Local Authorities by all operators. The degree of information provided in these plans and their accuracy varies widely. It can be difficult to provide meaningful feedback on some rollout plans in these circumstances. Guidance from MOA to help improve and standardise the plans would be of great assistance in improving efficiency. Their submission or otherwise is not generally referred to in the determination of planning applications.

- 4.2 A major value of Rollout plans is however in notifying other operators of proposals at pre-application stage enabling mast sharing discussions to take place.

5. How satisfied are planning authorities with the current level of guidance given to them on the latest studies into the effects mobile phone technology on public health?

- 5.1 The current guidance on the latest studies into the effects mobile phone technology on public health from the Scottish Executive is set out in NPPG 19 'Radio Telecommunications' which refers to the Independent Expert Group on Mobile Phones (Stewart Report) published in May 2000. This independent assessment of health risks concluded that "... the balance of evidence indicates there is no general risk to the health of people living near base stations...". NPPG 19 states that the Scottish Executive has instructed local planning authorities that "it is not necessary ... to treat RF emissions as a material consideration", however as a precautionary approach a declaration of compliance with ICNIRP regulations must be submitted as part of a planning application.
- 5.2 Widespread experience suggests that this is often met with incredulity by members of the community whose main concerns about telecoms proposals continue to be the perceived potential health impacts, rather than siting and design issues. It is within this context that East Dunbartonshire and other Councils have added a requirement to policy that it will not agree to telecoms installation on land or property adjoining sensitive landuses such as schools. This reflects Council's concerns over community well being and anticipates the power to "advance community wellbeing" identified in the Local Government (Scotland) Bill 2003.
- 5.3. Recent research (JP & EL January 2003, pp 13-22) confirms the widely held view amongst Scottish Planning Authorities that, using objective measure of stress levels in communities, the impact of telecommunications proposals on community well being can be considerable. The author divides this into:-
- "Pre-telecoms" stress - frustration at disempowerment
 - "Post telecoms" stress - response to perceived risks and unfair treatment.

The author argues that on the basis of indirect health effects above, community health should be a material planning consideration. In the case of Newport County Borough V Secretary of State for Wales (1998) the Court of Appeal accepted that "unfounded fears" could be a basis for refusal as long as those fears were genuinely held.

- 5.4 It is noted that the Stewart Report recommended the use of the precautionary principle and that a review of information be undertaken in three years time (May 2003). It is not clear how the results of studies published in the future would be disseminated.
- 5.5 Due to high levels of community concern within the East Dunbartonshire area the Council has adopted a policy of issuing telecoms planning consents for 5 year periods, on the presumption that these consents will be renewed if the installation is operating satisfactorily and no new adverse information has become available in relation to the effects of exposure to this technology. Circular 4/1998 sets out Government policy on the use of conditions in planning permissions. Section 105 sets out the three main principles applying to Temporary Permissions. The first of these states that it will rarely be

necessary to give a temporary permission to an applicant who wishes to carry out development which conforms with the provision of the development plan. This wording does not rule out giving a temporary permission. Secondly it states it is undesirable to impose a condition requiring the demolition after a stated period of a building that is clearly intended to be permanent. Telecommunications installations are often not buildings. They may involve mast structures or equipment located on existing buildings. The third principle refers to the possibility of using temporary consent as a trial run in order to assess the effect of the development on the area. This latter reason is valid in this case at the Council view that a 5 year temporary consent is appropriate subject to the emergence of further information on impact of the installation.

5.6 Even in recent months the application of the technology has made a number of advances, for example:-

- Silant TM - an environmental solution to assist with the expansion of mobile networks into the rural community - it provides a working silo for the farm, and hides telecom equipment, also there is no need for an equipment cabin.
- Smaller antennas introduced by BT for Cardiff City centre measuring just 70mm x 210mm

6. What is the Society's opinion of the appropriateness of the existing procedures? What changes would the Society wish to see made, especially in light of the way the network may roll-out in the medium-long term?

(a) *appropriateness*

The existing procedures have allowed for some improvements in the process of erecting new radio base stations. More improvements are however required, particularly in the realm of community consultation and in addressing concerns raised by members of the public. Community consultation must be meaningful. Sending standard letters out to ward councillors and community councils if a site is marked 'amber' in terms of the FEI traffic light model has often failed to illicit a response. Ward councillors can find themselves in a difficult position if invited to comment as good practice advises against expressing views on a planning proposal prior to it being presented for determination. Community Councils meet infrequently and it may be some time before their next meeting when they can debate the proposal and put together a response to the operator. Meanwhile the operator may submit the planning application and the local residents are still unaware of the proposal. Even in a 'red' site many in the community can remain unaware of the planning proposals even when an application has been submitted as they are outwith the statutory neighbour notification area. East Dunbartonshire Council advertises all telecommunications applications as "bad neighbour" developments in order to maximise opportunities for community awareness. This approach has raised concerns from a number of operators. Statutory neighbour notification should be widened in the case of telecoms planning applications.

(b) *changes*

(i) Concerns about the removal of Redundant Telecommunications Equipment have been raised by a number of urban authorities. Recent experience in dealing with redundant Atlantic Telecom equipment has identified several areas of concern. There is an obligation on Code System Operators to remove redundant equipment, as set out in the Telecommunications Code in Schedule 2 to the Telecommunications Act 1984. However when a company goes into receivership their code powers can be removed and hence this obligation no longer applies. Since Atlantic Telecom went into administration Councils have been investigating the available options for removal of this redundant equipment. One site in East Dunbartonshire involves a prominent mast with a bulky headframe on land where the site provider does not wish the structure to be used by any other mobile phone operators. The Code Powers for Atlantic Telecom have been revoked and the administrator takes no responsibility for the remaining infrastructure or for its removal. Since this apparatus was erected under permitted development rights there are no planning powers for its removal. This is of concern. In East Dunbartonshire alone there are around 80 existing telecoms sites (built, or where planning permission has been granted) and a similar number of proposed sites. Given the current volatility of the Telecoms industry, should just one operator go out of business this will leave a great number of redundant sites across Scotland. Even if some of these sites could be reused by other operators there will be instances where this is just not feasible. Councils are therefore concerned that by confirming permitted development notifications and approving planning applications for telecoms developments now the landscape might be blighted in the future when companies go out of business. Urgent attention should therefore be given to creating a bond or setting up a fund for dealing with the removal of redundant equipment should operators go out of business.

(ii) Applicants consistently fail to draw the red line (which delimits the application site) on submitted plans wide enough around the proposed compound so that if landscaping is required in order to screen the base this cannot be accommodated and the consequent negotiations can result in unnecessary delays, a refusal of consent or the requirement for a resubmission. Landscaping around the base of telecoms masts, their associated equipment Local Plan policy guidance. It would therefore greatly assist if published MOA guidance over submitting proposals both for new telecommunication developments, or for additional equipment at existing sites could strongly advise, that the red line around the site be widened to enable landscaping schemes to be accommodated.

(iii) The policy fairly widely adopted by Councils regarding a Moratorium on the use of Council land and property for telecoms equipment is not a planning policy. The role of the Council as a landowner is quite separate to that as a local planning authority. The Council can seek to manage its own property and assets in a manner similar to other landowners. Many private landowners operate a similar moratorium, for example in order not to

prejudice the redevelopment of plots of land. The Committee's recognition that the role as landowner is different to Council's role as local planning authority would be welcomed.

(iv) Proposals which fall under Permitted Development rules can have an adverse cumulative impact and there has been experience of operators declining to implement the planning authority's reasonable requests, amongst other things, for screening. This is a source of frustration and requires to be addressed.

7. Clarification of previously submitted evidence

7.1 In its evidence to the Committee on 5 February 2003 the Mobile Operators Association claimed (paragraph 3.6.2) that "East Dunbartonshire Council does not permit...upgrades of existing installations" on Council owned land. It also asserted that the Council operates "250 metre "no-go" zones around schools, hospitals, residential etc..."

7.2 Both of these assertions are incorrect in that:-

- There are no installations on Council property and therefore upgrades are not an issue.
- The local Plan policy merely requires evidence of community consultation on proposals in listed sensitive locations. No reference is made to hospitals or residential premises in this context. Following appropriate constructive engagement with community concerns a number of telecommunications consents have in fact been issued in these sensitive zones.

Transport and the Environment Committee
Executive Summary of written submission by Nigel Hooper,
Tuesday 18 February at Committee Chambers, George IV Bridge, Edinburgh

Written submission by Nigel Hooper, Bsc (Hons); MCD; Dip LAM; MRTPI., East Dunbartonshire Council Planning Manager, representing the Scottish Society of Directors of Planning. The views expressed in this paper are those of the author but in preparing them consultation has taken place with colleagues in other (particularly urban) local authorities.

1. Relationship between Industry and Planning Authorities

- Significant improvement
- “Dedicated” Telecoms Planners could improve the relationship
- Increased use of Qualified Planners by applicants would also assist

2. Evidence of Site Sharing

- High level of secrecy within the industry
- Willingness to site share but requires a significant local authority input
- The impact of shared structures is often greater than a larger number of individual structures

3. Hierarchies of Preferred Locations in Plans

- Local Authority approaches vary
- East Dunbartonshire local plan presented as an example
- Crude zonation unlikely to be useful

4. Submission of Roll Out plans

- Roll out plans are being submitted
- Accuracy varies widely
- Main value is facilitating liaison between operators

5. Satisfaction with Current Guidance

- NPPG 19 and PAN 62 are very useful
- Community continues to be deeply suspicious of Health claims
- Valid case for “community well being” as a material consideration
- Use of temporary consents is supportable in an evolving technology

6. Changes Sought

- Recognition of requirement for more active community consultation
- MOA fund for removing redundant equipment
- MOA guidance on widening the “red line” to allow landscaping
- Moratoria on the use of Council owned land are valid
- Cumulative impact of Permitted Development proposals

7. Clarification of Previous Evidence

- Errors in MOA submission

Appendix 1. Sample of Pre-application feedback

Our Ref: [Click here to type our ref](#)
Your Ref: [Click here to type recipients ref](#)
Date: 16 October 2002

**DEVELOPMENT AND ENVIRONMENT
Partnership and Planning**
Alan Sim
Head of Partnership and Planning
The Triangle,
Kirkintilloch Road,
Bishopbriggs
G64 2TR
Telephone 0141 578 8600
Fax No: 0141 578 8575

Dear Sir /Madam

POSSIBLE NEW TELECOMMUNICATIONS INSTALLATION

Thank you for your letter dated the 14 October 2002 regarding the above. I have been to visit the site and have assessed the proposal against Council policy and guidance.

The site is located on top of a chimney stack situated between the Bank of Scotland building which is at the junction of Cowgate and Kerr Street, and a building containing three shop units adjacent. The shop units are Sentiments Florest, a solicitors office (which also includes the upper storey of the building) and a coffee shop. The building is bounded on the other side by another bank. There is a bank car park to the rear of the property and the post office building is to the south of that.

Scale: The Council encourages operators to develop networks which rely on base stations with minimum visual impact. This proposal for antenna within a chimney pot complies with this element of Council policy.

Built Form: The Council encourages the use of existing buildings and structures in preference to freestanding masts. The situation of the chimney pot on top of an existing chimney stack on a building complies with this aspect of Council policy.

Location: This small scale proposal is to be located on a non-residential building in compliance with Council guidance.

Layout: No details have been given as to how the equipment cabin and associated cables etc. would be designed. The preferred method, to minimise visual impact, is to enclose cabling and equipment cabins within existing structures where possible.

Detailed design: The Council requires operators to adhere to best available design practice as set out in PAN 62 and any emerging opportunities to reduce adverse impact.

The proposal to use a GRP chimney stack takes on board this guidance and will camouflage the antenna and reduce visual impact.

Community Well-being: As you can see from the attached map the site is within 250 metres of Lairdsland Primary School and St Mary's Nursery School. Telecoms proposals within 250 metres of schools, nursery schools and playgrounds have in the past often been subject of community concern. The council has therefore marked these areas as areas of Community Well-being concern and applications in these locations will require to be accompanied by documentation to indicate how community concerns have been addressed. This site would be rated 'red' in terms of the FEI traffic light model and the schools mentioned above should be consulted at pre-application stage together with the Community Council and local Councillor. Should objections be raised to the proposal the Council will liaise with [Operator] Community Liaison officer to see how these concerns can best be addressed.

Please note that all comments are made without prejudice to the Council's decision on any planning applications which may be submitted.

I hope you find this information useful. Please contact me with any queries regarding this matter.

Yours faithfully

Catherine Stewart
Planner

Appendix 2. EDC Telecommunications Policy and Guidance Note

4.1 Design Quality Telecommunications

The government aims to make the UK "the best place to do business electronically by 2002" and therefore proposes to continue to extend the social and economic benefits of modern technology and in particular affordable access to broadband services.

The Independent Expert Group on Mobile Phones reported in May 2000 (Stewart Report) that...

"... the balance of evidence indicates there is no general risk to the health of people living near base stations..."

and consequently the Scottish Executive has instructed local planning authorities that "it is not necessary.... to treat RF emissions as a material consideration". Planning legislation and associated guidance (NPPG19) and advice (PAN62) are focussed on achieving a balance between the need to meet the growing demand from the community for access to the telecommunications network and the need to protect environmental amenity.

It is the Government's hope that if good practice in location and design is pursued the installations will in time become an accepted and unobtrusive feature of urban and rural areas. The Council's policy should support the approach of both the UK government and the Scottish Executive towards meeting the growing community demand for telecommunications whilst avoiding adverse environmental impact on the amenity of urban and rural areas.

The policy should also recognise the continuing community sensitivity towards installations located near schools, nurseries and play areas, on residential property or at locations which adversely affect the amenity of residential areas. Uncertainty over long term health effects (Stewart Report paragraphs 6.35 to 6.42) also mean that it would be prudent for the Council to adopt a precautionary approach to issuing planning consents.

NPPG 19 and PAN 62 include extensive guidance and advice on good practice in location and design. The Council has produced Guidance Note 14 which incorporates these principles and builds upon this guidance and advice. These principles and the guidance are expected to be incorporated in operators rollout plans, site selection enquiries, notifications, applications and will be applied in the Council's assessments. Developers will be required to take particular care in designing proposals which have an impact on historic or natural environment designations (see also policy GB 2K).

DQ 4 Telecommunications Installations

The Council will work in close liaison with operators to facilitate the development of a comprehensive, modern local telecommunications infrastructure which minimises adverse environmental impact and takes a precautionary approach to community well-being sensitivities.

This will be achieved by assessing operators' annual rollout plans, site selection enquiries and applications for planning permission (and notifications where the development does not require planning permission) and against the matters as contained in Guidance Note 14.

Appendix 2. EDC Telecommunications Policy and Guidance Note

Guidance Note 14

Telecommunications Developments

INTRODUCTION

The following Guidance in support of the Council's Interim Policy on Telecommunications Planning was adopted by the Council in October 2001 and should be read in conjunction with the Local Plan Policy DQ 4.

NPPG 19 and PAN 62 include extensive guidance and advice on good practice in location and design. The Council's principles of guidance adapt and build upon this guidance and advice. Although they are not repeated here, these principles are expected to be incorporated in operators rollout plans, site selection enquiries, notifications and applications and will be applied in the Council's assessments. Developers will be required to take particular care in designing proposals which have an impact on historic or natural environment designations identified in the Local Plan.

GUIDANCE

a) Scale

It is considered that large telecommunication base stations and massed antennas generally have the potential for far greater environmental and community impact than a greater number of smaller, normally lower wattage, installations spread over a wider area. This is particularly the case in urban areas. Base stations which have the outward appearance of the surrounding street lighting columns (in scale, location, colour and local design) will generally have a more acceptable visual impact than larger structures in residential areas. It is however accepted that a system based on smaller lower wattage base stations may have a more restricted locational choice. This preference for smaller units is also subject to the requirement to address concerns raised in the areas of sensitivity identified in section f) below.

The Council will encourage operators to develop networks which rely on base stations with the minimum visual impact, particularly in urban areas. This may require a number of smaller installations rather than fewer larger ones.

Where the operator can demonstrate that a large installation is unavoidable such a development will be considered. The Council will not however generally support the development of additional apparatus in the vicinity of an existing structure where there is physical potential for mast sharing. Independent advice may be sought by the Council in this matter.

Where substantial base station structures have been demonstrated to be required the Council will wish to see evidence that opportunities both to share existing sites and masts have been fully exploited and that the potential for future sharing arrangements is maximised in the design of the proposed new installation.

b) Built form

Free standing installations (towers and poles) generally have a greater environmental and community impact than those mounted on existing buildings and other structures such as existing masts. In general therefore new installations on buildings are

Appendix 2. EDC Telecommunications Policy and Guidance Note

preferable to the erection of free standing masts. Historically however some taller buildings, such as water towers, have been very attractive sites for telecommunications infrastructure, to the extent that they have become festooned with various types of antennas. Where a number of existing antennas or related equipment are already present on a building, the Council may therefore take the view that further proliferation would have a significant adverse visual impact and resist additional proposals.

The Council will encourage operators to develop networks of installation on existing structures (where this does not result in visual clutter) in preference to free standing installations.

c) Location

Where larger and particularly free standing installations offer the only option, their environmental and community impact can be considerably reduced by selecting an appropriate location. Many types of installation are difficult to fit into urban and particularly residential environments and could be more appropriate to industrial or business areas, commercial or other non-residential buildings (especially in town centres) in an urban environment or larger urban open spaces such as golf courses (which allow room for landscape screening). The suitability of these locations would also be subject to the provisions of Section f) below. Although many of the more attractive rural areas are as unsuited as residential areas to accommodating unsympathetically located installations, some areas of countryside must offer more scope to absorb these developments than urban areas. The visual impact of large free standing installations can for example be minimised by locating them in quarries or woodlands (subject to amenity considerations) or associating them with industrial or institutional establishments or substantial farm buildings. Even more than in urban areas however care will need to be taken to avoid prominent skyline locations especially when seen from established view points. Operators should avoid adverse impact on locally important environmental resources defined on the Council's databases including listed buildings, ancient monuments, sites of importance for nature conservation, important wildlife corridors and on the landscape quality of the greenbelt as described in the Glasgow and the Clyde Valley Landscape Character Assessment. Telecommunications proposals within the Campsie Fells Regional Scenic Area will be resisted.

Where larger free standing installations have been demonstrated to be necessary the Council will require these to be located

(i) in urban areas

- **in industrial and business area**
- **on industrial and business land supply (where this does not constrain future development opportunities)**
- **on large, free standing commercial or non-residential buildings**
- **in open spaces (where appropriate screening can be accommodated)**

(ii) in rural areas

- **in quarries,**
- **associated with industrial or institutional establishments**
- **associated with substantial farm buildings**
- **in woodlands (subject to amenity considerations)**

Appendix 2. EDC Telecommunications Policy and Guidance Note

d) Layout

Much of the adverse visual impact of telecommunications infrastructure arises as a result of the “clutter” associated with such development. The community is generally more prepared to accept proposals with clean lines (such as poles, rather than open lattice masts), although it is acknowledged that some designs of pole may be less suitable for sharing than masts. Associated equipment should also be minimised or contained within existing structures. Fencing or other security arrangements are often necessary in the interests of community safety or to protect equipment. This will, however, require to be agreed to the Council’s satisfaction before development can commence.

In order to reduce visual impact all cabling should be underground, the equipment should not be illuminated and no logos or advertising lettering should appear on any of the equipment or associated fencing.

The Council will encourage operators to minimise the “cluttered” visual effect of their installations by for example using poles instead of open lattice structure, undergrounding all associated cables and avoiding the use of palisade or other discordant security fence structures. A preferred method of minimising the impact of associated equipment is for it to be enclosed within an existing structure or in a newly built structure which (in its design and materials) reflects surrounding buildings.

e) Detailed design

If a satisfactory location can be agreed, it is considered that much of the residual potential for adverse community or environmental impact can be addressed by appropriate orientation, colour and finish (including camouflage). This may be particularly important in cases which could affect Conservation Areas (and other local designations), listed buildings or designed landscapes. Where planting is proposed to conceal elements of the installation, maintenance arrangements require to be agreed to the Council’s satisfaction.

The Council will require operators to adhere to best available design practice as set out in PAN 62 and any emerging opportunities to reduce adverse impact.

Speculative applications for masts or poles which give insufficient indication of the type, number or scale of devices to be attached are not commonly received but can be difficult to properly assess and, in the interest of community well-being and transparency of the process, will not be encouraged.

The Council will generally be reluctant to give consent for speculative proposals for telecommunication apparatus until full details of the development are available.

f) Community well-being

Although direct health implications of proposals for telecommunications installations (which are accompanied by an ICNIRP certificate)¹ are not a material planning consideration, the indirect impact on community well-being arising from telecommunications proposals can however be considerable. Recent experiences have indicated that telecommunication installations which are on residential buildings or property or have significant impact on the visual amenity of residential properties

Appendix 2. EDC Telecommunications Policy and Guidance Note

can be a source of community concern. Applications in these locations will require to be accompanied by documentation to indicate how community concerns have been solicited and addressed.

Unless the operators can demonstrate that they have engaged with either residents or parents groups as appropriate and addressed their expressed concerns, the Council will resist telecommunications developments which are:-

a. on residential property,

b. located and designed in such a way that they have a significant visual impact

on the amenity of residential properties, or

c. within 250 metres of schools, nurseries or specified play areas².

Notwithstanding the above, the Council will resist development proposals within schools, nurseries or specified play areas or on land or buildings adjoining these.

Applicants for planning permission are required to formally notify adjoining property owners and occupiers or where there is a single surrounding ownership, those within 90 metres of the development site. Particularly in rural areas this may only involve a very limited number of members of the community. Given however the current level of community interest in telecommunications development it is important that proposals are widely publicised in order to ensure that the wider community has ample opportunities to express views. Major proposals (for example new masts near residential properties) are likely to be classed as “bad neighbour” developments and will require to be advertised under Article 12(5)B of the General Development Procedure (Scotland) Order 1992. The majority of telecommunications proposals do not however fall into this category but in recognition of the widespread community interest the Council will (in addition to placing a notice in the “weekly list”), for the time being, advertise all telecommunications applications in the press.

g) Precautionary approach

In addition to respecting community sensitivities as set out in section f) above, the Council will take cognisance of the Stewart Report’s findings that a precautionary approach is justified in the light of “... gaps in knowledge...” about potential adverse health effects. It may therefore be appropriate to build in a mechanism by which the continued operation of specific telecommunications installations can be reviewed should new information become available on health effects.

The Council will generally only issue telecommunications planning consents for a five year period. Such consents can be renewed for further five years periods subject to the emergence of further information on impact and the satisfactory operation of the installation.

h) Community gain, environmental improvement and site restoration

In the interests of local amenity it is important that, in a rapidly developing sector, provision is made for site restoration should the installation become redundant (in whole or part including any access track or other aspects required for the construction process). This will apply to ground based and building mounted equipment.

The Council will place conditions on planning consents for telecommunications developments requiring the removal of equipment (and

Appendix 2. EDC Telecommunications Policy and Guidance Note

any associated cabling, fixing or ancillary items) and the reinstatement of the site (including all evidence of the development, ranging from for example fixing holes on buildings to access tracks to base stations in rural locations) within 3 months of its becoming redundant or obsolete.

Where the development of a telecommunications installation is considered to involve some degree of loss of amenity and the operator has demonstrated that the installation is required and that the impact cannot be remediated, it is appropriate for the Council to seek a compensatory “gain” on behalf of the community. This could involve improved public access, habitat creation or other local environmental improvements.

Where it is considered that despite the application of good practice in siting and design, the proposal will cause a loss of amenity, the Council may seek an appropriate scale of contribution towards environmental impacts in the area.

In assessing proposals for new base stations it is proper to consider how the environmental impact of inherited hardware can be ameliorated. Opportunities may arise to merge or replace older base stations with smaller, better designed and located installations.

The Council will take into account when assessing the impact of new proposals, the extent to which applicants are prepared to review existing (particularly any less well-designed or located) infrastructure installed under previous arrangements.

h) Procedures

Operators will be expected to take every available opportunity to engage with the Council and the Community (as recommended in PAN62) when preparing their “roll out plans” and assessing site options prior to submitting a planning application. Unless this has taken place it may be more difficult to efficiently process applications.

The Council will expect to be consulted and for its concerns to be accommodated at the “draft roll out plan” stage and when siting options are being considered.

Should you require any further information please do not hesitate to contact :
The Planning Office, Development Quality Section,
The Triangle,
Kirkintilloch Road,
Bishopbriggs G64 2TR
Tel: 0141 578 8000

¹ The Council will ensure that the ICNIRP certification is valid and complete, accurate and specific to the proposal. Independent advice may be sought on this matter and applications which are not accompanied by the appropriate certification will not be validated for processing.

² Specified play areas will be those Council operated playgrounds with play equipment.

DUMFRIES AND GALLOWAY COUNCIL
TELECOMMUNICATIONS DEVELOPMENT

**SUMMARY OF EVIDENCE OF DAVID BANFORD TO THE TRANSPORT
AND ENVIRONMENT COMMITTEE**

1. Introduction

Dumfries and Galloway is a large rural authority in the southwest of Scotland, extending from Stranraer in the west to Langholm in the east, a distance of some 190 Km. The total land area is 6370 sq. km. and the population is some 147,000. There are two main transportation corridors traversing the region, being the M74 and Glasgow-Carlisle railway and the A75 Euroroute from Carlisle to Stranraer.

The bulk of the population is to be found in the 17 main small and medium sized towns.

The combination of these factors means that there is less pressure for Telecoms development as compared to the urban areas. This is reflected in the turnover of enquiries and applications being received. The table attached confirms this (46 cases to date).

2. Discussion Topics

The same bullet point headings are used as in the letter of 16 January 2003.

2.1 How has the relationship between the industry and Planning Authorities developed over the last few years? Is there a common picture throughout Scotland? If not are there any reason why this may be so?

- There is now some pre-application discussion since the new legislation came into play. Previously, there was virtually none.
- There is a very different level of pre-application discussion between the different operators. Recent entrants are better and are more accommodating than the longer established players. This may reflect their spread of infrastructure.
- There are still a significant number of cases where no discussion has taken place (see table).
- Some have a bad habit of submitting proposals as pre-application discussions one week and then submitting the application the next week without waiting for the response.
- Rollout plans patchy – perhaps the longer established operators have full coverage for our area by now.
- The Airwave proposals for the emergency services have been good at discussing their proposals and appear to listen.
- We grant temporary permissions for masts (10 years, as per our Structure Plan Policy S25). Some operators have no problem with this but others take great exception to it.

2.2 What evidence exists that individual operators are co-operating in respect of identifying individual sites for masts?

- Getting operators to mast or site share is very difficult. The vast majority of cases does not involve mast or site share (see table).
- There appears to be a hierarchy for site searches:- looking at existing (non-telecom) structures first, with freestanding sites next.
- Site share is viewed as a last resort.
- Site share may only be considered in the face of a recommendation for refusal.

2.3 To what extent have hierarchies for preferred locations been established by Planning Authorities

- It depends on the location as to what options are available - there are very few existing structures suitable in rural areas.
- In areas such as the A74(M) corridor there is beginning to be a bit of an over-proliferation of masts in close proximity. Written justification for why existing masts cannot be used is now necessary.
- Operators often give poor technical performance of a competitor's site to, which seems perverse.
- Easy and economical access to an independent opinion on these submissions would be of great benefit and would make the system both more transparent and more robust.

2.4 How widespread is the submission of annual rollout plans by individual operators? How are such plans viewed by Planning Authorities? What status do they have when decision are being made in respect of individual applications?

- See 2.1 above. Such plans are regarded as a very useful guide to what are likely to become new "hot spots" and several unacceptable sites or obvious mast / site share options can be seen when they are all assembled.
- Rollout plans have no statutory status.
- A weakness in the plans is that they appear at different times, whereas their key advantage is to be used together to inform the "bigger picture".

5) How satisfied are Planning Authorities with the current level of guidance on the latest studies into the effect of mobile phone technology on public health?

- The best scientific evidence is still that given in the ICNIRP guidelines.
- NPPG19 clearly lets Planning Authorities detach health from the planning process for ICNIRP certified masts.
- This is in accordance with the wishes of the original working party and is to be welcomed.

6) What is our opinion of the appropriateness of the existing procedures? What changes would you wish to see made especially in the light of the way the network may roll out in the medium-long term?

- The procedures are generally working well in this region and are considered to be appropriate.

- Of the 46 cases dealt with, only 1 has been refused and officers approved 39 on a delegated basis.
- The public has maintained objection in 9 cases. This low figure may well reflect the geography and dispersed population of the region.
- Industry objection to time-limited permissions is misplaced. Ten years is a considerable period given the pace of change in the industry. Old equipment needs to be removed.
- Time limits are the norm in other industries, e.g. mineral extraction.
- In the majority of cases, the legislation has encouraged better outcomes on the ground.
- The vast majority of cases are for new ground-based masts for the mobile operators. For the most part, operators have been receptive to pre-application advice. The system allows planning authorities to deal effectively with the remaining unacceptable cases.
- The system is an effective vehicle for involving the public in the application process, giving a more transparent and democratic result.

DUMFRIES AND GALLOWAY COUNCIL - SUMMARY OF CASES JULY 2001 TO DATE

TYPE OF DEVELOPMENT	Alteration to GBM	Replacement of GBM	On bldg, no equipment	On bldg, with equipment	Other	Total
New ground based mast	7	2		2		46
OPERATOR						
Mobile	1	Other				46
MAST SHARE						
Yes	37					46
No						
POTENTIAL FOR SHARE						
Yes	13					45
No						
DELEGATED DECISION						
Yes	3					46
No		Withdrawn			4	
DECISION						
Approved	1					42
Refused						
PRE-APPLICATION DISCUSSIONS						
Yes	18					44
No						
APPLICATION IMPROVED						
Yes	2					12
No						
CASES AMENDED AFTER RECEIPT						
						9
CASES WITH PUBLIC OBJECTIONS						
						9

TRANSPORT AND THE ENVIRONMENT COMMITTEE

Subject: Petition PE 377 by Michael Kayes on polluting activities in built-up areas.

Meeting No: 4th Meeting

Date: 18th February 2003

Author: Fiona McLeod MSP

Introduction

1. Members will recall that the Committee considered a Reporter's report on petition PE 377 at its meeting on 18 December 2002. The Committee agreed the report, subject to specified changes, and forwarded it to the Minister for Environment and Rural Development, the Deputy Minister for Social Justice, SEPA and CoSLA for their response.
2. Members may wish to note that the Minister for Environment and Rural Development and the Deputy Minister for Social Justice have produced a joint response which reflects the position of the Scottish Executive. CoSLA has also produced a brief response.
3. The responses to the report are set out at Annex A, the report itself is reproduced at Annex B and the report from the Petitions Committee of the European Parliament is attached at Annex C.
4. This paper summarises responses from the Scottish Executive and SEPA to the Reporter's report on petition PE 377. The purpose of this paper is to provide an aid to the Committee's consideration of the responses. Where appropriate within the paper, the Reporter has provided her comments on the responses.
5. The Committee is invited to consider revising the report to incorporate the Committee's views on issues arising from the responses. It is proposed that a revised report could then be considered by the Committee at its meeting on 4 March, with a view to publishing a finalised report prior to dissolution.
6. As an aid to the Committee's consideration of the responses, where appropriate the Reporter has provided comments on the responses.
7. This paper also provides an opportunity to update the Committee on the progress of the consideration of the issues raised in the petition by the Petitions Committee of the European Parliament.
8. Members may wish to note that the Convener has viewed this paper prior to its consideration by the Committee as a whole.

Recommendations contained in the report

9. Each of the recommendations contained within the original report is summarised below and highlighted in italics. Responses from the Executive and SEPA to each of the recommendations are also summarised. Comments from the Reporter on the responses are highlighted in bold.

Environmental Impact Assessment (Scotland) Regulations 1999

The Reporter recommended that a review be carried out on all planning permissions for animal carcass incinerators granted prior to the enforcement of the EIA Regulations 1999.

10. The Executive response notes that changes in planning regulations stem from Directive 97/11/EC which amended Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. The response states that, as Directive 85/337/EC is not intended to apply retrospectively, the Executive does not see a basis for a review of planning permissions granted prior to the implementation of the EIA Regulations 1999.
11. The response from SEPA does not comment specifically on this recommendation.

Interplay between planning authorities and SEPA

The Reporter identified the interplay between planning authorities and SEPA as one of the key issues highlighted by the experience of Carntyne. The Reporter recommended that SEPA should be provided with statutory powers from the Executive to become actively involved in the environmental impact assessment process as a statutory consultee.

12. Under the EIA Regulations 1999, animal remains incineration is included in Schedule 2 (screening required as to whether EIA necessary). The Executive response points out that under the 1999 Regulations, SEPA is a statutory consultee in relation to the environmental statement. SEPA must provide its views on what should be included in an environmental statement for each application and on the environmental statement itself. However, the response also notes that there is no statutory requirement to consult SEPA on whether an EIA should be required for a particular development
13. The Executive's response states that SEPA is also a statutory consultee under the Town and Country Planning (General Development Procedure) (Scotland) Order 1992 with regard to planning applications for the use of land for the treatment or disposal of trade waste. The response adds that SEPA played an important role in the consideration of the planning appeal into the Carntyne incinerator, noting that the Executive reporter considering the appeal stated that SEPA:

“had not objected to the planning application and would only recommend refusal if it thought that its requirements could not be met, which is not the case here.”

14. The response from SEPA notes SEPA’s statutory rights as outlined within the Executive response. The response also notes that there is no statutory requirement to consult the Health Board on any aspect of an EIA.

15. SEPA’s response states that SEPA’s contributions to planning applications, such as that of the Carntyne plant, can only extend to issues which are material to land use planning. SEPA notes that this inability to comment on the planning implications of how a site may be regulated represents a major concern.

16. The response from SEPA also states that:

“SEPA would welcome any change whereby planning and pollution control applications are submitted simultaneously, allowing better informed decision making, and harmonised applications of conditions and standards and enforcement”

17. On the issue of interplay between planning authorities and SEPA, the Executive response notes that:

“A root cause of the problems that have arisen at Carntyne is the view that the plant may be located in an inappropriate location given the nature of the activity carried out and its proximity to an urban/residential area...there may be scope for better interaction between the land use planning and environmental protection consenting regimes...I recognise that the tendency is for the two processes to take place sequentially with SEPA considering the detailed environment protection implications of proposals for which land use consent has already been obtained from the planning authority.

It is, therefore, proposed that the Scottish Executive, in consultation with SEPA and other interested parties, will undertake a study to establish the scope for improving interaction between the statutory land use planning system and environment protection consenting regime. This will include considering the respective powers of the Executive, planning authorities and SEPA to assess the way in which they are working together.”

18. The Reporter welcomes the Executive’s proposal to undertake a study on the integration of land use planning process and environmental regulation. The Reporter recommends that such research should be carried out urgently and would also like to encourage the Executive to consider the points raised by the Committee on this issue including SEPA’s role in enforcing the EIA Regulations 1999. The Reporter would also like to encourage the Executive to consider the points raised in SEPA’s response, in particular SEPA’s suggestion relating to planning and pollution control applications.

The Disposal of BSE infected cattle

Testing of carcasses for BSE

The Committee sought clarification from the Executive as to why the test which conforms to European rules takes around 10 to 14 days to process in Scotland when elsewhere in Europe the same test can be processed within a few hours.

19. The Executive response claims that tests can take up to 14 days where initial tests are either inconclusive or positive but that straightforward negative tests are often processed within 24-48 hours. The response states that in terms of health and safety it is more efficient to incinerate carcasses as soon as possible.
20. In response to the Committee's request for further information on the approach to testing of fallen stock elsewhere in Europe, the response states that the Executive's understanding is that similar timescales apply in the rest of Europe as apply in the UK.
21. **The Reporter is disappointed that the Executive is unable to provide a definitive answer to this question.**
22. SEPA's response states that SEPA uses the precautionary principle, meaning that it assumes there could be BSE contaminated carcasses present, and requires the operation of the plant to be adequate to destroy the prion.

Safe working practices

The Committee agreed to seek assurances from the Executive and SEPA that working practices are sufficient to protect staff at all incinerators in Scotland which may be burning BSE infected cattle.

23. The Executive response notes that guidance on the health and safety of staff has been produced by a number of Departments including the Health and Safety Executive, the Advisory Committee on Dangerous Pathogens, the Spongiform Encephalopathy Advisory Committee (SEAC) and the Veterinary Laboratory Agency. The response details the role of the Rural Payments Agency (RPA) which provides written guidance and on-the-job training for staff on the handling of dead stock, the extraction of brainstem samples and safety advice on decontamination and waste disposal.
24. SEPA's response states that it is not able to comment directly on the protection of staff from infection with the BSE prion as this is a health and safety issue but it is clear that SEPA is aware of the RPA guidance referred to in paragraph 23.

Incineration temperature

At the Committee meeting on 18 December, members questioned whether the temperature of 850°C was sufficiently robust to destroy the BSE prion. The

Committee agreed to request information from the Executive and SEPA on the basis for setting the temperature at this level.

25. The Executive response provides information on the findings of the Spongiform Encephalopathy Advisory Committee (SEAC), the principal source of advice to the UK government on transmissible spongiform encephalopathy. This Committee has concluded that incineration in dedicated incinerators which reached 850 degrees celcius would be sufficient to ensure there was no risk from the BSE prion.

26. SEPA's response supports the information provided within the Executive response.

The precautionary principle

The Reporter recommended that SEPA should assume that all animal carcass incinerators in Scotland may be burning BSE infected cattle and license and regulate incinerators on that basis.

27. The Executive response seeks to assure the Committee that incinerators contracted for BSE surveillance work are already operating at a level that allows for the possibility that they will process BSE positive cases. The response notes that SEPA has adopted the precautionary principle by taking SEAC's recommendations into account when setting conditions in its authorisations for dedicated incinerators; that is to say it requires all plants to operate at temperatures that are adequate to destroy the BSE prion.

28. SEPA's response supports the Executive's viewpoint.

29. On the basis of the information provided, the Reporter is satisfied guidelines are in place in respect of (1) staff working practices and (2) the temperature level at which the incinerator operators to take account of the risk posed by the plant dealing with potentially BSE-infected cattle. The Reporter supports SEPA in its use of the precautionary principle in monitoring the working practices of cattle incinerator operators.

The regulation of incinerators

The role of SEPA and planning conditions

The Reporter did not appreciate the merit in setting planning conditions preventing BSE cattle incineration when this condition cannot be met under the current system for testing and incinerating BSE infected cattle.

The Reporter recommended that SEPA should have a statutory role in the process for regulating BSE. Specifically, conditions regarding the incineration of BSE infected cattle should be licensing conditions prescribed and enforced by SEPA.

30. In relation to the planning condition for the Carntyne incinerator on the regulation of BSE, the Executive response notes that NPPG 10 indicates that the physical

nature of the waste that is acceptable at a disposal plant is an issue which could be covered by planning conditions. The response notes that this guidance should be used in conjunction with the advice in SEDD circular 4/1998 which states that conditions should relate to planning, be enforceable and reasonable in all other respects.

31. In relation to the recommendation that SEPA should have a statutory role in regulating BSE, the Executive does not believe that there would be any merit in giving SEPA any additional statutory role as this function falls under animal health policy, co-ordinated by UK agriculture departments and assisted by expert advice from the State Veterinary Service.
32. SEPA's response notes that the Carntyne incinerator is the only incinerator that has a planning condition relating to the burning of BSE infected carcasses. The response adds that it is worth reasserting the requirement for planning conditions to meet the tests set out in SEDD circular 4/1998.
33. **Having considered the responses, the Reporter reiterates her view that there is little merit in attaching planning conditions that cannot be enforced (see, for example, the comments attributed to the Head of Planning at the City of Glasgow Council as well as the comments in SEPA's response (para 15). However, the Reporter considers it vital that the Executive, within the study referred to above, considers the effectiveness of the current application of Circular 4/1998 by planning authorities.**
34. **The Reporter also believes that the Executive should give further consideration to SEPA's role as the *environmental* regulator as regards the disposal of BSE-infected cattle.**

Availability of information regarding BSE-infected cattle incineration

The Reporter recommended that the RPA should monitor the origin and the disposal point for BSE infected cattle and provide this information to SEPA on a regular and on-going basis.

35. The Executive response stated that this function is the responsibility of the State Veterinary Service. However, the response states that, should SEPA have an operational requirement for data on disposal points, the Minister for Environment and Rural Development would be prepared to consider such a request.
36. The response from SEPA welcomes the Committee's recommendation, stating that the test results would allow SEPA, for example, to assess whether the ash and extractive atmospheric emission sampling frequencies are adequate at each plant.
37. **The Minister has previously stated that he would arrange for data on the disposal points in respect of the plant at Carntyne to be made available to SEPA for a period of six months following the recommencement of operations. Given SEPA's comments on the general desirability of having such information, the Reporter considers that there is clearly merit in**

making such information available as standard. The Reporter therefore recommends that the Executive should broaden its position so that the provision of BSE data on disposal sites throughout Scotland is provided to SEPA.

The Regulation of incinerators by SEPA

The Reporter noted the clear dissatisfaction of the Minister for Environment and Rural Development and SEPA in connection with the Carntyne incinerator operators' poor compliance record. The Reporter considered it unacceptable that there isn't consensus between the Executive and SEPA as to the exercise of their respective powers in situations such as the situation at Carntyne.

38. Within the Executive response the Minister states that the respective roles of the Scottish Executive as legislator and SEPA as enforcer of the regulations are clear and should remain separate as is consistent with SEPA's status as an Executive Non-Departmental Public Body. The response notes that although Ministers have the power to direct SEPA, these powers should be used in limited circumstances as SEPA's expertise and judgement allows it to deploy the powers available to it. However, the Minister notes that he would direct SEPA if he believed that SEPA's actions were creating a risk to public health.
39. The response notes that, if problems persist at the Carntyne plant, SEPA has the option to take further enforcement action, revoke an authorisation or recommend prosecution to the Procurator Fiscal.
40. In its response SEPA states that responsibility for the day to day regulation of the plant lies with SEPA. SEPA also comments on its power to revoke an authorisation noting that SEPA must exercise this power in accordance with general administrative law principles including the Human Rights Act 1998. Effectively, the response notes, in order to revoke an authorisation SEPA must be able to demonstrate that it is technically not possible to up-grade the plant to meet the standard required by the authorisation. The response adds that this is a difficult test to prove.
41. **The Reporter recognises the legitimacy of the differing roles of legislator and regulator but also notes that the legislation gives the Minister powers of direction in respect of SEPA's exercise of its authority. The Reporter also notes SEPA's comments about the framework in which it must exercise its powers but believes this should not be interpreted so restrictively as to create inertia.**

European Parliament Petitions Committee

42. Dorothy-Grace Elder MSP presented a petition to the European Parliament Petitions Committee raising similar issues to those highlighted within petition PE 377. In January 2003, a delegation of MEPs from the Petitions Committee visited the incinerator site and held meetings with interested parties including the Convener and the Reporter from this Committee.
43. The MEPs produced a report on the basis of the evidence gathered which concluded that the Carntyne Incinerator Plant should be closed as soon as a viable alternative site can be found. In addition, the report concluded that SEPA should be given additional powers and the consequent resources to allow it to be more closely involved in the planning process in the context of improved integration of planning and environmental regulations.
44. **In connection with the main recommendation of the European Parliament report – that the plant should be closed as soon as a viable alternative site can be found – the Reporter notes that the weakness of planning condition 6 coupled with the circumspect comments of SEPA as to the likelihood of revocation of Sacone’s authorisation to operate, means that the plant is only likely to permanently cease to operate if and when it suits the operator.**

Reporter’s conclusions

45. The Reporter, and the Committee as a whole, has undertaken an in depth examination of the broader issues relating to the application of the planning system and environmental regulations which arise from the petition. Given the Committee’s stance not to attempt to resolve local disputes, the Committee does appear to have made headway in a number of the broader regulatory matters which are illustrated by the issues raised by Petition 377.
- Firstly, the Minister has committed the Executive to undertaking research on the integration of land use planning process and environmental regulation. This is to be warmly welcomed, given that the common view is that the root problem of the situation at Carntyne is that an incinerator has been sited in an inappropriate location.
 - In planning applications that raise issues of environmental protection, it is clearly desirable that the application to SEPA for licence authorisation should take place at the same time as the application to the planning authority for land use consent and that there needs to be a far greater level of interaction between the two processes.
 - Secondly, given the situation that exists at Carntyne the Reporter welcomes the assurances that have been given by SEPA and the Executive as to the safeguards which have been put in place to mitigate the risks imposed by the plant dealing with BSE-infected carcasses.
46. But the bottom line for residents of Carntyne is that is unsatisfactory that a cattle incinerator was ever allowed to be located in a built-up area.

47. In addition to this is the licensing authorisation which is regulated by SEPA. While the Reporter recognises the framework in which such regulation is to be applied (paras 40 and 41), the Reporter remains mystified as to how it is possible that operators of this plant remain able to attempt to operate in such a location as Carntyne if all the powers which are available to SEPA and Scottish Ministers are exercised to their full extent.

48. However, the reality of the current situation is that without the consent of the operator there would appear to be little prospect of the permanent cessation of the plant. While SEPA can continue to closely regulate how the plant operates, this does not address the underlying problem. Ultimately, it is a matter for the City of Glasgow Council, local MSPs, the Scottish Executive and the operators of the plant to work together to negotiate a permanent solution.

Recommendation

49. The Committee is invited to consider the responses from the Scottish Executive, SEPA and CoSLA to the Reporter's report with a view to a draft Committee report being prepared for consideration at the next meeting of the Committee.

Our Ref: EXT05-A2003014
Your Ref:

Bristow Muldoon MSP
Convener, Transport and the Environment Committee
c/o Room 3.5
Committee Chambers
The Scottish Parliament
EDINBURGH EH99 1SP

28 January 2003

Dear Mr Muldoon

Transport and the Environment Committee: Reporter's Paper on Petition 377 on Polluting Activities in Built up Areas

Further to your letter of 9 January 2003, SEPA welcomes the opportunity to respond to Fiona McLeod MSP's report on the issues raised by petition 377. SEPA has commented on several aspects of the report, and where relevant, referenced the paragraphs in the report.

Introduction

1. The report is a well balanced assessment of the issue and effectiveness of the interface between the statutory planning and environmental protection regimes. In general, SEPA supports the contents and recommendations of the report.
2. There are a number of factual issues (mostly of a non-material nature) that are not strictly correct in the report. I highlight these for completeness:
 - paragraph 3: currently the incinerator only burns cattle carcasses (not sheep).
 - paragraph 12: the meeting on 23 August 2002 was in SEPA's East Kilbride office.
 - paragraph 24: SEPA monitors the operation of incineration plants following the granting of an authorisation under the Environmental Protection Act 1990. Obviously planning permission would have been required to permit the plant to be built, but is not required by statute for SEPA to authorise the operation of the process.
 - paragraph 48: SEPA has served 4 enforcement notices on the incinerator at Carntyne. Two were on the previous operator (Westcot Hides), and two on the current operator (Sacone Environmental). At the time of report to the T&E committee, three of these enforcement notices had been complied with (rather than the two stated). The plant was closed in March 2002 due to the fourth enforcement notice. Sacone complied with the requirements of the fourth enforcement notice in mid-December 2002.

Planning and Environmental Impact Assessments

3. With reference to paragraph 20, under the Environmental Assessment (Scotland) Regulations 1988, there was no provision requiring an EIA for animal carcass incineration. A knackery or an incinerator for controlled waste (animal remains are not controlled waste) would have required a screening exercise on whether an EIA was required. Under the revised EIA (Scotland) Regulations 1999, animal remains incineration is now included in Schedule 2 (screening required as to whether EIA necessary).

Cont'd/...

4. As part of the Policy and Financial Management Review currently underway, SEPA reported on issues with the statutory land use planning and environment protection regulations interface and sought dialogue as to how integration could be improved. Part of this process will require clarification of the respective powers of SEPA, the Executive and Local Authorities, and assess the way in which they are working together to protect Scotland's environment.
5. SEPA has a right to contribute to the consideration of an application by a planning authority, either through statutory consultation (for example, the General Development Procedure (Scotland) Order 1992 (as amended) requires planning authorities to formally consult SEPA on all applications for proposals involving waste management facilities), or by voluntarily making a representation to a planning authority. However, SEPA's contributions can only extend to issues which are material to land use planning. In most cases, issues connected with the environmental regulation of the site are not material to the planning decision as these are controlled by other regulations. In its report to the Scottish Executive, SEPA highlighted that this inability to comment on the planning implications of how the site may be regulated represents a major concern.
6. With reference to the concern raised by paragraph 27, SEPA would welcome any change whereby planning and pollution control applications are submitted simultaneously, allowing better informed decision making, and harmonised applications of conditions and standards and enforcement.
7. The impacts of a proposal on the environment are material considerations in the determination of a planning application (as set out in paragraph 51 of Scottish Planning Policy 1). However, the planning system should not be used to secure objectives that are more properly achieved under other legislation (paragraph 57, SPP1), therefore consideration of specific environmental issues, which are covered by SEPA's regulatory functions, cannot form part of the planning application determination.
8. With reference to the recommendation in paragraph 28, an EIA will normally be undertaken by the applicant and submitted to the planning authority for their consideration prior to a decision. Under Regulation 2(1) SEPA is a "consultation body", and is therefore already a statutory consultee. SEPA is sent a copy of the EIA and may make representations. SEPA may also comment on the findings and methodology of the EIA. SEPA is additionally a statutory consultee when a planning authority has had a request from an applicant for a "scoping opinion" regarding the aspects on which the Environmental Statement should focus. The need for a "scoping opinion" is not statutory but results from a request from the applicant for the local authority's opinion. There is, however, no requirement for a planning authority to consult SEPA on requests for screening opinions (for Schedule 2 developments), that is, whether a EIA should be required for a particular development. There is no requirement for the planning authority to consult the Health Board on any aspect of the EIA.

The disposal of BSE infected cattle

9. With reference to paragraph 23, for Part A and B processes under Environmental Protection Act 1990, Part I, SEPA does not have any statutory power to withhold the granting of an operating licence irrespective of whether planning permission has been granted (again providing the appropriate technology to control emissions has been used). This is different from the Waste Management Licensing Regulations 1994 and Part II of the Act which require planning permission to be granted prior to the granting of the environmental operating licence and highlights differences within environmental protection legislation
10. There are several 'grades' of cattle disposed of at sites in Scotland. These include:

Cont'd/...

- SRM (specified risk material, tissues removed from the human food chain e.g. spinal cord, brains etc). This material can be rendered or incinerated.
 - BSE suspects (where a vet suspects BSE is present and puts down the animal for that reason). In Scotland these carcasses are incinerated at a designated site. This incinerator operates to the same 850°C and 2 second residence time standard. The operators of incinerator designated for BSE suspects bid for this work.
 - Fallen stock (animals that die or are put down on farm but BSE is not specifically suspected). These carcasses are incinerated.
 - OTMS (over 30 month animals, mostly dairy, destroyed as not fit for human consumption). These carcasses can be incinerated or rendered and incinerated.
11. Each animal carcass incinerator in Scotland is authorised by SEPA to burn animal carcasses. Except for one plant, there are no specific conditions relating to which carcasses are permitted to be incinerated at the plant, but there are conditions relating to the operating parameters of the plant and the emissions permitted.
 12. The Rural Payments Agency (RPA) contracts incineration and rendering plants to destroy carcasses. The contracts are for specific categories of carcasses collected in specific geographic locations.
 13. The Carntyne Plant planning permission granted on appeal by the Scottish Office states in Condition 6 that “no...remains from animals clinically confirmed or diagnosed as suffering from BSE, tallow or bone meal shall be burned at the plant”. The Carntyne incinerator is the only plant with such a planning permission condition.
 14. With reference to paragraph 40, in current practice, Circular 4/1998, The Use of Conditions in Planning Permissions, sets out a series of tests which planning conditions should meet. One of those tests is that a condition must have the ability to be enforced by the planning authority. Although SEPA is not best placed to comment on the appropriateness of the conditions attached, it is worth reasserting the requirement for planning conditions to meet the tests set out in Government policy.
 15. In practice, SEPA does not enforce Condition 6 of the planning permission. SEPA determined that there was no mechanism available to SEPA to enforce this condition. Within the national herd there is known to be about 0.25% suffering from pre-clinical BSE, and some of these carcasses will die of unknown cause (fallen stock) or be destroyed as not fit for human consumption (OTMS). However, where there is no clinical sign of the BSE disease, the only method of detection is laboratory analysis. This analysis currently takes up to 7 days in the UK, and as carcasses are required to be destroyed within 72 hours, the results are not available until after the disposal operation is complete.
 16. Therefore, although there is no statutory requirement for SEPA to specifically make provisions for the treatment of BSE infected cattle, SEPA used the precautionary principle (as stated in paragraph 38) to determine the operating parameters at the plant, that is, SEPA assumes there could be BSE contaminated carcasses present, and requires operation of the plant to be adequate to destroy the prion.
 17. With reference to paragraph 39, the Spongiform Encephalopathy Advisory Committee (SEAC) determined that operating the incinerator with a minimum temperature in the secondary chamber of 850°C for at least a 2 second residence time should destroy the prion (statement of 7 June 1996). As recommended in paragraph 41, these conditions (850°C for at least a 2 seconds) are required at every animal carcass incinerator in Scotland
 18. Although the Reporter states in paragraph 36 that the burning of carcasses prior to receipt of the BSE test results circumvents the planning condition, the actual operation of the plant with regard to environmental protection would be the same if confirmed BSE cases were incinerated at the plant.

19. With reference to paragraph 32, in addition to the policy based on economic considerations, there are practical difficulties with incineration of chilled carcasses.
20. SEPA is not able to comment directly on whether the practices referred to in paragraph 35 with regard to protection of staff from infection with the BSE prion as this is a health and safety issue. However, the Meat and Livestock Commission supervise all handling of carcasses at incineration plants. Additionally, brain stem sampling is only permitted by suitably trained staff (the RPA arranged the training of incinerator operator staff).
21. SEPA welcomes the recommendation in paragraph 46 that all BSE positive test results in Scotland are provided to SEPA subject to further details as to how this arrangement would work in practice and consideration of the resultant resource implications. The test results would enable SEPA to, for example, assess whether the ash and extractive atmospheric emission sampling frequencies are adequate at each plant.

The regulation of incinerators by SEPA

22. Due to residents' concerns and the location of the incinerator, SEPA varied the authorisation in July 2001 (before Sacone started operating the incinerator) to reduce the particulate emission limit from 100 mg/m³ to 50 mg/m³. This is a tighter limit than other animal remains incinerators in Scotland. This limit has been further reduced to 10 mg/m³ in September 2002 as the abatement equipment fitted by Sacone is capable of operating to this lower limit. This reflects the requirements of Section 7(2) of the Act, that plants should be designed and operated to the best available techniques not entailing excessive cost.
23. With reference to paragraphs 50 to 52, SEPA has certain powers within Sections 10 to 14 of the Environmental Protection Act 1990 which it is required to exercise. With specific regard to revocation of an authorisation under Section 12, SEPA has a discretion to revoke authorisations. SEPA is, however, required to exercise this power in accordance with the purpose of the Act and general administrative law principles including the Human Rights Act 1998. This means that SEPA would have to demonstrate that the process cannot be operated within the conditions of the authorisation, that is, it is technically not possible to up-grade the plant to meet the required standard. This is a difficult test to prove. SEPA has therefore served notices on the operator requiring upgrading of the plant to meet the requirements of the authorisation.
24. SEPA is a corporate body set up by section 20 of Environment Act 1995. As an executive non-departmental public body SEPA is accountable to the Scottish Parliament through the Scottish Executive. The Scottish Executive issues a management statement to SEPA which sets out the relationship between SEPA and the Scottish Executive (Scottish Executive Paper 2002/19) and policy priorities to SEPA (Scottish Executive Paper 2002/20). Within the legislative framework the Minister retains powers of direction under individual regimes (under the Environmental Protection Act 1990 sections 7 and 10 contain powers of direction in relation to conditions of authorisation and variation) and more generally under section 40 of the Environment Act 1995. These powers of direction can only be exercised by the Minister for the purpose of the relevant act. These powers of direction do not operate to give the Minister any wider powers than SEPA itself has. It is clear within this framework that the primary responsibility for day to day regulation of the site lies with SEPA.

Yours sincerely

Brian Healey
Environmental Regulation & Improvement Manager



SCOTTISH EXECUTIVE

Minister for Environment & Rural Development
Ross Finnie MSP

Pentland House
47 Robb's Loan
Edinburgh EH14 1TY

Bristow Muldoon MSP
Convener
Transport and Environment Committee
Committee Chambers
The Scottish Parliament
Edinburgh
EH99 1SP

Telephone: 0131-556 8400
scottish.ministers@scotland.gsi.gov.uk
<http://www.scotland.gov.uk>

Our ref:

February 2003

Thank you for your letter of 9 January about petition PE 377 concerning the incinerator at Carntyne in the east end of Glasgow. You also wrote to the Deputy Minister for Social Justice and I have agreed with Mr McNulty that this reply will cover both our respective interests in the points raised by the Transport and Environment Committee.

I very much welcome the time taken by the Committee to examine the various issues which the operation of the Carntyne incinerator has highlighted, and for the opportunity to respond to the paper prepared by the Reporter. The Committee has focused on a number of issues, using the experiences at Carntyne as an example, and has sought clarification, and made recommendations, on a number of points. I will comment on each of these in turn.

Environmental Impact Assessment (Scotland) Regulations 1999 (paragraphs 17-21)

Recommendation: that a review be carried out on all planning permissions for animal carcass incinerators granted prior to the enforcement of the EIA Regulations 1999.

This recommendation seeks a review of planning permissions granted for incinerators before the Environmental Impact Assessment (Scotland) Regulations 1999 (the 1999 Regulations) came into force. The changes in the planning regulations on environmental impact assessment (EIA) introduced in 1999, stem from Directive 97/11/EC which amended Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. The amendments made by Directive 97/11/EC are not intended to apply retrospectively, and Directive 97/11/EC states that for requests for development consent submitted prior to the time limit for implementation "...the provisions of Directive 85/337/EEC prior to these amendments shall continue to apply". In view of

this, the 1999 Regulations do not apply retrospectively. The Executive does not see a basis, therefore, for a review of planning permissions granted prior to the coming into force of the 1999 Regulations.

It is worth noting that SEPA's authorisations are subject to 4-yearly statutory reviews. This gives SEPA the opportunity to vary the conditions in its authorisations to take account of the latest technical guidance relevant to the sector or process concerned. In addition, SEPA can vary an authorisation at any time to address a particular problem with a process.

Enforcement of the EIA Regulations 1999 (paragraphs 22-28)

Recommendation: that SEPA is provided with statutory powers from the Executive to become actively involved in the environmental impact assessment process as a statutory consultee.

SEPA is already a "consultation body" under the 1999 Regulations in relation to planning applications. This means, among other things, that SEPA must be consulted for their views on every environmental statement produced. In cases requiring EIA, the 1999 Regulations state that a planning authority shall not grant planning permission for development requiring EIA without taking "the environmental information" into consideration. This "environmental information" includes the environmental statement and any representations made by any body required by the 1999 Regulations to be invited to make representations.

SEPA is also required to be consulted by the planning authority where, prior to making a planning application, a developer asks for the planning authority's opinion on what should be included in an environmental statement. Where a screening opinion on the need for EIA is sought from the planning authority by a developer, there is no statutory requirement to consult SEPA. It would be up to the planning authority to decide whether it needed SEPA's, or any other consultation body's, opinion as part of its screening process on a particular case.

In addition, SEPA is a statutory consultee under the Town and Country Planning (General Development Procedure) (Scotland) Order 1992, with regard to planning applications for building or other operations or the use of land for the retention, treatment or disposal of trade-waste. The Executive's planning policy in relation to waste disposal facilities is set out in National Planning Policy Guideline 10: Planning and Waste Management. Paragraph 17 of NPPG 10 points out that matters relevant to a pollution control authorisation or licence may also be material planning considerations. The weight attached to those matters will depend on the scope of the pollution control system in each case. While it is a long established policy that planning controls should not duplicate other statutory controls, or be used to secure objectives achievable under other legislation, that does not prevent, for example, issues relating to pollution control authorisations or licences informing the planning decision. It also notes, however, that

planning authorities should not substitute their own judgement on pollution control issues for that of SEPA, which has the relevant expertise and statutory responsibility for that control.

SEPA played an important role in the consideration of the planning appeal into the Carntyne incinerator, appearing and giving evidence at the Public Local Inquiry which was held in 1997. The Inquiry Reporter's decision letter noted that SEPA drew attention to a number of planning policy guidelines. In particular the Reporter pointed to guidance in NPPG 10 which indicates that "*planning powers should not normally be used to secure objectives which can be achieved under other legislation*" and that "*measures outwith the planning system may exist for controlling a particular aspect, but that aspect may still be a factor in deciding the planning application.....provided account is taken of the views of statutory consultees...*". The Reporter then

indicated that they (SEPA) *"had not objected to the planning application and would only recommend refusal if it thought that its requirements could not be met, which is not the case here.*

In considering the evidence the Reporter noted that planning guidance indicates *"that planning authorities should not substitute their own judgement on pollution control issues for that of SEPA, which has the relevant expertise and statutory responsibility for control"*. She also noted that *"any EPA [Environmental Protection Act 1990] authorisation would, among other things, set emission standards in line with the current relevant guidance and requires emissions to be free of visible smoke"*. Drawing all the evidence together the Reporter concluded that *"Some of the controls which I regard as essential in guarding against pollution and safeguarding health are intended to be imposed by SEPA, which I find to be the primary responsible authority in those respects"*. She therefore decided to uphold the appeal, but in so doing she made it absolutely clear that her decision granted planning permission only, the grant of the necessary environmental permit to operate the plant being the responsibility of SEPA.

A root cause of the problems that have arisen at Carntyne is the view that the plant may be located in an inappropriate location given the nature of the activity carried out and its proximity to an urban/residential area. The role SEPA played in the planning process for Carntyne was clearly very relevant. Officials have discussed this with SEPA and have reached a preliminary view that there may be scope for better interaction between the land use planning and environmental protection consenting regimes. We have gathered evidence on this issue as part of the Policy and Financial Management Review of SEPA. While the Scottish Executive's Planning Advice Note 51 advises that land use planning applications that give rise to environment protection considerations should be considered in parallel with the licence application or authorisation, I recognise that the tendency is for the two processes to take place sequentially with SEPA considering the detailed environment protection implications of proposals for which land use consent has already been obtained from the planning authority.

It is, therefore, proposed that the Scottish Executive, in consultation with SEPA and other interested parties, will undertake a study to establish the scope for improving interaction between the statutory land use planning system and environment protection consenting regime. This will include considering the respective powers of the Executive, planning authorities and SEPA to assess the way in which they are working together. As previously noted, NPPG 10 provides SEPA with scope to contribute to the planning process and the study will review whether SEPA's interpretation of the guidance is appropriate.

Testing of carcasses (paragraphs 29-34)

I am happy to clarify the issue over timings to receive BSE test results. Tests can take up to 14 days, particularly where initial tests are either inconclusive or positive, and the sample is referred for further testing. Straightforward tests providing negative results are often processed in 24-48 hours. However, it is still more efficient, both operationally and in terms of health and safety, to incinerate carcasses as soon as possible. I should add that these timings include the despatching of samples.

In Europe BSE testing is carried out on all cattle over 30 months (and in certain countries this is carried out on a voluntary basis for cattle over 24 months) because older cattle can go into the human food chain. This contrasts with the current position in the UK where the vast majority of OTMS (Over Thirty Months Scheme) animals do not enter the food chain. The only exceptions are a very small number of bovines up to 42 months from the Beef Assurance Scheme. My understanding is that the tests for the equivalent BSE surveillance of fallen stock and casualty animals are processed in similar timescales as applied in the UK. In any event, since the incinerator operates above a minimum temperature of 850 degC, the issue of time turnaround for release of BSE test results is not critical in safety terms.

Safe working practices (paragraph 35)

Health and safety is everyone's prime concern and there are no exemptions from general health and safety legislation. Guidance on the health and safety of staff has been produced by a number of Departments who are involved with overseeing the incineration of clinically diagnosed BSE and OTMS carcasses. These include the Health and Safety Executive, the Advisory Committee on Dangerous Pathogens, the Spongiform Encephalopathy Advisory Committee (SEAC) and the Veterinary Laboratory Agency.

In particular, the Rural Payments Agency (RPA) provide written guidance and on-the-job training for staff on the handling of dead stock and the extraction of brainstem samples. Guidance includes safety advice on decontamination and waste disposal. The Committee should be aware that SEPA is not permitted under the Environmental Protection Act 1990 to impose conditions in an authorisation for the purpose only of securing the health of persons at work (within the meaning of Part I of the Health and Safety at Work etc Act 1974).

Incineration temperature (paragraphs 38 and 39)

The principal source of advice to the UK government on transmissible spongiform encephalopathy is SEAC. This Committee has concluded that incineration in dedicated incinerators which reached 850 degC would be sufficient to ensure there was no risk from the BSE prion, either to those exposed to the smoke plume, e.g. those living in the neighbourhood or living downwind of the plant, or in relation to the ash which could safely be landfilled. SEAC's recommendations are reflected in UK Process Guidance Note 5/3(95) which is used by SEPA in its authorisation process to ensure that emissions do not pose a risk to the environment or human health. SEAC's website is at <http://www.defra.gov.uk/animalh/bse/bse-publications/level-4-seacstate-07jun96.html> The Committee has previously heard evidence that temperatures up to 1,400 degC may be needed to destroy the BSE prion, but we have been unable to trace the source of these claims.

Role of SEPA (paragraph 40 and 41)

Recommendation: that SEPA should have a statutory role in the process for regulating BSE. Specifically, conditions regarding the incineration of BSE infected cattle should be licensing conditions prescribed and enforced by SEPA.

SEPA currently has a statutory, regulatory role in controlling the receipt of waste, operational conditions, and emissions from processes which dispose of carcasses. As mentioned, this includes the regulation of an incinerator's combustion conditions to ensure that the BSE prion is rendered harmless, in line with Process Guidance Note 5/3(95). I do not believe, however, that there would be any merit in giving SEPA any additional statutory role in the regulation of BSE. This function clearly falls under animal health policy, co-ordinated by UK agriculture departments and assisted by expert advice from the State Veterinary Service. However,

Recommendation: the Reporter queried the merit in setting planning conditions preventing BSE cattle incineration when this condition cannot be met under the current system for testing and incinerating BSE infected cattle, and recommended that SEPA should assume that all animal carcass incinerators in Scotland may be burning BSE infected cattle and licence and regulate incinerators on that basis.

It would be inappropriate for the Executive to comment on the planning merits of a particular planning condition or specific planning permission. As mentioned previously, the Executive's planning policy in relation to waste disposal facilities is set out in National Planning Policy

Guideline 10: Planning and Waste Management. Paragraph 104 of NPPG 10 indicates that the physical nature of the waste that is acceptable at a disposal site is an issue which could be covered by planning conditions. Such conditions should comply with the Executive's general guidance on the use of conditions (SEDD Circular 4/1998), which states that, among other things, conditions should relate to planning, be enforceable and reasonable in all other respects. The enforcement of any condition in this regard is a matter for the planning authority.

I understand that the Carntyne incinerator is the only such plant which has a planning condition to the effect that "no...remains from animals clinically confirmed or diagnosed as suffering from BSE, tallow or bone meat shall be burned at the plant".

I can assure the Committee that incinerators contracted for BSE surveillance work are already operating at a level that allows for the possibility that they will process BSE positive cases. As the Committee has noted, SEPA has adopted the precautionary principle by taking SEAC's recommendations into account when setting conditions in its authorisations for dedicated incinerators; that is to say it requires plants to operate at temperatures that are adequate to destroy the BSE prion.

Availability of information regarding BSE-infected cattle incineration (paragraphs 42-46)

Recommendation: that the RPA should monitor the origin and the disposal point for BSE infected cattle and provide this information to SEPA on a regular and on-going basis.

This function is the responsibility of the State Veterinary Service. The RPA have no veterinary expertise to take on this role. The results of the BSE active surveillance programme in Scotland are freely available on the Scottish Executive web site. Equivalent data for the UK is contained in the DEFRA web site. If SEPA has an operational requirement for data on disposal points, I would be prepared to consider such a request.

The regulation of incinerators by SEPA (paragraphs 47-52)

Recommendation: the Reporter considered it unacceptable that there appeared to be no consensus between the Executive and SEPA as to the exercise of their respective powers in situations such as the one at Carntyne, and urged the Executive and SEPA to liaise in order to adopt a common position.

In responding to this recommendation, I have taken into account views expressed by SEPA. I believe that the respective roles and responsibilities of Scottish Ministers and SEPA in regulating industrial plants, like Carntyne, under environmental legislation are clear. It is right that these roles remain separate: the Scottish Executive as legislator and SEPA as enforcer of the regulations. This is consistent with SEPA's status as an executive Non-Departmental Public Body. It is, therefore, appropriate that the Executive adopts an "arms length" approach in respect of day-to-day operational control over SEPA's functions. The relationship between, and respective functions of, the Executive and SEPA are set out in detail in a formal Management Statement.

As noted in my letter last October, Scottish Ministers have powers to direct SEPA. These powers enable Ministers to direct SEPA to exercise the powers already available to the Agency. I firmly believe, however, that Ministers' powers in this regard should be used in only very limited circumstances. This is based on our policy that reliance should be placed on SEPA to use its expertise and judgement on how, and when, to deploy the powers available to it rather than Ministers intervening directly. It is also the case that the use of these powers could well cut across the policy interests of other areas within the Executive. That said, I would not hesitate to direct SEPA if I

believed that SEPA's actions were creating a risk to public health, or if SEPA was acting unreasonably in carrying out its functions or failing in its duty to protect the environment.

As you know, SEPA has powers under Part I of the Environmental Protection Act 1990 to take action against any operator who contravenes the conditions in an authorisation. The effectiveness of these powers is illustrated by the enforcement action already taken against Sacone, and the previous owner of the plant, which had the effect of closing the incinerator until SEPA was satisfied that the company had taken the necessary steps to address the problems at the plant. The outcome of this enforcement action is that improvements introduced at the plant should enable the incinerator to achieve now the higher standards of the Waste Incineration Directive that are not due to be introduced for existing incinerators until 2005. If problems persist, SEPA has the option to take further enforcement action or recommend prosecution to the Procurator Fiscal.

SEPA also has specific powers under section 12 of the 1990 Act to enable it to revoke an authorisation at any time, by notice in writing. There is a particular reference in SEPA's enforcement policy to repetitive breaches of authorisation conditions: *"Persistent breach of licence conditions will not be tolerated. Required action may be phased in over a reasonable but binding timescale depending upon its importance to the environment and the attitude of the licence holder."* One such action perceived as "required" may be revocation, and the appropriateness of that particular action and timing of it, amongst a range of possibilities, would be considered by SEPA against the background of the particular circumstances under investigation.

In summary, I acknowledge there are a number of difficult issues which the problems associated with the Carntyne incinerator have highlighted. One particular issue that has surfaced is the need to ensure that there is an effective interface between the land use planning and environment protection regimes. The study we are proposing will look at this very carefully. On the Carntyne incinerator itself, I have been assured by SEPA that the company's authorisation contains stringent conditions to ensure that the necessary environmental standards are met. I have also been assured that the company is complying with these conditions. My officials and SEPA will continue to monitor the incinerator's operations very closely.

I hope these comments are helpful to the Committee.

ROSS FINNIE



6 February 2003

Your Ref:

Mr Bristow Muldoon MSP
Convener of the Transport and the Environment
Committee
Scottish Parliament
Parliamentary Headquarters
George IV Bridge
EDINBURGH
EH99 1SP

Our Ref: EH/4 & PL/4/4

Dear Mr Muldoon

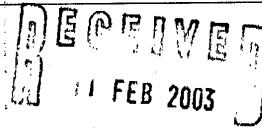
**TRANSPORT AND THE ENVIRONMENT COMMITTEE: REPORTER'S PAPER ON
PETITION PE 377 ON POLLUTING ACTIVITIES IN BUILT-UP AREAS**

Thankyou for your letter of 9 January to Rory Mair, inviting COSLA to make a response on the Reporter's quite thorough paper on petition PE 377. COSLA shares the Committee's practise of not taking a view on specific local issues and we note that the wider issues which may be raised by the petition appear to require early resolution by the Deputy Minister for Social Justice, the Minister for Environment and Rural Development and SEPA. COSLA therefore does not intend to make a response on the paper.

Yours sincerely,

Bob Christie

Head of Policy



WHEN CALLING PLEASE ASK FOR: Bob Christie 0131 474 9269 bob@cosla.gov.uk

petition PE 377 6feb03 1
Bob Christie

COSLA, Rosebery House, 9 Haymarket Terrace, Edinburgh EH12 5XZ
Telephone 0131 474 9200 Fax 0131 474 9292 Internet www.cosla.gov.uk

Annex B

REPORTER'S PAPER ON PETITION PE377 BY MICHAEL KAYES ON POLLUTING ACTIVITIES IN BUILT-UP AREAS

Introduction

- 1 This paper outlines work undertaken by Fiona McLeod MSP, and the Transport and the Environment Committee as a whole, on petition PE377 on polluting activities in built up areas. The paper reviews the written and oral evidence received by the Reporter and the Committee. The paper makes recommendations from the Reporter for action in a number of areas.

Background

- 2 The petition expresses concern at the potential impact on the health of residents of the East End of Glasgow of toxic dumping and cattle incineration. The petition requests that the Scottish Parliament carries out an urgent investigation into these practices.
- 3 One of the petitioner's primary concerns is the effect of airborne and water borne emissions from a cattle and sheep incinerator on the people living in the Carntyne area of Glasgow. The petition includes some background information regarding the specific problems which the petitioner indicates are being faced by residents at Carntyne. Further information regarding the petitioners' concerns can be found in oral evidence they gave to the Public Petitions Committee in June 2001.
- 4 The following background papers are attached for members' information:
 - a copy of the petition;
 - an extract from the *Official Report* of the Public Petitions Committee meeting in June 2001;
 - a letter dated 14 May 2002 from the Convener to the Scottish Environmental Protection Agency (SEPA) and its response;
 - a letter dated 26 June 2002 from the Reporter to the Minister for Social Justice and its response;
 - a letter dated 20 June 2002 from the Reporter to the Minister for Environment and Rural Development, a response dated July 2002 and a further response dated 5 September 2002; and
 - a letter dated 2 October 2002 from the Reporter to the Minister for Environment and Rural Development and its response.

Progress of the petition

- 5 The petition was considered by the Public Petitions Committee (PPC) at its meeting on 19 June 2001, at which time that Committee agreed to seek the views of SEPA on the issues raised in the petition, and on additional points raised by members. A response was received from SEPA, which was subsequently considered at a meeting of the Public Petitions Committee on 11 September 2001.

- 6 The Public Petitions Committee referred the petition to the Transport and the Environment Committee with the request that it responded to the wider planning issues arising from the petition.
- 7 Following the referral, local concern was expressed over the possibility that BSE-infected cattle may have been processed at the incinerator despite the operators not possessing the necessary license for this type of incineration. In addition, concern was expressed that BSE-contaminated waste may have been discharged into the sewage system.
- 8 The Transport and the Environment Committee first considered the petition, at its meeting on 6 June 2002. In recognition of the Committee's practise not to take a view on specific local planning issues, the Committee agreed to appoint a reporter, Fiona McLeod, to examine broader questions relating to the application of the planning system and environmental regulations which arise from the petition.
- 9 The Committee also agreed that the Reporter should write to (i) the Minister for Social Justice and (ii) the Minister for Environment & Rural Development in respect of some of the issues raised by the petition.

Terms of Reference

- 10 On 26 June 2002 the Committee approved terms of reference for the Reporter as follows:

The Reporter will report back to the Committee in respect of—

- *the current guidelines on location of incinerators and whether there are any proposals to review the existing guidelines;*
- *the methods for disposal (incineration or otherwise) of material which may be BSE-infected;*
- *the level of information which is available regarding the number of BSE-infected cattle which are incinerated at individual operations in Scotland.*

- 11 At its meeting on 26 June 2002, the Committee also agreed that an appropriate course of action for the Reporter would be to undertake a site visit of the operation at Carntyne and hold a meeting with SEPA officials to discuss areas of concern.

Work undertaken by the Reporter

- 12 On 23 August 2002, the Reporter met with SEPA officials in Glasgow. The Reporter then visited the incinerator in Carntyne and met representatives of the owners, Sacone.
- 13 Following these meetings, the Reporter wrote follow-up letters to the Minister for Environment and Rural Development and the Deputy Minister for Social Justice

regarding issues arising from their previous responses and the issues raised during meetings with SEPA and Sacone.

14 The Reporter also met with the petitioner, Michael Kayes, at his home in Carntyne on 7 October 2002.

15 During the investigation of the issues raised by the incinerator at Carntyne the Reporter has gained an appreciation of the dissatisfaction of local residents over the uncertainty surrounding the future operational use of the incinerator. The Reporter recognises the real concerns of the residents in Carntyne.

16 The Committee's policy is not to focus on the particular issues related to individual cases but instead examine whether local problems are illustrative of wider problems with the planning and environmental regulations system. The Reporter believes that the experience of Carntyne highlights in particular three such issues—

- the role of planning authorities and SEPA;
- the current system for the disposal of BSE infected cattle;
- the regulation of incinerators by SEPA

Interplay between planning authorities and SEPA

Environmental Impact Assessment (Scotland) Regulations 1999

17 One of the main concerns raised in the petition is the proximity of the incinerator to built-up areas at Carntyne. The incinerator is situated – in terms of the local authority's development plan - in a light industrial zone. The areas surrounding the zone are all residential.

18 A letter from the Reporter to the Minister for Social Justice dated 26 June 2002 requested information on the current planning guidelines relating to the location of incinerators. The response outlined the current planning guidelines including the *Environmental Impact Assessment (Scotland) Regulations 1999*.

19 Depending on the capacity of the incinerator, and the nature of the waste disposed of, the Regulations require either a mandatory EIA or a screening process undertaken by the local authority to establish whether or not an EIA is necessary which involves consideration of the potential environmental impacts of the proposed development.

- 20 The Deputy Minister's response notes that these Regulations were **not** in place when planning permission was granted for the Carntyne incinerator and that the regulations that were in force at that time (the Environmental Assessment (Scotland) Regulations 1988) did **not** include provisions for animal carcasses/waste. Therefore, no screening process or EIA was carried out to consider the potential environmental impacts of the incinerator when the original planning application was made.
- 21 The Reporter is deeply concerned that those considering the application to locate an incinerator in a light industrial zone at Carntyne were not required to consider the specific environmental impacts of an animal carcass incinerator. The Reporter is concerned that, prior to the 1999 Regulations, a similar situation may have arisen with other planning applications for animal carcass incinerators. In light of this concern, the Reporter recommends that a review be carried out on all planning permissions for animal carcass incinerators granted prior to the enforcement of the EIA Regulations 1999.**

Enforcement of the EIA Regulations 1999

- 22 Under the present planning system, the local authority is responsible for enforcing the 1999 EIA Regulations, by carrying out an EIA or an in depth assessment to gauge whether an EIA is required, for each incinerator planning application.
- 23 It is the role of SEPA to consider whether a proposed incinerator will have the appropriate technology to meet emissions standards for that source material and can then set site specific licensing conditions prescribing that these standards are met. However, SEPA does not have any statutory power to withhold the granting of an operating licence where planning permission has been granted for a process which uses technology appropriate to meet emissions standards for that source material. In addition, SEPA has no statutory right to contribute to the EIA process.
- 24 Following the granting of planning permission, SEPA monitors substances released into the air from incinerators, the final discharge from sewage works which process discharge from the incinerators and the operating methods and equipment used during the incineration process.
- 25 The Reporter considers it anomalous that SEPA has no statutory right to contribute to local authority consideration of the environmental impact of proposed incinerators and yet is responsible for the regulation of the environmental impact of incinerators which are granted planning permission.
- 26 The Reporter notes that NPPG 10 on Planning and Waste Management provides guidance as to the respective responsibilities of the local authority and SEPA. NPPG 10 states that, for incinerators, the role of the planning authority is to deal only with the matters that are material considerations and that the regulation of the incineration process is the responsibility of SEPA.

27 The Reporter is concerned that, in enforcing the EIA Regulations 1999, local authorities are taking responsibility for certain matters within the planning application which are not purely material considerations but matters which would, in the Reporter's opinion, be more appropriately considered in conjunction with SEPA.

28 The Reporter strongly recommends that SEPA have a greater involvement in considering the environmental impact of proposed incinerators as SEPA has specific expertise in this area. **The Reporter therefore recommends that SEPA is provided with statutory powers from the Executive to become actively involved in the environmental impact assessment process as a statutory consultee.**

The disposal of BSE infected cattle

29 Local authorities are currently responsible for prescribing conditions in relation to the treatment of BSE infected cattle at animal carcass incinerators within planning permissions. For example planning condition 6 for the incinerator at Carntyne states that "No special waste, clinical waste, remains from animals clinically confirmed or diagnosed as suffering from BSE, tallow or bone shall be burned at the plant"

30 Currently there is no requirement for SEPA to make provisions for the treatment of BSE infected cattle. The Environmental Protection (Prescribed Processes and Substances) Regulations 1991 (as amended) prescribes that SEPA must regulate "the destruction by burning in an incinerator of any waste, including animal remains", but does not specifically mention the incineration of BSE contaminated carcasses.

31 The Reporter wrote to the Minister for Environment and Rural Development on 26 June 2002 requesting information on the current method adopted in Scotland for testing for BSE and the disposal of BSE infected cattle in Scotland. The Minister's response states that the disposal of BSE infected cattle in Scotland is by incineration and is controlled by the BSE monitoring scheme which is co-ordinated by the Rural Payments Agency (RPA).

32 The response states that all tests for BSE are undertaken on behalf of the RPA and that the tests specified by the European Commission take 10 to 14 days to generate a positive or negative result. The Minister's response states that storage of the carcasses at incinerators whilst awaiting their test results would require large refrigerated units. The Minister notes that it is the Executive's policy, for control and economic purposes, that rather than store carcasses and await tests results, it is more efficient to incinerate the carcasses quickly.

33 *[The Reporter wishes to note that the Executive's policy not to store cattle is based upon the idea that BSE testing takes 10 to 14 days. The Reporter considered the issue of BSE cattle incineration on the assumption that the test used by the Executive was the quickest available test which fulfilled the specification of the European Commission. However, evidence given by Dorothy-*

*Grace Elder MSP to the Committee on 18 December 2002 suggested that similar test results are processed in Germany and France within a few hours¹. **The Committee therefore seeks clarification from the Executive as to why the test which conforms to European rules takes around 10 to 14 days to process in Scotland when elsewhere in Europe the same test can be processed within a few hours.]***

34 In a letter dated 5 September 2002, the Minister for Environment and Rural Development noted that the system outlined above had resulted in 2 BSE infected cattle being burned at Carntyne, before the BSE tests for the cattle had been processed revealing positive results, between September 2001 and March 2002.

35 *[During the Committee's consideration of the Reporter's paper on 18 December, members noted their concerns that incinerators such as Carntyne, which are burning BSE cattle but are not licensed to do so, may not be required to take the necessary precautions to protect members of staff from infection. **The Committee agreed to seek assurances from the Executive and SEPA that working practices are sufficient to protect staff at all incinerators in Scotland which may be burning BSE infected cattle.]***

36 It is clear to the Reporter that the current system for incinerating cattle prior to the receipt of BSE test results, at incinerators which are not licensed to burn BSE infected cattle, circumvents planning conditions.

37 The Reporter does not consider local authorities to be the appropriate bodies to enforce conditions in relation to BSE. The Reporter is of the view that, these conditions are not material considerations of relevance specifically to planning, nor do local authorities possess the infrastructure or the expertise to enforce such conditions.

38 In practice, in the case of Carntyne, SEPA has adopted the precautionary principle meaning that it has set licensing conditions which dictate the operating methods in an attempt to ensure that any BSE prion is destroyed within the incineration process (for instance, setting incinerator temperatures at a minimum of 850°C which, SEPA suggests, is sufficient to destroy the BSE prion).

39 *[At the Committee meeting on 18 December, members questioned whether the temperature of 850°C was sufficiently robust to destroy the BSE prion. **The Committee agreed to request information from the Executive and SEPA on the basis for setting the temperature at this level.]***

40 While the Reporter welcomes the pragmatic approach adopted by SEPA, she considers that the root problem is the respective statutory roles of local authorities and SEPA. The Reporter is of the opinion that there is little merit in setting a planning condition that the planning authority cannot enforce and which, in practice, SEPA enforces. **The Reporter therefore recommends that SEPA should have a statutory role in the process for regulating BSE. Specifically,**

¹ Official Report, 18 December 2002, Col 3978-9

conditions regarding the incineration of BSE infected cattle should be licensing conditions prescribed and enforced by SEPA.

- 41 In addition, the Reporter does not appreciate the merit in setting planning conditions preventing BSE cattle incineration when this condition cannot be met under the current system for testing and incinerating BSE infected cattle. The Reporter recommends that SEPA should assume that all animal carcass incinerators in Scotland may be burning BSE infected cattle and license and regulate incinerators on that basis.**

Availability of information regarding BSE-infected cattle incineration

- 42 The Rural Payments Agency collates data on all cattle that have been incinerated and have tested positive for BSE. In its response to the Convener, SEPA noted that it had requested information from DEFRA and the Scottish Executive on the number of carcasses that have been incinerated at Carntyne and have tested positive for BSE. This request was refused and only the total number of carcasses tested in Scotland and, of those, the number confirmed with BSE was provided.
- 43 The Reporter wrote to the Minister for Environment and Rural Development on 26 June 2002 inquiring why specific information about Carntyne had not been made available to SEPA in its role as the environmental regulator. The Minister responded in July 2002 explaining that the RPA only collated information on the origin of the BSE, not the disposal point. However, as mentioned previously, the Minister provided specific information on the number of cattle incinerated at Carntyne in a letter dated 5 September 2002.
- 44 The Reporter wrote again to the Minister on 2 October 2002 asking why this information was only collated and made publicly available at this stage at the request of a Committee Reporter when the organisation responsible for the environmental regulation of the incinerator requested it some months ago. The Reporter also asked whether, following the release of this information, the Executive intended to have this information collated, provided to SEPA and made publicly available on a regular basis in the future.
- 45 The Minister replied on 18 October 2002 informing the Reporter that he would arrange for officials to provide the relevant information to SEPA for a period of six months after the incinerator at Carntyne (which is currently closed due to an enforcement notice from SEPA) recommences operations. The Minister added that he would not commit to providing the information on a permanent basis due to the amount of work involved in the exercise.
- 46 The Reporter is unconvinced by the Minister's reasoning in this matter. The Reporter recommends that the RPA should monitor the origin and the disposal point for BSE infected cattle and provide this information to SEPA on a regular and on-going basis.**

The regulation of incinerators by SEPA

47 The Reporter notes that, in order to prevent the production of BSE contaminated waste from incinerators, the current system relies on SEPA enforcing the precautionary principle within its licensing conditions and incinerator operators adhering to these conditions at all times.

48 Four enforcement notices have been issued by SEPA on the incinerator at Carntyne, two of which have been complied with. SEPA wishes to emphasise that the fourth enforcement notice was only enforced due to a technical infringement and was imposed after the incinerator closed due to the third enforcement notice in March 2002. The incinerator is currently closed due to the third enforcement notice which was enforced when the incinerator exceeded emissions limits for particulates. The plant is due to reopen in the New Year once new equipment has been installed.

49 The Minister for Environment and Rural Development's letter to the Reporter dated July 2002, acknowledged the residents' concern regarding BSE contaminated waste. The Minister stated:-

"I realise that residents will be concerned that the poor compliance record of the plant is reflected in a less than rigorous approach by the incinerator's operators to complying with conditions intended to ensure BSE risks are minimised. I share this concern. I would therefore expect regulators to take very seriously any incident that involved operating conditions potentially failing to meet the requirements intended to ensure the prion is destroyed."

50 The Reporter notes that the Minister for Environment and Rural Development and that SEPA are both clearly dissatisfied with the incinerator operators' poor compliance record. However, the Reporter is unclear as to the division of responsibility between SEPA and the Minister in deciding a future course of action for Carntyne.

51 Representatives from SEPA have stated that ultimately the Minister has the power to direct SEPA in its actions. The Minister, in a letter dated 18 October 2002, stated that such powers of direction have never been used to intervene directly in SEPA's statutory functions in such a way, and that such action could cut across the policy interests of other areas of the Executive, setting an unwelcome precedent.

52 The Reporter considers it is unacceptable that there isn't consensus between the Executive and SEPA as to the exercise of their respective powers in situations such as the situation at Carntyne. The Reporter urges the Executive and SEPA to liaise in order to adopt a common position.

**Fiona McLeod MSP
Reporter
9 January 2003**

Petition No. 1104/2001 by Dorothy Grace Elder MSP

Report of the fact-finding mission to Scotland. (January 7 - 9 2003)
(Pursuant to Article 175,3 of the Rules of Procedure.)

Members: Felipe Camison
Herbert Bösch
Eurig Wyn.

The decision to send a fact-finding mission of three MEPs to Edinburgh and Glasgow to investigate the allegations contained in the petition submitted by Dorothy Grace Elder was taken with a view to ensuring that the Petitions Committee of the European Parliament might formulate an enlightened judgement on an issue which directly affects a community of some 60,000 people in eastern Glasgow.

The legal environment concerning the Carntyne Incinerator Plant, and the nearby Paterson's Landfill Site is one where European legislation potentially applies.¹ At the same time the petition concerns matters which are the responsibility of the United Kingdom authorities (both in London, and Edinburgh since devolution) as well as the Glasgow City Council. Moreover, a Scottish regulatory body - the Scottish Environmental Protection Agency (SEPA) - plays a crucial rôle in advising the Scottish Executive on the matter. (Ref: SEPA Management Statement July 2002, sections 1.6, 2.2 & 3.)

Beyond the legal environment lies a compelling human environment, and it was this fact which motivated the Committee on Petitions to take up this case and seek to cooperate with the Scottish Parliament and the Glasgow City Council in order to find a solution to the two distinct issues raised by the petitioner, in the interests of the people of Glasgow's poorest neighbourhoods.

- The Carntyne Incinerator Plant, now owned by Sacone Environment Ltd, was allowed to operate against the wishes of Glasgow City Council in 1996 only following a successful appeal by the previous owners, Wescot Hides Ltd, which was granted by the Scottish Office in London following a Report by Ms J McNair dated January 21st 1998. A number of conditions were nevertheless imposed. The plant incinerates fallen cattle.
- The Paterson Landfill Site, in Greenoakhill, is said to be the largest open landfill site in Europe and it was first developed over fifty years ago. It was most recently granted a Waste Management Licence (ref. WML/W/00036, in June 2000. The licence notably defines which substances the site may accept under Directive 76/464/EEC (List 1 and List 2 substances). Over the years, the Glasgow conurbation has naturally spread and now many thousands of persons are living in close proximity to the site. Health concerns have been raised, and a number of complaints made about the smell emanating from the site.

Members of the Committee visited both locations and conducted extensive discussions with the owners of the incinerator plant, including the company chairman, Mr Fowler and his directors; and at the landfill site, with Mr Paterson and Mr Lindsay the site manager. In both places meetings were both informative and cordial.

At Glasgow Council Chambers a meeting was organised with local councillors representing the communities concerned, presided by the Lord Provost of Glasgow, Mr Alex Mosson. The involvement of the Lord Provost underlined the commitment of the City Council to finding a solution to the problems

¹ Council Directive 75/442/EEC on waste as amended by Directive 91/156/EEC & Council Directive 91/689/EEC on hazardous waste. Regulation (EEC) 1774/2002. Directive 2000/76/EC on the incineration of waste. Directive 94/67/EC on the incineration of hazardous waste. Directive 99/30/EC. Directive 96/62/EC

raised. Representatives from Scottish Water (Trade Effluent Quality Team) and the Greater Glasgow NHS Board were present and responded to questions. A separate meeting took place in the Chambers with the Chairman of SEPA and his colleagues. Both meetings were held in public.

In Edinburgh, at the Scottish Parliament, members met with Margaret Curran MSP, Constituency member for Glasgow Ballieston whose constituency includes the incinerator plant and Robert Brown MSP also from Glasgow. A meeting was also held with the Convenor (Chairman) of the Transport & Environment Committee, Mr Bristow Muldoon and Ms Fiona McLeod the reporter of the committee on the incinerator issue. At the end of the visit, a meeting was organised with Mr Allan Wilson MSP, Deputy Minister for Environment and Rural development who has particular responsibility for the subjects at issue.

Of particular importance for the members of the fact-finding team was the meeting with the local people most affected by the incinerator plant and representatives from the local housing associations and community councils. Members were able to see also the neighbourhood affected by the presence of the incinerator plant and the landfill site, including, as regards the former, the local playing fields and schools, adjacent to the site.

The Carntyne Incinerator Plant.

The plant is situated on a narrow strip of land running next to a railway track on one side, designated by the planning authority for light industry. The vicinity was used in the past by the tanning industry but has since been designated for 'improvement' by the city planners. Next to the plant are to be found a picture framing company and other small firms. The incinerator is close to houses and apartment blocks as well as a number of caravans, an old peoples' home, schools and a local hospital. When operating normally the plant functions around the clock on a twenty-four hour basis, day and night.

There is no doubt that in recent years, according to eye-witness accounts, the local residents have been subject to unacceptable levels of exposure to the effects of the incinerator plant which include cattle blood and remains which have been regurgitated by the drainage system as well as the acrid black smoke from the chimney stacks which has deposited a greasy residue over the whole area, not to mention the noise which reaches levels which are intolerable. The transport of carcasses was also done previously in uncovered vehicles at one time when the plant was owned by Wescot Hides Ltd. Now, it would appear at least that all haulage is sealed.

Since the new owners arrived in 1998, they have invested extensively in modernising the incinerator equipment, under pressure from SEPA, which has closed the site on three occasions for failure to comply with certain technical requirements for incineration. On one occasion the plant was closed for more than eleven months. Unsightly waste-pipes for effluent have been replaced and buried, the incineration equipment has been substantially renewed and filters added to the chimney stacks and waste water pipes. The Chairman, Mr Fowler, informed the members that everything has been done to conform to the new EU Directive 2000/76/EC, which has yet to be put into effect in the UK.

However, the Scottish Office in London granted planning permission originally with a certain number of conditions. Condition number six states *"No special waste, clinical waste, remains from animals clinically confirmed or diagnosed as suffering from BSE, tallow or bone meal shall be burned at the plant."* It is a proven fact that in the recent period, at the end of 2001 or early in 2002, two BSE infected cattle were in fact burned at the plant. The owners were unaware of this fact and have never been formally told by DEFRA. The way in which tests were conducted and the time it takes for results to be obtained meant that the cattle were burned well-before anyone could have known of their infection with BSE. This is a grave and totally unacceptable situation, especially for the local community but also for the owners of the plant whose employees are entitled to be aware of such a risk. Given the number of cattle being treated in that time period, this level of infection represents 2% of the cattle incinerated at the plant.

It is certainly the case that incineration is the best way to eliminate BSE infected cattle as long as the burn is conducted at the right temperatures and in the right conditions. Incinerators - second chambers - must burn at a temperature no less than 850 degrees to destroy the gas components. At Carntyne, members saw that temperatures in an empty test burn exceeded 900 degrees.

Plants must also have all the requisite filters to control waste water and ash etc.

But, Carntyne is not one of the designated incinerators in the UK to receive BSE infected cattle.

The Carntyne Incinerator Plant does not choose which cattle they burn; these are designated by DEFRA in London through the Rural Payments agency. The East End of Glasgow receives cattle from other parts of Scotland and also from parts of England. The absurdity of transporting dead cattle from the countryside into an urban area, two miles east of Glasgow City centre, has to be seen to be believed. Yet according to the regulatory agency, nothing can be done legally to prevent this. According to the Head of the Glasgow City Council Planning Department, even condition number 6 of the planning agreement would not stand a chance of being upheld in court because of the vagueness of the wording in legal terms. But, as regards the relevance of Article 4 of the EU Waste Directive certain questions must be nevertheless be raised and answers given.

Given the location of the plant and the topography of the site, not only in an urban area but also in a valley, under certain weather conditions, with high pressure prevailing, the thick black smoke is kept in the valley by a climatic lid. Rainfall brings black particles immediately down to earth covering everything. SEPA has recognised in its own enforcement notices that there are problems with the stacks which do not provide good dispersion of the exhaust gases...in all weather conditions. This is an inherently nauseous and unhealthy site for an incinerator plant where the local population just happens to be amongst the poorest in the UK and suffer from many disadvantages in terms of employment, and general health standards. Life is made extremely miserable for a vulnerable community who must suffer such pollution every hour of the day, yet, we are led to believe, they can do nothing about it. That is what we shall see...

Members of the fact-finding mission did not meet anyone in the course of their visit who believed that the incinerator plant should be sited in this densely populated part of the East End of Glasgow which is Carntyne. Even the owners, Sacone Environment Ltd., would be willing to relocate the plant in a more amenable and suitable location where the impact on a local population would be negligible. The City Council, the Scottish Parliament and even the regulator believe that the plant should be situated elsewhere. The deputy Minister for the Environment appeared sympathetic and considered that an urgent solution should be found which involved all parties to the problem. Surprisingly, members felt that rarely had any of the parties met together with the objective of finding a solution to the problem.

Moreover, the local community, including the Councillors, considered that they were inadequately informed by the public authorities about what the incinerator plant was doing; the owners of the plant for their part were not informed about the nature of the cattle they were being contracted to burn.

Greenoakhill Landfill Site (Paterson's)

The maximum amount of controlled waste material, which is allowed on to the site, should not be more than 15,000 tonnes per week or 500,000 tonnes in any year. That makes for a lot of lorry loads. The licence makes provisions for gas management control, environmental monitoring points, capping, management of dangerous substances such as asbestos, liquid waste disposal (which has now ceased since last year) and other items.

The petitioner refers in her petition to the fact that Paterson's is the only "high-level toxic dump within a city boundary anywhere in Scotland" It accepts according to the petitioner cyanide, arsenic, asbestos and mercury amongst many other substances.

The members, in the time available, were not able to verify the extent to which the licence has been properly respected or otherwise. No representations were made by the regulatory authority which implies any lack of respect for the license provisions. The license itself is renewed every four years following a SEPA inspection. The members were informed by the site owner that as of 2004 no more hazardous waste will be accepted on the site, nor waste from car tyres. The future of the dumping of asbestos is still to be determined, though specific safeguards for its disposal already apply. Every sixth load which arrives on site is sampled and sent to SEPA for inspection. When waste has caused problems of smell, which is the principle reason for complaints received, contracts have been terminated, according to the site manager. Tannery waste and blood products are no longer taken.

The owner of the landfill site has invested in turbine generators of which it currently has four, to produce electricity from the gases generated by the landfill. Wells are sunk at different points around the site to extract the gas and 4 megawatts of electricity are generated every day and go into the national grid. It is the gas extraction which has caused complaints, especially when new wells are being drilled. There was also a problem with the assessment of the level of smell from the site and SEPA continues to monitor now that the probes have been properly placed to capture emissions. The site plans to close by 2015.

Restoration of the site is done by infilling and capping and the objective is to recreate an urban woodland. The site is situated in an area which was formally a quarry. The sides are sandy and the bottom is clay over a rock lining, so it is not therefore lined.

Members were assisted during parts of their visit by Dr Helene Irving of the Greater Glasgow Health Board because the impact on the health of the local community was a key concern of the petitioner. Members were also able to discuss the possible health impact of the landfill site with the Director of Public Health for Glasgow, Dr Harry Burns. He conducted a detailed study on this which was published in November 1999. (Ref. Paper No. 99/136 - 12b of 16/11/1999) He confirms that "much of the waste generated by people living in the West of Scotland is buried in the landfill site at Greenoakhill". Dr Burns defined 'health' as being a result of a range of variables such as economic status, social and physical environment and genetic endowment.

He informed the members of the fact-finding mission that he had found no objective evidence of disease that could be attributed to the presence of, or proximity to the landfill site. However as many live in such a poor environment people do feel at risk. It is not, he considered, appropriate for waste to be dumped- especially in such quantities, in an urban area. He provided some further disturbing information about the overall health of people living in the area affected by the incinerator plant and the landfill site. In particular, as an example he mentioned that men were 2.34 times as likely to die before the age of 65 than the UK average. Infant mortality is twice the national average.

Dr Burns acknowledged that the Paterson's landfill site was being run to the best of the owner's ability. But the size - some 11km.sq. - is an historical "anomaly" making it almost impossible to manage effectively. Noting the human condition involved, Dr Burns said that people are not really being helped to help themselves when they are obliged to live in inadequate housing, without the prospect of work and with a landfill site on their doorstep. Their dignity is being denied in such circumstances.

Dr Burns considered that it would be useful to conduct, under the auspices of the European Commission perhaps, a comparative study on "understanding health". He noted great improvements had been achieved in France, Austria, Spain and Finland but not in Scotland or in the UK, nor in some other EU countries.

Returning to the landfill site, the health study mentions the smell which at times has been breathtaking - something also mentioned by the petitioner. Though it cannot be proved that the smell is a cause of disease it is an undoubted cause for the lack of well-being within the community. Consideration of the use of the site must be conducted in the context of the Scottish Waste Management Strategy currently being undertaken by the authorities.

Recommendations.

Carntyne.

- The Carntyne Incinerator Plant should be closed as soon as a viable alternative site can be found. The alternative site should not be located in an urban environment but in such a place where the inherent by-products of the incineration process, including the smoke from the stacks and other waste may be disposed of without threatening local communities or causing any harm to the surrounding environment, in line with all relevant EU Directives. The closure is to be considered an urgent priority.
- The Scottish Executive should be invited to consider convening a meeting on the plant closure, to which members of the Scottish Parliament concerned, members of Glasgow City Council and the management of Sacone Environment Limited should be invited. SEPA must be involved in this process in an advisory capacity under the terms of its functions as specified in the SEPA Management Statement.
- The local community must be regularly informed about this process.
- The European Commission is requested to investigate in which way it could contribute to this process, possibly in an advisory capacity but also by means of contributory financial support, having due regard for the relative poverty and social environment of the East End of Glasgow.

Greenoakshill Landfill Site.

- Bearing in mind that for over-riding practical reasons the closure of the landfill site is not an option, additional measures should be envisaged for improving the landscaping around the perimeter of the site. Such landscaping should be designed with regard to further preventing the transmission of dust and nasty smells to the neighbouring community.
- Similarly, greater attention should be brought to bear on the restoration of the landfill site and the replanting of trees and scrubland to generate a more acceptable local environment for residents of the area. Because this is also a matter of enhancing the public health and well-being of this part of Scotland, public funding should be considered for such projects.

SEPA

- Should be given additional powers and the consequent resources to allow it to be more closely involved in the planning process in the context of improved integration of planning and environmental regulations.

Conclusions.

Members of the fact-finding mission would like to place on record their thanks to all persons in Scotland who contributed so effectively to the organisation and preparation of the mission. This list includes the Rt.Hon Allan Wilson, deputy Minister for the Environment and Rural Development, the Lord Provost of Glasgow, Mr Alex Mosson, Members of the Scottish Parliament mentioned in this report, Mr Ken Collins, Chairman of SEPA, Mr Alastair Fowler, Chairman of Sacone Environment Ltd, Mr Tom Paterson, owner of Paterson's Landfill Site, Dr Harry Burns & Dr Helene Irving, and to the members of the local community in Carntyne, Gartraig, Sprinboig, Baillieston & Mount Vernon.

It hopes that the report and its recommendations respond to the request of the petitioner, Ms Dorothy Grace Elder, and to the persons on whose behalf she submitted the petition.

TRANSPORT AND THE ENVIRONMENT COMMITTEE

Subject: Paper on the Scottish Executive response to the Committee's report on the competitive tendering of Clyde and Hebrides lifeline ferry services.

Meeting: 4th Meeting, 18 February 2003

Author: Assistant Clerk

Introduction

1. This paper invites the Committee to consider the Executive response to the reporters' report on proposals for tendering Clyde and Hebrides Lifeline Ferry Services.
2. Committee reporters Maureen Macmillan MSP and Des McNulty MSP presented a report on the proposals to the Committee on 2 October 2002. The report was considered and agreed by the Committee. It was then submitted to the consultation on the proposals and forwarded to the Deputy Minister for Enterprise, Transport and Lifelong Learning for the Executive's response.
3. The report and its response from the Deputy Minister are attached for members' information.

Gourock-Dunoon route*Reporters' paper*

4. The draft service specification, published by the Executive, provided a broad framework of proposals for the tendering of the network. The Executive response focuses on decisions taken by the Executive, following the publication of the draft service specification, with regard to the Gourock-Dunoon ferry route.
5. The draft service specification states that the Gourock-Dunoon ferry service must be a stand-alone passenger service instead of the current vehicle and passenger service. The Executive had stated that, under European competition rules, the vehicle service did not qualify for a subsidy as a private competitor nearby is operating a vehicle service without subsidy. It was considered that the current passenger and vehicle service could not continue to carry vehicles and subsidise only the passenger service as this allowed for 'subsidy leakage'.
6. In their report, reporters noted their concern that the removal of the vehicle service from the network might produce a private monopoly of the route. The reporters' report states that, rather than simply implement these rules, the Executive should strive to persuade the Commission to accept an interpretation which takes into account the unique circumstances of the network.

Executive response

7. The Executive's response proposes that the Gourock-Dunoon passenger service is removed from the Clyde and Hebrides network and is tendered separately, allowing bidders to produce bids on the basis of a combined passenger and vehicle service or a passenger-only service. The response points out that this proposal does not guarantee a vehicle service as bidders are required to bid for the contract on the basis of the lowest bid for subsidy. The response goes on to outline proposed features of a separate draft service specification for the Gourock-Dunoon service. These include an indication that in order to ensure that the unsubsidised service close by is not undermined, the restrictions in terms of frequency and length of operating day that have applied to the Gourock/Dunoon service, currently operated by Caledonian MacBrayne, would be maintained.
8. Members are invited to provide general comments on the Executive's proposals for the Gourock-Dunoon ferry service.

Draft service specification – other recommendations

9. Members will recall that reporters made a number of other recommendations on all of the main features of the draft service specification for the Clyde and Hebrides network. The response refers to these recommendations noting that the development of the final Clyde and Hebrides service specification is still underway and that decisions are yet to be made on the way forward, with the Deputy Minister making a commitment to write to the Committee again when the service specification is completed.

Further action by the Committee

10. The final service specification for the Clyde and Hebrides network and the draft service specification for the Gourock-Dunoon route will not be published until the next parliamentary session. Due to the limited amount of time available to the Committee prior to dissolution, it seems that this Committee's consideration of issues surrounding the tendering is limited to the proposals for the Gourock-Dunoon route. The Committee may therefore wish to detail what it considers to be the important outstanding issues on the tendering as a whole within its legacy paper for a future committee's consideration.

Recommendation

11. The Committee is invited to:
 - comment on the developments in relation to the Gourock-Dunoon route;
 - note the time scale for the final service specification for the Clyde and Hebrides network; and
 - consider what issues the Committee wishes to highlight on the competitive tendering of these ferry services within its legacy paper.

Roz Wheeler
Assistant Clerk to the Committee

Annex

REPORTERS' REPORT ON HIGHLANDS AND ISLANDS FERRY SERVICES

Subject: The Scottish Executive proposals for tendering Clyde and Hebrides lifeline ferry services

Meeting: 27th Meeting, 2 October 2002

Authors: Des McNulty MSP and Maureen Macmillan MSP

Introduction

1. This report outlines work undertaken by Des McNulty MSP and Maureen Macmillan MSP, and the Transport and the Environment Committee as a whole, into the Scottish Executive's draft service specification for the tendering of the Clyde and Hebrides lifeline ferry services. The report reviews the oral evidence gathered by the Reporters and the Committee, and reaches conclusions and makes recommendations for action in a number of areas.

Background

2. On 23 January 2001 the Minister for Transport announced the Scottish Executive's proposals for the tendering of Highlands and Islands Ferry Services. The proposals were subsequently put to the European Commission for consideration as required under the Regulations on State Aid to Maritime Transport.
3. The Committee considered the proposals on 28 February 2001 and agreed to appoint Des McNulty and Maureen MacMillan as reporters. It was agreed that the reporters would consider this issue further and report back to the Committee with proposed terms of reference for an inquiry into this issue.
4. On 12 June 2001 the Committee approved terms of reference for the reporters as follows:

Reporters will investigate

- *the justification for and implications of the decision to tender lifeline ferry services in order to comply with EC guidelines on State aid in maritime transport.*
 - *the development of the service specification for these services*
 - *the need for an independent regulator, and an appropriate operator of last resort*
 - *the structural, organisational and service delivery implications of this decision (including employment, pensions and Transfer of Undertakings (Protection of Employment) (TUPE) Regulations issues relating to Caledonian MacBrayne staff and the need for the service to be integrated with other modes of transport)*
5. In addition to appointing reporters, the Committee also took evidence on the proposals from the Highlands and Islands Strategic Transport Partnership, local authorities, trade unions, and representatives of Caledonian MacBrayne on 18 June 2001, and the Minister for Transport and officials on 26 June 2001.

Initial Reporters' Work

6. Reporters met informally with the Minister for Transport on 3 April 2001, and received background briefing on the issues from Executive officials on 28 April 2001.
7. On 11 July 2001 Reporters travelled to Brussels. They attended a meeting at Scotland Europa with representatives from CalMac, local authorities, Scotland Europa, the Scottish Executive and MEPs. Reporters also met with officials of the European Commission.
8. During the 2001 Summer Recess reporters travelled to the Highlands and Islands and Argyll and Bute, and engaged in discussions with local communities regarding the proposals.
9. The Executive appointed two sets of consultants to take forward matters relating to the tendering process. Burness Corlett and Partners (Maritime Consultants) were appointed to take forward the development of the service specification, reporters met with representatives of this firm on Tuesday 11 September 2001. Shepherd & Wedderburn WS and PriceWaterhouseCooper are taking forward the development of the structuring of the Vessel Owning Company (VesCo) and the Operating Company (OpCo), reporters met with representatives of these firms on 8 November 2001.

Reporters' Interim Report

10. In September 2001, reporters made an interim report on the key issues emerging from Committee evidence taking sessions and reporters meetings prior to this date. The Committee as a whole considered the recommendations of the report at its meeting on 26 September 2001.
11. The Committee agreed to endorse the reporters' report and forward it to the Executive. Lewis Macdonald MSP, the then Deputy Minister for Transport, issued a formal response to the report on 21 November 2001.
12. Summaries of both the reporters' interim report and the Executive's response to it are attached at Annex A and Annex B respectively.

Reporters' Visit to Orkney

13. On 19 December 2001 the Committee considered and agreed a reporters' trip to Orkney where a similar, although much smaller scale, tendering exercise has been undergone in relation to the Northern Isles ferry services. During the 2002 February recess reporters travelled to Orkney and engaged in discussions with representatives of local authorities and service users to gain an insight into the tendering process and lessons that might be applied to the tendering process for the Highlands and Islands ferry services.

Draft Service Specification

14. The Executive released the draft service specification for the Highlands and Islands ferry services network at the end of June 2002. The consultation period for the draft service specification is 12 weeks.
15. At its meeting on 22 May 2002 the Committee agreed a programme for reporters to consult on the draft service specification. The Committee further agreed that the Committee as a whole would then take evidence from the Deputy Minister for Enterprise, Transport and Lifelong Learning on the specification. Finally, the Committee agreed that, following this evidence taking session, reporters would produce a report on the specification for the Committee to consider and amend as necessary which would then be submitted to the Scottish Executive's consultation.

Reporters' Work on the Specification

16. The reporters consulted on the specification during the 2002 Summer Recess. Reporters held meetings in the Clyde and Western Isles area and spoke to individuals who will be involved in or affected by the tendering process regarding the possible impact of the proposed service specification. Reporters met with local authorities, representative groups of local service users, local service users, academics, economic development bodies, trade unions and representatives of Caledonian MacBrayne.
17. Reporters also met with the Executive officials who are taking forward the development of the service specification and also the structuring of VesCo in order to discuss the main proposals of the specification and also those aspects of VesCo which fall outwith the remit of the service specification.

Committee's Work on the Specification

18. At its meeting on 4 September 2002, the Committee considered the key issues emerging from meetings held by reporters on the draft service specification. The Committee then took evidence from the Deputy Minister for Enterprise, Transport and Lifelong Learning on the specification at its meeting on 11 September 2002. The Official Report of the meeting is attached at Annex D.
19. The key issues emerging from the Reporters' work and the Committee's evidence taking session on the specification include:
 - Scope of the specification
 - Bundling of services
 - Competition
 - Costs and transparency
 - Service levels and service development plans
 - Fares

- Local employment issues
- Integration
- Transfer of services
- Provision of last resort

These issues are explored further below:

20. As a preface to the discussion of these issues, reporters want to highlight the fundamental importance of the ferry services to the economic and social sustainability of remote and island communities. Certain mainland peninsulas and all the islands off the west coast of Scotland are almost completely dependent on ferry services. The economies of the Hebrides and some of the more isolated Argyll islands are especially vulnerable to changes in the level of service.
21. Reporters consider that the draft service specification should form a framework for a service which not only provides a financially viable transport service but also forms the most effective basis for sustaining island life. While it is not part of the reporters remit to consider issues beyond the immediate impact of the tendering process, it was felt that the Executive's proposals required to be considered in the broader context of rural strategy and in particular strategies in respect of island communities. So far as possible the reporters have assessed the proposals set out in the draft service specification with this in mind.

Overview of the Specification

22. Overall, the draft service specification was very much welcomed by the individuals and organisations consulted by reporters, including the Scottish Trades Union Council (STUC), Highlands and Islands Strategic Transport Partnership (HISTP) and Highlands and Islands Enterprise (HIE). In particular, reporters found there was strong support from the majority of individuals and organisations for the protection of current maximum fares and minimum service levels¹. In addition, the commitment within the specification to maintain current safety levels was strongly endorsed as the current Caledonian Macbrayne services were generally perceived to maintain excellent safety standards.
- 23. Reporters support the fact that the central provisions of the specification reflect the idea that the first tendering contract should, to a large extent, create a continuance of the practices on the current network, in order to assure service users that the tendering process will not destabilise the network.**

Scope of the Specification

24. The reporters are of the opinion that the purpose of releasing a draft service specification should be to consult with interested parties on all subjects intended for the final specification. Concerns were expressed to reporters about the lack of

¹ The specification proposes that the successful bidder must not exceed current maximum fares and must run minimum services according to the Summer and Winter timetable operated by Calmac prior to the transfer.

detail in the draft service specification with regard to key areas of service provision including channels for consultation, fare structure and the provision of last resort for the network.

25. HISTP has submitted evidence to the Executive on methods of consulting with service users during the initial 5 year contract. The Executive intends to use this as a basis for its own draft proposals which, it is intended, will be open to consultation later in the year. The final proposals for methods of consultation will be incorporated into the final specification. In terms of fares, the Executive has identified the need for research to review the fares structure. However the results of this research will only be available in time to inform the second tendering process. Finally, although the provision of last resort will be the responsibility of the VesCo, the conditions for its provision are of central importance to the provision of services should the OpCo cease to serve the network. The draft service specification states that as soon as the VesCo is established it should begin producing proposals on the provision of last resort for consideration by the Executive.
- 26. Reporters are aware of the importance of consulting fully on all proposed provisions for the specification in order to ensure that the final specification is a comprehensive framework which takes into account the views of those organisations and individuals with relevant expertise. For this reason, reporters recommend that the Executive takes the steps necessary to ensure that the draft service specification which is produced for the second tendering process is a comprehensive document and that the actual process of consultation is both thorough and inclusive.**

Bundling of Services

27. The draft service specification proposes that the Clyde and Hebrides ferry services network (services considered eligible for subsidy by the European Commission and subsidised by the Scottish Executive) should be tendered as a single bundle. It also proposes the inclusion of routes within the single bundle which were previously outside the network, the creation of new routes and the inclusion of mainland to mainland routes (namely Gourock-Dunoon (passenger only) and Tarbet-Portevadie) following the Commission's confirmation that these services are eligible for subsidy.
28. Reporters found that there was general support for extending the network and tendering it as a whole as this is likely to reduce the potential for "cherry picking" of routes, provide the optimum value for public money and aid the integration of ticketing and marketing services.
29. The main point of contention expressed by various organisations regarding the bundling of the network is the proposal that the Gourock-Dunoon service should be restricted to a passenger only service. The importance of the issues relating to this route to the tendering of the network are explored further in the section below on Competition.

Competition

Competition and State Aids Rules

30. The Executive has said that, in order to comply with State Aid rules² and Regulation 3577/92/EEC on Maritime Cabotage, it is required to put the Clyde and Hebrides network out to tender.³ The Regulations provide for freedom to provide such services within the Community. However, they also recognise that account should be taken of the nature of certain specific services and of differences in economic development between Community members.
31. Specifically, the Regulation takes into account the transport needs of island regions and establishes in Article 4 the conditions under which Member States may conclude public service contracts or impose public service obligations (PSOs) as a condition for the provision of cabotage services on shipping. PSOs are defined as obligations which the shipowners, if they were considering their own commercial interest, would not assume or would not assume to the same extent or under the same conditions.

Subsidy Levels and Stability

32. Under the current system, Caledonian MacBrayne negotiates the subsidy for the Clyde and Hebrides network with the Executive on an annual basis.
33. The draft specification states that, in accordance with EU State Aid rules, the tendering contract will be offered to the bidder who requires the 'lowest financial compensation' for the five year contract to comply with the core provisions of the draft service specification. The annual subsidy will be calculated according to the five year subsidy and the inflation rate. It will then be paid to the bidder in monthly instalments. Clearly, the new system will provide for stability in the subsidy levels for longer periods of time than the present system based on annual negotiation.
34. As outlined above, the Executive is required to award the tendering contract to the bidder who complies with the specification for the lowest level of subsidy. This requirement is based on the assumption that bidders, in competing with each other, will strive to produce the lowest possible bid. However, the Executive concedes that, so far there has been limited interest from potential bidders in the tendering contract. Potential bidders may be deterred by the constraints that the provisions of the specification would place on the Opco.
- 35. Reporters are concerned that, should the number of bidders be relatively limited, there will be insufficient competition to drive down the subsidy**

² see Article 87 (1) of the EC Treaty

³ Ministerial Statement on CalMac and State Aids

levels proposed by bidders. As a consequence of this, the successful bid may not provide the best value to the taxpayer.

Implementation of Competition Rules

36. The draft specification states that EU competition rules are such that a vehicle ferry across the Clyde does not qualify for a subsidy as a lifeline service since there is an unsubsidised private sector competitor operating a vehicle service nearby. The passenger service is not considered to be in direct competition with the private sector competitor as it provides a different form of service, linking with other forms of transport and therefore the passenger service is eligible for subsidy. Following discussions with the Commission, the Executive announced that the passenger service would continue as a stand alone service within the undertaking. It was considered that the current passenger and vehicle service could not continue to carry vehicles and subsidise only the passenger service as this allowed for 'subsidy leakage'.
37. The Executive has indicated that it is unlikely that the OpCo would have the resources to lay on an additional unsubsidised vehicle service separate to the passenger service. But concerns have been expressed by local residents that, should the vehicle service cease on the Gourock-Dunoon crossing, Western Ferries will become a private monopoly.
38. This relates to a broader issue of principle. If private companies were to set up rival services that are anticipated to be profitable, then these profitable routes may be removed from future undertakings. The result would then be the creation of private monopolies on routes which had previously been deemed to be lifeline ferry services. This process is what has been referred to as 'cherry picking' and one of the Executive's key objectives has been to prevent this happening. If some of the more profitable routes were to be lost it is arguable that this could deter other bidders from tendering for the less profitable routes, necessitating increases of subsidy if those routes were to be retained.
39. A related concern is the potential difficulties that would arise if a private company stopped servicing a route. It was suggested to reporters that any service considered a lifeline route should have a provision for last resort provided by the VesCo regardless of whether or not OpCo ran the ferry service on the route.
40. The Committee raised these issues about competition with the Deputy Minister at its meeting on 11 September. Members pointed out that enforcement of European Competition rules could have the effect of creating a private monopoly on the Gourock Dunoon route and outlined the implications of this on the network as a whole as well as on users of the Gourock-Dunoon service. The Deputy Minister responded by stating that the Commission would not be concerned if a service was run by a private monopoly and argued that, where no subsidy is

involved, competition is a matter for the marketplace and that any anti-competitive behaviour was a matter for the Office of Fair Trading⁴.

41. Reporters are concerned that there seems to be no scope for interpreting European Competition rules to address the circumstances of the network where some routes may be profitable but the overwhelming majority are subsidised. **Reporters take the view that the Commission's rigid requirements for the enforcement of European Competition rules should be challenged since it seems illogical that the application of rules designed to protect and advance competition should have the effect of creating a monopoly on an important route for a single private provider. Rather than simply implement these rules, the Executive should strive to persuade the Commission to accept an interpretation which takes into account the unique circumstances of the network.**
42. Another option outlined by the Deputy Minister for the Gourock-Dunoon route would be to remove the route from the undertaking and offer it to bidders prepared to run the service without subsidy. While it would be preferable to secure the agreement of the Commission to a relaxation of the rules **the reporters recommend that the Executive should work with the relevant local authorities to market-test the route for profitability and give consideration to removing the service from the undertaking if it proves profitable.**

Costs and Transparency

43. In evidence, the Deputy Minister did not contest the fact that the Gourock-Dunoon vehicle service may be profitable and therefore that cross subsidy may not occur. However, he explained that the Executive had not been able to develop an accounting mechanism that could demonstrate this argument to the Commission.
44. **Reporters are of the view that this problem highlights the importance of setting up a transparent system of accounting to allow the Executive to provide a financial breakdown of route costs wherever necessary. Therefore reporters strongly recommend that the Executive continues to invest in developing transparent accounting systems in order to be able to justify policies for the second tendering exercise.**

Service Levels and Service Development Plans

45. HIE's key concern following tendering, was the lack of sailings to remote islands. For example there are no sailings at weekends to Coll during the Winter meaning that schoolchildren have to stay in youth hostels on the mainland throughout term time.
46. Local residents and service users have also told reporters that at present the service levels are unresponsive to changes in demand including the needs of

⁴ Per Deputy Minister for Enterprise, Transport and Lifelong Learning, Col, Official Report

growing industries, such as fish farming, which are of importance to island economies.

47. The specification acknowledges the existence of unmet demand on the current network and encourages the OpCo to try to tap into this demand by stating that the successful bidder can put on extra sailings or extra routes. The specification provides an incentive by allowing the OpCo to keep any profits arising from these initiatives.
48. Reporters note that, regardless of this incentive, the OpCo may lack the resources to experiment with new initiatives in order to develop its services given the constraints laid down in the specification in relation to fares and service levels. Although Reporters appreciate the need for these constraints within the initial tender, they recognise the need for flexibility in the long term in order to develop these services.
49. Reporters believe that there are insufficient incentives to encourage the OpCo to develop services which may not prove to be profitable in the short to medium term but which may meet broader social or economic objectives such as increasing employment levels on remote islands. Reporters also note that the limited contract period may deter the OpCo from developing longer term service development plans to respond to changing demands. Reporters were not convinced that VesCo would be either the most appropriate or the most capable body to carry out the task of taking forward service development planning.
50. Reporters note that the Executive plans to conduct research during the first two years of the contract to develop ideas for service developments. Reporters wish to stress the importance of exploring how service levels can be increased on the network and what mechanisms are required to allow services to develop in response to changes in levels of demand and changes in the needs of local residents. **The reporters are of the view that there is a need for a structure separate from OpCo and VesCo to take responsibility for long term planning for the network. Reporters are also of the view that the structures for consultation should be radically overhauled to reflect the creation of the OpCo, the VesCo and any new planning structure.**
51. Various proposals have been put to reporters in respect of schemes to test new initiatives. For example HIE and HITRANS suggested proposals for a route development fund jointly funded by economic development bodies such as themselves and the Executive. Under this scheme local authorities would bid for funds to run new routes and ascertain the demand and potential improvements these routes could provide. Reporters consider this to be a valid proposal, as was an alternative suggestion that a route enhancement fund be set up to allow additional sailings on existing routes by covering the marginal costs involved.
52. Reporters recommend that the Executive require potential bidders to contribute to the planning process in order to gain ideas from organisations with commercial expertise for new initiatives and development plans. The proposal by the Calmac Consultative Users' Committee to require bids for the actual specification and an additional bid detailing suggestions for a service which is not constrained by fares

and service levels is also worth serious consideration. This is similar to the 'enhanceable franchise' idea developed by the Strategic Rail Authority. It would also seem sensible to require bidders to outline their plans for the longer term so that their plans can be taken into account in the future planning of the Executive and other stakeholders.

- 53. Reporters recommend that serious consideration be given to the ideas of a route development fund/ route enhancement fund. Reporters also consider that methods of assessing potential demand for services not currently offered by the Opco should be developed so that this information can be fed into the planning system.**

Safety

54. The specification allows the OpCo to lay on any additional services beyond those detailed in the specification. Representatives from the STUC noted that the specification does not stipulate that these additional services should maintain the same safety levels and staff conditions as those prescribed in the document. Reporters can find no justification for a distinction being made between services within the undertaking and those outwith the undertaking so far as safety and staffing levels are concerned. **Reporters therefore recommend the inclusion of a provision within the specification to ensure consistency in safety levels and staff conditions on all ferry services laid on by the successful bidder.**

Fares

Road Equivalent Tariffs

55. Road Equivalent Tariff (RET) is a method of price setting which relates the fare charged for the ferry transport to the cost of driving the equivalent road distance. At its meeting on 22 May 2002, the Committee as a whole considered a petition on this subject, PE 421 by Alasdair Nicholson calling for the implementation of a form of RET on the Clyde and Hebrides network. The Committee agreed that reporters should take into account the issues raised in the petition when consulting on the draft service specification.
56. Reporters found that very few of those individuals and organisations consulted viewed the implementation of a form of RET as a practical option for the network. Concerns were expressed that the need for a large increase in subsidy levels to implement a form of RET would not sit well with a specification which sets a limited subsidy for 5 years.

Freight

57. The specification does not include a provision for the current discount scheme for hauliers as it is seen to contradict European competition law. Hauliers, such as DR MacLeod, expressed their concern to Reporters at the lack of such a scheme since even with the discounts under the current scheme, the fares on certain routes make it financially unviable to transport high volume, low cost goods. Concerns were also expressed by hauliers that high fares for freight meant they

were subsidising other users. Reporters acknowledge the need for an equitable discount scheme to redress the balance for hauliers, including small hauliers carrying small loads relatively infrequently who do not benefit from the current system based on volume and the number of crossings per year.

58. In evidence, the Deputy Minister stated that Caledonian MacBrayne was developing a discount scheme based on volume and long term commitment which he believed would not breach European competition law. He also stated that he was confident that a discount scheme would be included within the final draft service specification⁵. **Reporters were very encouraged by the Deputy Minister's comments and recommend that the Executive continues to develop its proposals for an equitable discount scheme.**

Peak Fares

59. Currently the peak fare system is used on various ferry routes on the network including islands with infrequent lifeline services. Local residents such as representatives of Tiree Community Council have argued that the price of peak fares are extremely prohibitive and that a lifeline service should function on a first come first served basis.

60. Various organisations, specifically the Western Isles Tourist Board and the Calmac Consultative Users' Committee, considered that there was scope for increasing the economic efficiency of the fare structure on the network by attracting higher volumes of traffic paying lower prices as a reward for early booking or using less popular services rather than on the use of peak fares. In addition, **reporters are of the view that, the Executive should research the advantages of discount schemes such as:**

- **transferable discount cards for businesses**
- **ferry passes for purchase by frequent users**
- **multiple journey tickets (beyond the current 10 journey maximum)**
- **young persons' discount cards**

Local Employment Issues

TUPE and Pensions

61. The specification states that whether the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations will apply to the tendering process is a matter of law and whether it applies to the tendering process will not be confirmed unless the issue is taken to court. Consequently the specification does not dictate whether or not the successful bidder must comply with TUPE. However, the specification does include a provision that the OpCo should work on the assumption that TUPE does apply. If it is found by the courts that TUPE does not apply, the subsidy will be reduced by the equivalent amount that applying TUPE would have cost the OpCo. It is intended that this provision will remove any financial gains to be made by the OpCo from mounting a legal challenge against

⁵ Per Deputy Minister for Enterprise, Transport and Lifelong Learning, Col 3429, Official Report

TUPE regulations. The specification includes a similar provision for the application of the Cabinet Office Statement of Practice in relation to the transfer of pensions.

62. Reporters found that groups were keen to retain the expertise of the Caledonian MacBrayne workforce and therefore wished to see TUPE implemented during the transfer of services. Trade union representatives in particular argued that the specification should contain the employees terms and conditions detailed in TUPE. This would ensure the effective application of TUPE regardless of whether the legal system rules that TUPE applies as the specification is a legally binding document in itself.
63. Members of the Committee outlined this proposal to the Deputy Minister in order to seek his views. The Executive's view is that the provision of TUPE could not be incorporated into the specification as the provisions are extremely detailed and therefore their inclusion would make for a final document of an unwieldy size⁶.
64. In response to this argument, reporters consider that there would be merit in including at least the baseline principles of TUPE within the specification and recommend that the Executive investigate the practicalities of this approach.
65. In evidence, one of the Deputy Minister's officials argued that the inclusion of TUPE within the specification, without confirmation from the courts that TUPE would apply, could reflect a certain amount of presumption on the Executive's part⁷.
66. Reporters were not convinced by this reasoning, arguing that the provisions already in the specification regarding TUPE suggests that the Executive is of the view that TUPE should apply. Therefore, **reporters do not appreciate why the inclusion of the provisions within the final specification would be considered more presumptuous than the Executive's existing policy of discouraging legal challenges to the provisions within the current specification.**
67. Reporters were encouraged by the Deputy Minister's comments on his intention to provide effective safeguards to ensure the successful bidder enforces TUPE. Reporters would endorse a robust financial penalty system to ensure the application of TUPE at the point of transfer and also to ensure that the provisions of TUPE are not abandoned following the transfer or when terms and conditions come up for negotiation between Opco or VesCo and the relevant Trade Unions. **Reporters recommend that financial penalties to ensure the application of TUPE are clearly set out in the final specification.**

Gaelic

⁶ Per Deputy Minister for Enterprise, Transport and Lifelong Learning, Col 3435, Official Report

⁷ Per Sandy McNeil, Legal and Parliamentary Services Department, Scottish Executive, Col 3435, Official Report.

68. The specification states that ferries on certain routes should have announcements and signs in Gaelic as well as in English. However, it does not include any requirement for ferry crews to have any knowledge of Gaelic. Argyll and Bute Council and Western Isles Council noted to reporters that the ferry routes serve communities with a strong Gaelic tradition and that certain islands have a high population of people who are native Gaelic speakers. **The reporters therefore consider it important for the specification to require each of these routes to be served by at least one crew member who can speak fluent Gaelic. Reporters consider that this provision would be particularly helpful in the unfortunate event of an emergency during a crossing.**
69. Trade Union representatives were of the opinion that the proposal from the two Councils would not contradict EC procurement rules as the ability to speak Gaelic would not need to be a statutory requirement of all staff. At the Committee meeting, the Deputy Minister stated that the Executive was willing to explore the suggestion with the Commission. **In the event that the Commission advises that the proposal breaches Procurement rules, reporters recommend that the Executive at least strengthen the wording within the specification to encourage the employment of one gaelic speaking member of crew on specified routes.**

Integration

Tourism and Marketing

70. During meetings held in Stornoway, reporters heard various accounts of the lack of integration between different forms of transport in the Hebrides and the lack of accessibility to information on the ferry services. Reporters were concerned that the lack of integration combined with the lack of information would deter tourists from visiting the islands.
71. **In terms of integration, reporters recommend that the specification includes wording which encourages the successful bidder to build partnerships with train and local bus operators and other ferry service operators. In terms of marketing and the provision of information, reporters recommend that the specification encourages the successful bidder to establish links with local tourist boards.**⁸

Performance Indicators

72. The performance levels outlined in the specification are tighter than those currently applied to Caledonian MacBrayne. Although good performance levels were deemed to be of importance, various organisations suggested that the rigid requirements of the specification militated against ferries linking up with other forms of transport in some instances. Ensuring integration of transport provision

⁸ During a meeting with reporters, Neil McArthur, Chairman of the Western Isles Tourist Board stated that the Board would be very keen to build links with the local ferry services in order to capitalise on potential tourism markets.

is particularly important when ferries may only sail three times a week to certain islands.

- 73. Reporters recommend that the Executive ensures that the proposed performance indicators do not adversely affect the successful bidder's potential to integrate its ferry services with other forms of transport.**

Transfer of Services

74. During the trip to Orkney reporters heard accounts from local service users of the problems encountered during the tendering process for the Northern Isles contract. The main problems seemed to be associated with the length of the tendering process with the final contracts being signed out approximately one year late. In addition, the stop-start nature of this procurement process appeared to put off potential bidders. Finally, the change of vessels on certain routes led to the need for changes to infrastructure at the ports including major new pier building projects. Unfortunately the delay in awarding the ferry contract meant there has been insufficient time available for port authorities to finalise capital schemes and deliver changes before the transfer of services (due to take place on 1 October 2002).

- 75. Reporters wish to encourage the Executive to take note of the problems encountered in Orkney, analyse the reasons for the time delays in the tendering process and prevent their reoccurrence during the tendering of the Clyde and Hebrides ferry services.**

Provision of Last Resort

76. As previously outlined, the specification provides very little detail on the provision of last resort. One of the few details it provides is that VesCo will be responsible for the provision of last resort and that if the OpCo fails to run a service for 7 consecutive days the VesCo will have the right to ensure provision of services.

- 77. Alastair Gow, Director of Transportation and Property from Argyll and Bute Council has informed Reporters that the Council consider 7 days to be too long a period to leave isolated islands such as Colonsay or Tiree without a ferry service. Reporters endorse this view on the basis of the evidence they have gathered on the dependency of island communities on their ferry services and recommend that the Executive reviews this provision accordingly.**

**Des McNulty MSP
Maureen Macmillan MSP
27 September 2002**



SCOTTISH EXECUTIVE

Deputy Minister for Enterprise, Transport & Lifelong Learning
Lewis Macdonald MSP

Victoria Quay
Edinburgh EH6 6QQ

Bristow Muldoon Esq MSP
Convener
Transport & Environment Committee
c/o Rm 3.5, Committee Chambers
The Scottish Parliament
EDINBURGH
EH99 1SP

Telephone: 0131-556 8400
scottish.ministers@scotland.gsi.gov.uk
<http://www.scotland.gov.uk>

Our ref:

29 January 2003

TRANSPORT & ENVIRONMENT COMMITTEE: RESPONSE TO PROPOSALS FOR TENDERING CLYDE AND HEBRIDES LIFELINE FERRY SERVICES

Thank you for your letter of 9 October enclosing the Committee's Report on the issue of Clyde and Hebrides lifeline ferry services.

I was grateful for the opportunity to provide evidence to the Committee on 11 September and I welcome the Committee's report on the subject.

The Report is, on the whole, positive in relation to the broad framework we have adopted in our draft service specification for tendering Clyde & Hebrides Ferry Services. It raises a number of issues for consideration and highlights concerns in relation to Gourock/Dunoon.

As the Committee will probably know, we received a large number of responses to consultation (over 400 including standard responses). The majority of these related to Gourock/Dunoon. However, comments were also made in relation to other detailed aspects of the draft service specification and/or making representations in respect of additional services. Decisions are yet to be made on the way forward on the service specification and I shall be considering the wide range of issues involved over the next few months. I will write to the Committee again when this process is completed.

However, I am pleased to be able to advise the Committee that we have made significant progress in relation to Gourock/Dunoon and I am announcing proposals which keep open the possibility of a vehicle/passenger service on the route.

I attach a copy of a Parliamentary Question and Answer together with a news release which give details. You may wish to note we discussed the way forward with the European Commission and were joined in these discussions by representatives of Argyll & Bute and Inverclyde Councils.

The result is that we have identified a way in which we can keep open the possibility of a vehicle service operating on the route between Gourock and Dunoon piers. This will involve:

- tendering the Gourock/Dunoon passenger subsidy separately from the rest of the Clyde and Hebrides network;
- allowing bidders to bid on the basis of either a passenger-only or a combined passenger and vehicle service;
- awarding the contract on the basis of the lowest bid for subsidy (which might mean either a passenger-only or a combined service);
- allowing operators the freedom to bring their own vessel solutions with no binding to the VesCo vessels; and
- maintaining the restrictions (in terms of frequency and length of operating day) which have applied to the Gourock/Dunoon service currently operated by Caledonian MacBrayne for a number of years, to ensure that the unsubsidised service close by is not undermined.

It is important to recognise that such a tender does not guarantee a vehicle service since it would depend on the nature of the successful bid. Nevertheless, commentators have argued that a vehicle service would be more efficient and, if so, such a service would seem likely to provide the lowest cost bid.

The local authorities have confirmed that they wish to proceed with a separate tender but have also made representations that VesCo provide vessels for the operator and fleet relief cover through an obligation on the provider of the main Clyde and Hebrides services. However, I do not think it is consistent with EC rules to place an obligation on an operator in respect of routes outwith the PSO for which they are being asked to tender. I am considering the issue of vessels further in the context of the wider investment programme for the main network as it is possible that this programme may free up some existing vessels which could then be leased to the Gourock/Dunoon operator.

The next steps include taking forward a separate draft service specification for Gourock/Dunoon and I intend to publish this for consultation in due course. Consequential amendments will also be required to the main service specification and, as I mentioned above, I will be considering the way forward for the remainder of the network as soon as possible. I will revert to the Committee when I have taken decisions on the way forward.

I hope this is helpful.

Yours sincerely

LEWIS MACDONALD