

## Scottish Parliament Region: Highlands and Islands

### Case 200401452: Scottish Environment Protection Agency

#### Introduction

1. On 3 November 2004 the Ombudsman received a complaint from Mrs C about the Scottish Environment Protection Agency (SEPA). Mrs C complained that, because of delay by SEPA in testing samples of oil removed from the shore close to her house in Shetland on 12 September 2002, the source of the pollution could not be established. She considers that SEPA should have made an immediate effort to trace the source of the oil and stop it spreading further. In particular, SEPA should have immediately carried out tests for poison or poisonous effluent at a fish farm adjacent to the shore. However, the fish farm was not inspected by SEPA for a further seventeen days, by which time no pollution was found.

2. Mrs C formally complained to SEPA in November 2002. She did not learn until 2004 that she could complain to this office, if she remained dissatisfied with SEPA's response to her about the manner in which they dealt with her complaint.

3. The complaints from Mrs C which I have investigated concerned:

- (a) the allegation that, in September 2002, SEPA failed to deal appropriately with a report of possibly poisonous pollution at a stretch of shoreline close to Mrs C's house, situated on a croft in Shetland;
- (b) the manner in which SEPA dealt with Mrs C's complaint.

4. Following the investigation of all aspects of this complaint, I came to the following conclusions:

- (a) not upheld, see paragraphs 9 to 34;
- (b) upheld, see paragraphs 35 to 47.

5. In summary, I did not uphold Mrs C's main complaint as I did not find that there was maladministration or service failure in the way that SEPA dealt with the

pollution incident. However, I did find that SEPA dealt inappropriately with Mrs C's complaint which caused inconvenience and frustration to Mrs C. In the light of these findings, the Ombudsman recommends that SEPA should make a redress payment to Mrs C and apologise to her.

6. Specific recommendations the Ombudsman is making, resulting from this investigation, are that SEPA should:

- i make Mrs C a redress payment of £500, in view of the time and trouble she has been put to in pursuing the complaint;
- ii issue Mrs C with a full formal apology for the manner in which they dealt with her complaint.

#### **Investigation and findings of fact**

7. The investigation of this complaint involved obtaining and reading all of the information and documents submitted to this office by Mrs C and SEPA. Enquires were made of both Mrs C and SEPA. This included several written enquiries and telephone discussions with Mrs C and members of SEPA staff. I interviewed Officer 4, Team Leader, and Officer 1, Senior Environmental Protection Officer, who are based at SEPA's Shetland office, by video conference call at SEPA's Stirling office.

8. I have set out, for each of the two heads of Mrs C's complaint, my findings of fact and conclusions. Where appropriate, recommendations are set out at the end of the sections dealing with individual heads of complaint. The recommendations are summarised in paragraphs 5 and 6. I have not included in this report every detail investigated but I am satisfied that no matter of significance has been overlooked. Mrs C and SEPA have had an opportunity to comment on a draft of this report.

#### **(a) In September 2002, SEPA failed to deal appropriately with a report of possibly poisonous pollution at a stretch of shoreline close to Mrs C's house, situated on a croft in Shetland**

9. In August 2002, Mrs C says she noticed a smell of rotten fish which she believed was coming from a fish farm near her home. She had to endure the smell

of rotting fish for several weeks. She later found excessive amounts of oil on the shore.

10. On 11 September 2002, she and her brother (Mr B) found two of Mr B's sheep covered in oil and very ill, possibly as a result of poisoning from the oil. In her opinion, the only possible source of the oil was from the adjacent fish farm. Mr B immediately reported the matter to SEPA.

11. Mrs C says that when the incident was reported to SEPA, it was emphasised that there was a distinct possibility the oil had caused the death of the sheep. However, SEPA then took seventeen days before carrying out an inspection of the fish farm. She was unable to access her vegetable plot or the beach because the area in question was fenced off, with the assistance of Shetland Islands Council. In addition, she found the experience to be stressful.

12. Mrs C formally complained to SEPA in November 2002. Thereafter, she engaged in lengthy correspondence with SEPA and the Scottish Executive concerning her complaint.

13. In a letter from SEPA's Chief Executive on 1 September 2004, she was advised that she could complain to this office if she remained dissatisfied with his response to her complaint.

14. In response to my investigation, SEPA say that, on 11 September 2002, they received a complaint from Mrs C's brother, Mr B. He reported that oil was coming ashore from a marine cage fish farm site in Shetland and that the oil had caused the death of one of his sheep. Due to other demands on the available staff resources, a site inspection was not undertaken on that day.

15. On 12 September 2002, Officer 1, accompanied by an Environmental Health officer from Shetland Islands Council, visited the area of shore referred to in Mr B's complaint.

16. The length of shore was inspected and samples of a fatty oil deposit taken. Officer 1 says that he checked, with the use of binoculars, the adjacent fish farm from the shore for any obvious problems in the marine cages. He saw no sign of

scum on the cages, no dead fish and no oil. He had a clear view of the farm, which was 100 metres from where he was standing, and there was nothing to be gained from walking round the cages or inspecting them.

17. SEPA staff had previously carried out a routine inspection of the fish farm site on 14 August 2002. This was carried out as part of SEPA's regular monitoring programme. Solid waste matter, oil, fat and grease were absent from the cages and shore. However, there was a problem with a non farmed species ('saithe') in the salmon cages. The saithe had entered the cages as juveniles and grown quite rapidly, as a result of the salmon feed diet. These had become trapped in the cages and were dying in large numbers. This phenomenon had been a problem throughout Shetland that particular year.

18. The samples were examined by three experienced officers at the local SEPA office. Their professional opinion was that the nature of the deposits did not appear to be associated with the fish farm.

19. On 16 September 2002, the samples were sent by ferry to the SEPA laboratory in Aberdeen. They could not be sent on 12 September 2002 because, by the time the samples had been collected and returned to the local SEPA office, they had passed the deadline for getting freight to the ferry. They did not consider it prudent to send the samples the following day because this would have meant samples lying in a warehouse over the weekend and, from previous experience, they were at risk of being broken or lost.

20. The samples were sent by overnight ferry to Aberdeen on 16 September 2002. The samples were then collected on 17 September 2002 by staff from SEPA's Aberdeen laboratory. The view of SEPA's Aberdeen laboratory was that the substance collected may have originated from the fish farm. However, as the SEPA laboratory staff had little expertise in this type of material, it was decided to transfer the samples to a different laboratory ('the laboratory') in Aberdeen, which is nationally recognised in this type of analysis. The samples were transferred to the laboratory on 19 September 2002.

21. The samples were not examined until 24 September 2002, as it was a holiday weekend in Aberdeen. The laboratory telephoned SEPA and informed them that

the samples were fish oil which had degenerated and so the species of fish could not be identified. SEPA's Shetland staff immediately contacted SEPA Marine Biology, based in Dingwall, that day and it was agreed that further investigation of the fish farm would be warranted. A boat was chartered and equipment and staff arrived in Shetland on 26 September 2002 and an investigation of the fish farm took place on 27 September 2002.

22. The area under and around the cages was examined using a drop down video camera. No evidence of pollution was found at the fish farm or that fish waste had been disposed of improperly. The sea bed was examined and found to be generally clean. There were no signs of any dead fish.

23. The fish farm operators denied they had caused the pollution. SEPA's legal advisers were of the view that there was insufficient evidence to secure a prosecution under environmental legislation.

24. Subsequent visits by SEPA marine biologists to the shore confirmed that there had been no significant effect on the natural flora and fauna since the incident.

25. A copy of SEPA's procedures for dealing with pollution complaints and events, applicable at the time of the incident, has been supplied to me. The document states that the investigating officer shall respond to a reported event as soon as possible and, in any event, within 24 hours. Mrs C's brother made the complaint about the pollution to SEPA on the morning of 11 September 2002. The copy incident report confirms this and shows that SEPA inspected the area of shore in question the following day, 12 September 2002. I am satisfied that there was no undue delay by SEPA in responding to the incident.

26. I have not seen any evidence to suggest that the samples collected by the SEPA official from the shore on 12 September 2002 were taken from an area of the shore not affected by the oil, as Mrs C has suggested during my enquiry into her complaint.

27. I have considered whether Officer 1 should have visited the fish farm, which was the alleged source of the pollution, and carried out a more detailed inspection

of the cages on 12 September 2002.

28. In doing so, I have taken account of the following:

28.1 On 14 August 2002, SEPA had carried out a routine inspection at the fish farm when a problem with saithe had been identified.

28.2 When Mrs C's brother complained to SEPA on 11 September 2002, he alleged the cause of the pollution was coming from the fish farm.

28.3 A report by Tidal Waters, Dingwall, following the eventual inspection of the fish farm on 27 September 2002, had concluded that 'if the fish farm was suspected from the outset it would have been pertinent for a member of ERI staff to visit the farm as one would expect to see dead fish and a scum in the cages as well as on the sea shore'.

29. However, in my view, Officer 1's decision to carry out only a visual inspection of the farm cannot be criticised. The reasons are as follows:

29.1 A copy of the report of the inspection of the cages at the fish farm on 14 August 2002 has been supplied to me. The health and safety risk assessment is shown as 'Low' and solid waste matter, oil, fat and grease are recorded as being absent in both the conditions of the water and shore.

29.2 SEPA had concerns, following their inspection on 14 August 2002, that the fish farm could have cut the nets holding dead saithe, causing the dead fish to fall to the sea bed. However, enquiries made by SEPA with Shetland Islands Council confirmed that the dead fish had been properly disposed of by the fish farm at the Council's land fill site.

29.3 Officer 1, when interviewed by me, said he had a clear view of the fish farm through his binoculars. He had seen no sign of scum on the cages, no dead fish and no oil. I am satisfied that this was a professional decision, based on his knowledge and experience, which Officer 1 was entitled to make.

29.4 The samples taken from the shore on 12 September 2002 were examined by three experienced officers at the local SEPA office. Their professional opinion was that the nature of the deposits did not appear to be associated with the fish farm. In their opinion, possible sources of the substance, which had a faint smell of linseed oil, included oil or hydraulic grease dumped at sea.

29.5 In addition, I note that, other than the observations of Mrs C and her brother, Mr B, there was only circumstantial evidence linking the fish farm site with the deposits on the shore; no vet's report was, or has since been, produced to support Mrs C and Mr B's claim that the oil on the shore had caused the illness and death of his sheep.

30. SEPA have explained the reason why the samples, collected on 12 September 2002, were not sent to Aberdeen until 16 September 2002. On the day in question, by the time SEPA officials had collected the samples and returned to the local office, they had passed the deadline for getting freight to the ferry that day. Sending the samples by ferry on 13 September 2002 would have meant the samples lying in a warehouse over the weekend and, from previous experience, they were at risk of being broken or lost. I accept their explanation.

31. I am satisfied that, for the following reasons, there was no undue delay in having the samples analysed once they arrived in Aberdeen and undertaking an investigation of the fish farm. In reaching my decision, I have taken particular account of a series of e-mails sent between officers from SEPA and the laboratory between 18 September and 30 September 2002 and a report from Officer 5, SEPA'S senior chemist in Aberdeen, copies of which have been supplied to me.

31.1 The samples were transferred to the laboratory because their staff had the expertise to analyse this type of material.

31.2 Officer 5 states that the samples would not have been analysed any sooner even if they had been transferred to the laboratory on 18 September 2002. This was because the laboratory had a full workload to clear before they could test the samples in question.

- 31.3 The laboratory informed Officer 4, on 18 September 2002, that the results of the analysis of the samples would not be available until 24 September 2002. However, they would try to bring this date forward.
- 31.4 Officer 4 acknowledged the importance of having the samples analysed as soon as possible: in particular, because the test results on Mr B's dead sheep were still awaited. Knowing there was going to be delay in testing the samples, he considered alternatives for having the samples tested sooner by another laboratory elsewhere. He took the decision that bringing in another company to test the samples would 'only complicate' matters further. SEPA were of the view that the quality of the analysis and the expertise of the laboratory in Aberdeen far outweighed any possible faster turnaround offered by any other laboratory either in Aberdeen or elsewhere. I consider that these were professional decisions which Officer 4 and other members of the SEPA staff were entitled to make.
- 31.5 On 25 September 2005, the laboratory informed SEPA that the results of the analysis of the samples taken from the shore on 12 September 2002 concluded that the material was 'fishy in origin, no more', due to the degraded state of the samples.
- 31.6 I have not seen any documents which show that evidence was lost because of the time taken to analyse the samples. I accept the evidence of Officer 5, who is a senior chemist, when he states that (1) the samples had been stored under cool and dark conditions at all times while in the custody of SEPA and any delay in analysis had little impact on the degradation of the samples and (2) although he is not in a position to say exactly how much degradation would need to have occurred nor how long this would take to prevent the identification of the species, the greatest degradation would have occurred while on the shoreline when exposed to the natural elements of sun, air and water.



31.7 The day after SEPA received the test results, 26 September 2002, a boat was chartered and equipment and staff arrived in Shetland. The investigation of the fish farm took place on 27 September 2002.

32. Having taken into account all of the evidence in respect of this head of complaint, I am of the view that SEPA did not fail or unduly delay to deal appropriately with the report of possibly poisonous pollution at the stretch of shoreline in Shetland in September 2002. Accordingly, I do not uphold this head of complaint.

33. I have, however, noted that, since this incident, SEPA have put in place an agreement with the local ferry company on Shetland that, in an emergency, samples can be delivered to the ferry nearer the time of sailing.

34. Therefore, the Ombudsman has no recommendation to make in respect of this head of complaint.

**(b) The manner in which SEPA dealt with Mrs C's complaint**

35. Following the incident in September 2002, Mrs C complained to Officer 2, who at that time was SEPA's Director of Operations and has since retired from the Agency, on 24 November 2002. On 6 January 2003, Officer 2 replied to Mrs C. In his letter, he offered Mrs C advice on how to escalate her complaint to the Operations Management Team if she was dissatisfied with his response.

36. SEPA, in their response to me, told me that, at the request of Officer 2, a review was undertaken by a senior member of staff from their Dingwall office, Officer 3, who was not involved in the regulation of fish farms and had no regulatory connection with the Shetland office.

37. On 13 January 2003, Mrs C again wrote to Officer 2 as she was clearly dissatisfied with his response. Officer 2 replied to Mrs C on 6 February 2003. In his letter he acknowledged that Mrs C was 'unhappy' that their investigation did not result in the outcome she had hoped for but he had decided 'to take no further action'.

38. SEPA have told me that in their view Officer 2, in his response to Mrs C, was suggesting that, without further evidence, the investigation of the incident was effectively closed, not that possible actions could be taken as a result of Mrs C's dissatisfaction with SEPA's failure to prosecute the fish farmer, who she believed caused the pollution. This had not precluded Mrs C taking further action.

39. Following a further communication from Mrs C on 13 February 2003, Officer 2 wrote to her again on 6 March 2003. According to SEPA's complaints procedure, applicable at the time, a customer questionnaire should have been sent with Officer 2's letter of 6 March 2003, telling Mrs C of her right of appeal to the Chief Executive, if she remained dissatisfied with his response. I consider that, on the balance of probabilities, no questionnaire was sent to Mrs C. This is because:

39.1 the letter from Officer 2, a copy of which has been supplied to me, concluded that, whilst he appreciated Mrs C's 'continuing concerns' and had arranged for Officer 4 to visit her, he 'consider[ed] the matter to be closed';

39.2 the letter makes no reference to a questionnaire being enclosed;

39.3 SEPA are unable to confirm that a questionnaire was sent;

39.4 in accordance with SEPA's complaints procedure, applicable at the time, completed customer questionnaires should be returned to their Quality Manager, who has confirmed to me that no such questionnaire was returned.

40. Mrs C was visited by Officer 4 in May 2003. A copy of the record of this meeting has been supplied to me. There is no evidence to suggest that Mrs C was told of her right of appeal to SEPA's Chief Executive at that meeting.

41. Following further enquiries by Mrs C, involving Scottish Executive Departments and her Member of the Scottish Parliament, Mr Tavish Scott, MSP, it was not until March 2004 that advice was given that Mrs C had a further right of complaint to SEPA's Chief Executive. Mrs C duly complained

in writing to SEPA's Chief Executive on 18 August 2004.

42. On 1 September 2004, the Chief Executive responded to Mrs C's complaint and told her of her right to complain to this office, if she remained dissatisfied with his response.

43. In terms of SEPA's complaints procedure, applicable at the time, a further customer questionnaire should have been sent with the Chief Executive's response. No customer questionnaire was sent. SEPA, in their response to this office, say the reason for this was because it was clear to them that Mrs C was unhappy with how SEPA had dealt with her complaint, so there was no point sending a questionnaire to confirm this. I do not consider this is a reason for not doing so. In particular, I note that SEPA's procedures, applicable at the time, state that the Customer Feedback Process is audited annually and the results of the audit are used for improvements in SEPA's complaints management system and the services which they provide.

44. The Chief Executive stated, in his response to Mrs C, that a complaint to this office had to be made through her Member of the Scottish Parliament, her local councillor or other representative. Since the introduction of the Scottish Public Services Ombudsman Act 2002, it has not been necessary for a complainant to do so. They can bring their complaint directly to this office.

45. I have noted that SEPA's current Service Charter does inform complainants of their right to complain to members of SEPA's Corporate Management Team, including the Chief Executive, and that they can complain directly to this office, in the event that they remain dissatisfied.

46. Nevertheless, in my view, there is evidence of maladministration on the part of SEPA in the way they dealt with Mrs C's complaint, as I consider that they did not follow their complaints procedure as they should have done. This has caused inconvenience and frustration to Mrs C and requires to be remedied. Accordingly, I uphold this head of complaint.

47. The Ombudsman recommends that SEPA should:

47.1 make Mrs C a redress payment of £500, in view of the time and trouble she has been put to in pursuing the complaint, and issue her with a full formal apology for the manner in which they dealt with her complaint.

25 April 2006

**Explanation of abbreviations used**

Mrs C	Complainant
Mr B	Complainant's brother
Officer 1	Senior Environmental Protection Officer, SEPA Shetland
Officer 2	former Director of Operations, SEPA Stirling
Officer 3	Officer, SEPA Dingwall
Officer 4	Team Leader, SEPA Shetland
Officer 5	Senior chemist, SEPA Aberdeen