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Dear Ms Vance

Water Environment (Controlled Activities)(Scotland) Regulations 2005 – Appeal under regulation 46(a) – River Nith, Dumfries (Dumfries and Galloway Council)

With reference to the above I now enclose SEPA's response to the appeal lodged by Dumfries and Galloway Council.

I confirm that a copy of the response has been forwarded to the Council.

Yours sincerely



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Regional Solicitor

Encs



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SEPA's response to the grounds of appeal by Dumfries and Galloway Council (the appellant) dated 14 August 2009 in respect of SEPA's decision dated 18 May 2009 to refuse its application to a water use licence under the Water Environment (Controlled Activities) (Scotland) Regulations 2005

1. Legal and Policy Background

1.1 Under Regulation 15(1)(a) of the Water Environment (Controlled Activities)(Scotland) Regulations 2005 (CAR), before determining the application for an authorisation to carry on a controlled activity SEPA must assess the risk to the water environment posed by the carrying on of that activity.

1.2 A Regulatory Method published in November 2006 set out SEPA's approach to regulation of engineering activities ("the Regulatory Method") (Document 1) The Regulatory Method sets out the process for determining an engineering authorisation under CAR. The regulations are designed to encourage sustainable development by ensuring adequate consideration is given during the design and implementation of engineering works to the protection of ecological quality of surface waters. Activities will be required to adhere to principles of best practice as a key element of the regulatory method.

1.3 The Regulatory Method explains the technical assessment process which involves licence screening and detailed impact assessment. The licence screening tests consider impacts on conservation sites, flood risk, environmental standards and best practice.

1.4 Details of how to apply environmental standards for rivers is given in supporting guidance on environmental standards for river morphology (Document 2)

1.5 Further, in terms of Regulation 15 (1) (b) of the Regulations, before determining an application for an authorisation to carry on a controlled activity SEPA must assess what steps may be taken to ensure efficient and sustainable water use.

1.6 A position statement published in August 2006 to support implementation of the new engineering regime under CAR sets out SEPA's regulatory approach to applications for sediment removal. The Position statement explains: the negative impacts that sediment removal can have on the quality of the water environment; the fact that SEPA has a presumption against sediment removal; and the circumstances where that presumption may be overturned ("the position statement")(Document 3).

1.7 In terms of Regulation 15 (1) (c) of the Regulations, before determining an application for an authorisation to carry on a controlled activity SEPA must apply the requirements of legislation referred to in Parts 1 and 2 of Schedule 4

to the Regulations, which includes Council Directive 2000/60/EC (The Water Framework Directive) and the Water Environment and Water Services (Scotland) Act 2003 (The 2003 Act). The Water Framework Directive establishes a framework for the protection of the water environment and requires Member States to implement necessary measures to prevent deterioration of the status of all bodies of surface water. Article 4 of the Water Framework Directive establishes the general objective of good status to be achieved in all surface waters by 2015 and introduces the principle of preventing any further deterioration of status. The 2003 Act implements the provisions of the Water Framework Directive in Scotland making provision for the protection of the water environment which includes preventing further deterioration of, and protecting and enhancing the status of aquatic ecosystems.

2. The Application

2.1 SEPA received an application from the appellant under CAR to carry on controlled activities, namely the removal of vegetation and gravel banks approximately 13 metres north of Buccleuch Street Bridge, Dumfries. The Application was attached as an accompanying document to the Appellant's grounds of appeal (the Application).

2.2 In determining the application for an authorisation for engineering works representing the removal of gravel from the north east bank of the River Nith, SEPA assessed the risk to the River Nith. SEPA considered the morphological conditions of the relevant stretch of the river, both in its existing state and if the proposed activity of gravel removal were authorised.

In particular SEPA considered;

- a. the impact that the sediment extraction would have in relation to the damage and loss of river habitats
- b. the fact that the proposed works would create a section of river that is unstable and would lead to continued habitat loss, and
- c. the fact that disturbance to the river bed would cause instability of finer sediments which would be released into the watercourse in suspension leading to impact on salmonid fish and invertebrates.

2.3 SEPA also considered the requirements contained in the Water Framework Directive and the 2003 Act referred to above in connection with preventing deterioration of status of water bodies and aquatic ecosystems and concluded that the works would be likely to cause a significant adverse morphological impact on the said watercourse and therefore present a risk to the water environment.

2.4 In addition, when assessing whether or not the application represented efficient and sustainable use of the water environment, SEPA considered the appellant's statement that the reason for the proposed activity is that the gravel banks in the area are unsightly as they provide a platform for weed growth which traps litter and debris, and should therefore be removed.

2.5 SEPA considers that, for the purposes of engineering works, efficient water use equates to using best management practice. This is the action which serves a demonstrated need, while minimising ecological harm, at a cost that is not disproportionately expensive. SEPA considers that, in principle, sediment or gravel removal is unlikely to constitute efficient water use, unless it can be justified for navigation, flood risk management, water supply purposes, infrastructure protection or other sustainable development activities.

2.6 SEPA has duly considered whether or not the said proposed activity of gravel removal represents efficient and sustainable water use, and notes that because removal of sediment will encourage sediment to be deposited rapidly in the future, it is likely that the works would require to be repeated, and that this is unsustainable. The applicant has not demonstrated that the proposed activity will solve the issue of sediment build up and litter or that there are any significant human health or safety benefits to be gained from the proposed works. SEPA has concluded that the proposal does not serve a demonstrated need and does not represent efficient and sustainable water use.

2.7 Accordingly, having assessed the risk to the water environment, applied the requirements of the Water Framework Directive and the 2003 Act referred to above and having assessed what steps may be taken to ensure efficient and sustainable water use, SEPA concluded that the application should be refused.

3. Grounds of Appeal

3.1. Damage and Loss of habitat

3.1.1 The appellant indicates that they do not see the significance of the loss of habitat especially as it contains invasive species. They state that the removal of these plants will address the stated concerns of SEPA on page 41 of the River Nith Catchment Management Plan (the Catchment Plan) (**Document 4**) without the use of potentially harmful chemicals.

3.1.2 For the avoidance of doubt, the Catchment Plan is a partnership initiative involving numerous organisations, community groups and individuals including the appellant. The concerns and the objectives are not only those of SEPA but also the other partner organisations.

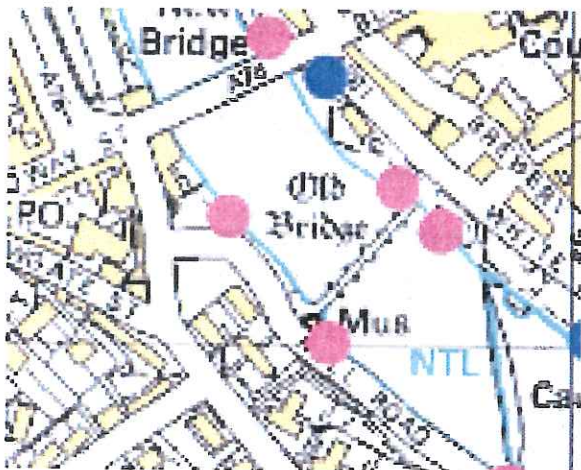
3.1.3 The section of the Catchment Plan referred to by the appellant is in section 4 of the Catchment Plan, Wildlife and Habitat Management. The objectives of the section are listed at the top of page 22 as follows;

- "Conserve and enhance the status and distribution of wildlife habitats and species of conservation interest in the Nith catchment."
- "Promote and support a strategic approach towards the control of invasive species."

3.1.4 By removing the gravel banks the appellant is not meeting the objectives of the Catchment Plan or the Water Framework Directive. It should be noted that the Draft River Basin Management Plan for the Solway Tweed River Basin District (**Document 5**) recognises the Nith Catchment Plan as a supporting document/plan. Section 4.2 of the Catchment Plan at page 22 refers to a number of rare aquatic invertebrates associated with the exposed river sediments and shingle. The appellant's proposal to remove the bank will destroy these rather than conserving and enhancing them.

3.1.5 Also within this section of the Catchment Plan it states "One of the easiest places to see and study wildlife of the River Nith is at the Whitesands in Dumfries. Despite the modifications to the river carried out over the centuries, the river here shows many of the natural features typical of a lowland river system. It has shingle and sand banks, a fringe of natural vegetation and a host of associated wildlife." This section also refers to a wildlife survey commissioned by Dumfries and Galloway Council Local Biodiversity Action Plan officer which was carried out in 2001 and identified over 180 species of plants growing on the riverbanks in the Dumfries area. The bank is therefore an important wildlife habitat which contributes positively to the Nith's ecological status; and the bank should be conserved in line with the Catchment Plan objective and not removed.

3.1.6 The appellant mentions that Himalayan Balsam and Japanese Knotweed are present in these banks. As part of a project under the Catchment Plan the mapping of invasive plant species in the catchment was undertaken by The Nith District Salmon Fishery Board. The mapping exercise did not indicate the presence of Japanese Knotweed in this bank (see attached portion of map). It did highlight the presence of Himalayan Balsam and Giant Hogweed.



Legend

Invasive plants species

- Giant Hogweed
- Himalayan Balsam
- Japanese Knotweed

3.1.7 The control of invasive plants by digging out gravel is not generally recognised as a way of controlling the aforementioned species of invasive plants nor can it be categorised as a long-term strategic approach. It is purely concentrating on this particular stretch and may lead to the release of large numbers of seeds locked in the gravels which could colonise elsewhere if dug out. A strategic approach would be to start at the upstream end of the river which contains the invasive species and concentrate on removing the seed source, namely the vegetation and not the banks, and then working downstream.

3.1.8 A document titled "River Nith Catchment Invasives" (**Document 6**) to which the appellant contributed has been produced to help landowners and the community understand the problem of invasive plants and offer advice and practical solutions to encourage sustainable control of these species.

3.1.9 This document indicates that a good way of controlling Giant Hogweed and Himalayan Balsam is by cutting stems before the plant flowers and sets seeds. Eradication can be achieved in 2-3 years. So rather than removing the gravel banks, vegetation control by regular cutting is a more sustainable approach. In addition, this would benefit larger stretches of the river by introducing a longer-term sustainable management strategy as opposed to ongoing short-term fire fighting that is fundamentally unsustainable. Use of a commercial glyphosate-based chemical is also effective if undertaken properly and professionally.

3.1.10 The document does not include gravel removal as a method of control.

3.2. Unstable River Section

3.2.1 The appellant indicates that the man made constraints on this section of the river, with solid walls lining the banks and a weir immediately downstream, do not allow natural hydrological processes to take place. It is their position that the works proposed would mimic the result of the natural processes.

3.2.2 This position appears to contradict the Catchment Plan at section 4.2, which states at page 22;

“Despite the modifications to the river carried out over the centuries, the river here (Whitesands) shows many of the natural features typical of a lowland river system. It has shingle and sand banks, a fringe of natural vegetation and a host of associated wildlife including fish, otters, kingfishers, noctule bats and goosanders.”

“In Dumfries town centre, the river is constrained by the walls but, as the channel is wider than the natural river channel during periods of low flow, there is still space for the river to build up sand bars and create shingle banks.”

3.2.3 It is SEPA’s position that the natural processes should be allowed to take place and it is important to ensure that these banks continue to be valuable for wildlife.

3.2.4 Despite their statement that no natural hydrological processes take place and an application for a single activity (point 16 of sheet E, Form E of the Application) the appellant now acknowledges that there will be a need to undertake similar work in the future because of the natural processes of deposition.

3.2.5 SEPA acknowledges, and indeed raised with the appellant prior to their application, that the appellant would have to carry out similar works at a future date as the natural river processes will continue to deposit gravels leading to ongoing river bank formation and the requirement for further removal. It is SEPA’s position that the appellant’s proposal is unsustainable and would lead to continued habitat loss.

3.3 Impacts on salmonid fish and invertebrates

3.3.1 The Method Statement in Form E of the Application did not indicate how the release of sediment would be minimised. The statement by Jim Henderson on how the work could be undertaken to minimise sediment release does not go in to detail about the appropriate techniques so SEPA cannot comment on it.

4.1 Other issues

4.4.1 The appellant raises the issue of water quality and aesthetics and the assessment of the impact of litter. The appellant refers to the Catchment Plan which highlights the impact of litter on wildlife and the fact that it detracts from the river’s beauty for the town and its visitors as being a particular issue at the site of the proposed works. The appellant claims that the removal of the banks will address this. However regular litter picking on the banks which has been undertaken by the appellant this year, does achieve this aim. This method helps to clean the area up without having to remove an important habitat and would be in keeping with the Catchment Plan objective of conserving and enhancing habitats.

4.4.2 The removal of the banks will not stop the littering problem. Any litter discarded would fall into the river and lie in the shallow water instead of on the banks. This would be aesthetically undesirable and the task of litter removal made more difficult than is currently the case. Indeed, in the past, the Council have intimated at meetings with SEPA staff that for health and safety reasons they are reluctant to remove litter from within the river, only from banks. If this is the case there could be longer term challenges in this regard if the bank was removed. Fundamentally, the problem of people throwing litter away needs to be tackled rather than seeking to destroy habitats as a method of litter control.

4.4.3 With regards to benefits for tourism by removing these banks, as suggested by the appellant, RSPB Scotland has stated the value of retaining these banks for tourism as follows *“ Instead of removing natural gravel banks that are valued by many people, we feel there is an opportunity for the appellant to interpret and promote the wildlife and natural features of the River Nith in Dumfries town centre, thereby encouraging more people to visit and enjoy the wildlife spectacle.”* (para 2, page 2 of RSPB Letter 23 July 2009) (Document 7).

4.4.4 In response to the five objectives from the Catchment Plan listed by the appellant:

- **Conserve and enhance sustainable fisheries in the River Nith by enhancing habitats, removing man-made obstacles to migration, ensuring genetic integrity and minimising threats from non-native species.**
- This is the objective set out in section 3 of the Catchment Plan. The appellant is not enhancing habitat they are in fact removing habitat. Within this section (Page 18) it states the importance of bank side vegetation and riparian habitats in providing insects for fish to feed upon and that this should not be underestimated. The non-native species referred to in the above objective is in relation to fish and not plants.
- **Conserve and enhance the status and distribution of wildlife habitats and species conservation interest in the Nith catchment.**

This is the first objective set out in section 4 of the Catchment Plan. The appellant's proposals are in contradiction to this chapter of the catchment plan as they advocate removing important habitat. As stated above bank side vegetation is extremely important in providing insects for fish to feed on. Also within this chapter mention is made of rare aquatic invertebrates within the Nith mostly associated with exposed river sediments. The proposal runs contrary to species conservation in this area.