The Water Environment (Controlled Activities) (Scotland) Regulations 2005: Policy Statement and Regulatory Impact Assessment

May 2005
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Scottish Executive Environment Group

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POLICY STATEMENT

INTRODUCTION

This document relates to the Water Environment (Controlled Activities) (Scotland) Regulations 2005 laid before the Scottish Parliament in April 2005 ("CAR" or "the Regulations"). The statement explains the purpose of the Regulations which implement the obligations of section 20 of the Water Environment and Water Services (Scotland) Act 2003 (WEWS Act). Under Section 20 Scottish Ministers have powers to introduce controls over a range of activities which can have an adverse impact upon the water environment.

The WEWS Act transposed the requirements of the Water Framework Directive (2000/60/EC).

The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament.

Further guidance on the practical implications of the Regulations will be available from the Scottish Environment Protection Agency (SEPA).

GENERAL PURPOSE AND PRINCIPLES

The Controlled Activities Regulations have been prepared in accordance with the principles of the Hampton Report of March 2005, which set out recommendations for reducing administrative burdens through the introduction of proportionate, targeted, and risk-based regulation which ensures integration between regimes.

The Regulations have three tiers of control providing **proportionate tools for regulating different scales of activity.**

They are risk-focused in that they require a risk assessment when applications for authorisation and reviews of authorisations are determined.

They bring together disparate legislative mechanisms into a single **flexible legislative framework and allow a single licence to cover a range of associated activities.**

They incorporate **economic and social considerations** into decision-making, thus ensuring that compliance measures do not incur disproportionate expense.

Just as the Water Framework Directive is a tool to deliver water obligations, the Regulations not only help deliver WFD objectives but also other EC and domestic obligations. Scotland now has a **framework for protection of the water environment** that integrates the control of pollution, abstractions, dams and engineering activities in the water environment.

In conclusion, the Regulations are designed to minimise **the regulatory burden** on business whilst ensuring the protection and improvement of the water environment.

THE WATER FRAMEWORK DIRECTIVE

Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for Community action in the field of water policy was adopted in October 2000 and came into force in December of that year. The Water Framework Directive ("WFD" or "the Directive") applies to all water in the natural environment, that is all rivers, lochs, estuaries, coastal waters and groundwaters.

Article 11 of the Directive requires Member States to establish a programme of measures for each river basin district in order to meet the following environmental objectives;

- prevent deterioration of water body status
- protect, enhance and restore water bodies with the aim of achieving good status by 2015
- progressively reduce pollution of water bodies from priority substances and to cease or phase out emissions, discharges and losses of priority hazardous substances.

The measures must include controls over point and diffuse sources of pollution; groundwater recharge; abstractions; impoundments; and engineering works on water bodies. The Controlled Activities Regulations will deliver most of these obligations and will be a key tool for achieving the environmental objectives.

THE WATER ENVIRONMENT & WATER SERVICES (SCOTLAND) ACT 2003

The Water Environment and Water Services (Scotland) Act 2003 ("WEWS" or "the Act") transposed the Directive into Scots Law. The Act begins the process of establishing the arrangements and mechanisms for implementation of the Directive within Scotland. The aim of WEWS is to protect and improve the ecological status of the water environment whilst also protecting the social and economic interests of those who depend on it.

The aim of WEWS is to protect the water environment whilst also supporting the social and economic interests of those who depend on it. The purpose of the act includes:

(a) preventing further deterioration of, and protecting and enhancing, the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on those aquatic ecosystems

(b) promoting sustainable water use based on the long-term protection of available water resources,

(c) aiming at enhancing protection and improvement of the aquatic environment through, amongst other things, specific measures for the progressive reduction of discharges, emissions and losses of priority substances and the cessation or phasing out of discharges, emissions and losses of the priority hazardous substances,

(d) ensuring the progressive reduction of pollution of groundwater and preventing further pollution of it, and

(e) contributing to mitigating the effects of floods and droughts.

River Basin Management Planning will be the eventual means of delivering this aim and the first River Basin Management Plan will be in place in 2009. In order to set the objectives that will be

contained in the River Basin Management Plans, we believe it is necessary to introduce a new system of simple and flexible controls based on an assessment of risk posed to the water environment.

Section 20 of the Act gave Scottish Ministers powers to introduce such a system in the form of regulations to control activities for the purposes of protecting the water environment. As noted above, these Regulations will be a key tool in the achievement of environmental objectives set out through the river basin planning process.

THE WATER ENVIRONMENT (CONTROLLED ACTIVITIES) (SCOTLAND) REGULATIONS 2005

The Water Environment (Controlled Activities) (Scotland) Regulations 2005 bring into effect the requirements of section 20 of the WEWS Act for controls over the following activities:

- activities liable to cause pollution of the water environment
- abstraction of water from the water environment
- the construction, alteration or operation of impounding works in surface waters or wetlands
- carrying out building, engineering, or other works
    - in inland water other than groundwater, or wetlands, or
    - in the vicinity of inland water or wetlands, and likely to have a significant adverse effect on the water environment
- artificial recharge or augmentation of groundwater.

Authorisations for many of these activities are not new. Pollution control regimes covering surface and groundwater already exist and these Regulations represent a broadly similar approach. Operators will therefore benefit from continuity with the added advantage of a harmonised system for all controls.

APPLICATION OF THE REGULATIONS

The Regulations apply across the water environment to provide a holistic approach to pollution control and protection of the water environment. The Regulations apply to Scotland as a whole; this includes the Scotland River Basin District as well as those parts of the cross-border Solway Tweed and Northumbria River Basin Districts within Scotland.

Our primary aim in drawing up the scope of the Controlled Activities Regulations is the establishment of a holistic framework to provide for controls over all activities having an impact on Scotland's water environment. The Regulations form the keystone of this framework. There are however some elements which will be addressed separately:

- Although CAR provides a framework within which diffuse pollution can be addressed, additional approaches to control diffuse pollution are being considered separately by the Executive. It is expected that proposals for a diffuse pollution strategy will be produced during 2005.

- Engineering works in coastal waters are broadly covered by the activities covered by the Food and Environment Protection Act 1985 (FEPA). Potential amendments to FEPA will be one avenue considered to ensure full integration with the WFD regime.

- The controls set out in the Regulations over engineering and building works apply to existing activities and new activities, but not to historic structures (other than impoundments), nor to structural modifications to water bodies undertaken before 1 April 2006. It is anticipated that measures to improve the habitats affected by such structures may be introduced through regulations to provide for remedial and restoration works.

- Discharges of pollutants from a vessel into coastal water are regulated by the Maritime and Coastguard Agency as set out in the Merchant Shipping Act 1995 and therefore not covered by the scope of the Regulations.

PUBLIC PARTICIPATION IN THE DEVELOPMENT OF THE REGULATIONS

These Regulations have been developed in partnership with other Scottish Executive departments, SEPA, and key stakeholders.

The Scottish Executive has taken careful account of stakeholders' views on both the structure of the proposed regulatory regimes and the estimated regulatory costs of the proposals. This participative process began in 2001 when the Scottish Executive issued its first thoughts on the structure of the regimes in 'Rivers, Lochs, Coasts: The Future for Scotland's Waters'. In its second consultation, 'The Future for Scotland's Water, Proposals for Legislation' issued in February 2002, a possible structure for the regimes was outlined. Scrutiny of the detailed proposals for the regulations was provided for by 'Controlled Activities Regulations: A Consultation' issued in April 2004. More recently the Executive consulted on 'Controlled Activities Regulations: Revised proposals for General Binding Rules'.

In addition to these formal consultations, the Scottish Executive has worked closely with key stakeholders and SEPA, holding a regular series of meetings and workshops with a wide range of water users and other interested parties. These meetings and workshops have provided a sounding board for the iterative development of the proposals, and have enabled the Scottish Executive to modify its proposals with stakeholder agreement.

In order to provide an estimate of the financial costs of implementing the control regimes over the period 2005/06 to 2009/2010, SEPA prepared a comprehensive resource plan in early 2004. This resource plan has been iteratively revised and updated as the proposals for the Regulations have developed over the course of the last year. The result of this process has been regulation on a more informed basis and a reduction of £25 million in the estimated costs of implementation. The availability of the resource plan has enabled stakeholders to make their comments on the proposals with the benefit of information on the financial costs of operating the regimes.

SEPA are currently developing proposals for allocating the revised costs through a new charging scheme. To support this process SEPA has created a stakeholder group. SEPA has also employed an external auditor to review the basis of the charging scheme and to report the results to the stakeholder group. SEPA are expected to consult on the proposals for their charging schemes during this summer.

ROLE OF SEPA IN IMPLEMENTATION

SEPA will have the key role in delivering the objectives of the Regulations. SEPA, like all NDPBs, is under an obligation to act **reasonably** in carrying out its statutory functions, and the Regulations are designed to be **proportionate**. SEPA will set controls tailored to address the **level of risk** posed to the water environment by the activity.

SEPA will have responsibility to address the key pressures upon the water environment. This means that SEPA will be able to select the most **cost-effective** means of delivering environmental improvements. SEPA will balance the need for protection of the water environment with Scotland's social and economic needs and will not propose conditions that are disproportionately expensive.

In setting authorisations under the Regulations, SEPA will have to deal with situations where improvements to deliver good status cannot be achieved because they are disproportionately expensive. Under these situations, SEPA's decisions may lead to **less stringent environmental objectives** being set as part of the river basin management planning. Under these circumstances, SEPA will be expected to involve interested parties in the decision-making process.

SCOPE OF THE REGULATIONS

The Regulations are based on a requirement for all controlled activities to be authorised. Some of the definitions of controlled activities in the Act are modified by the Regulations to improve the clarity of the control requirements.

Controls over pollution

Controls are currently in place to regulate water pollution from identifiable sources such as discharges from the end of a pipe; and these controls have already brought about improvements in the quality of Scotland's water environment.

The Regulations will control activities liable to cause pollution. Pollution was formerly controlled by the Control of Pollution Act 1974 (CoPA). Under CoPA, all discharges of pollutants were licensed by SEPA who could impose any reasonable conditions before granting consent to the discharge. There are approximately 100,000 licences (consents) for discharge held by SEPA.

These licences will be transferred to the CAR regime and any new discharges will be controlled under CAR. CAR will provide a more flexible and proportionate approach to controlling discharges.

Pollution into groundwater can remain within a water body for many years after the pollution has taken place. The Groundwater Regulations 1998 provided a system of control over direct and indirect discharges of specified hazardous substances to groundwater.

These new Regulations replace the Groundwater Regulations and provide for SEPA to continue to regulate with the aim of protecting groundwater in line with the requirements of the Groundwater Directive using the streamlined and flexible approach provided in the Regulations.

Abstraction

There are presently an estimated forty to fifty thousand abstractions in Scotland, the majority of which are small private water supplies but substantial volumes are abstracted for public drinking water supply, hydro-electricity generation and a range of industries such as whisky distillers, aquaculture, agriculture and opencast mining.

The main environmental impacts to a river, loch or estuary caused by abstraction come from changes to water level or depth, flow velocity and water quality. Different water bodies will be sensitive to changes in some or all of these factors to varying degrees and at different times of year. This sensitivity varies with the characteristics of the water body and the ecology that they support. An example might be the marginal vegetation around the shoreline of a loch; or gravel beds used by spawning salmon which are susceptible to changes in water level. Abstractions from groundwater can also cause rivers and wetlands to dry up and can lead to polluted or saline water being drawn into high quality groundwater.

New abstractions are currently controlled by a range of different legislative mechanisms: an Electricity Act licence is required for hydropower, a Water Order for public water abstractions and a Natural Heritage Act licence for irrigation in controlled areas. The planning system is used to set conditions for other industrial or private abstractions. There remain large numbers of existing abstractions which are subject to no controls over their environmental impact.

Small abstractions of less than 10m3 a day are included in the scope of the Controlled Activities Regulations and users must comply with general binding rules. Although SEPA have to monitor the impact of such abstractions in order to assess cumulative impacts, the Regulations do not include a requirement for these abstractions to be registered. That is because the Executive is also developing Private Water Supply Regulations with the intention of including a requirement for local authorities to compile a register of all such abstractions; SEPA would have access to that data for monitoring purposes. This will reduce the regulatory burden for individuals and it is anticipated that the Private Water Supply Regulations will also come into force on 1st April 2006.

CAR will introduce a comprehensive control regime for abstractions which will allow SEPA to manage water resources across Scotland and therefore ensure their long-term sustainable use. By controlling abstracting, the environmental impacts can be minimised and the water environment protected.

Impoundments

It is estimated that there are presently between five and ten thousand impoundments in Scotland. The effects of these impoundments will be variable, depending on their size, design and operation, and the sensitivity of the location. They have impacts both upstream and downstream, interfering with the normal pattern of flow of water and the movement of sediment, for example the impacts caused by the physical modification of a dam. They may also be a barrier for migrating fish and other species.

Certain impoundments have been covered by legislation in the past such as the Electricity (Scotland) Act 1989 for hydro-electric power and the Salmon (Fish Passes and Screens)

(Scotland) Regulations 1994 for fisheries management but this is the first time that all impoundments will fall within the scope of one set of regulations.

Building, engineering and other works

The natural heritage of Scotland plays an important role in the national economy. The many river-based activities that support local tourist and industrial activities would not be productive without good quality river habitat. Yet, data from the pressures and impacts analyses required by Article 5 of the Water Framework Directive shows that a third of the rivers in Scotland River Basin District are at risk from physical changes to their habitats. Examples include straightening and deepening of rivers for agricultural improvements, culverting rivers to maximise the area available for building, introduction of rubble or concrete to control erosion and the provision of flood defences.

Engineering activities which affect rivers and lochs are currently controlled under Local Authority land use planning. Regimes such as the Conservation (Natural Habitats &c.) Regulations 1994 also require SNH to issue licences to protect designated species and habitats. The Regulations will provide a single set of controls that are flexible enough to minimise adverse effects in Scotland's rivers, lochs and wetlands.

Duty to use water efficiently

In order to ensure that all water users comply with the underpinning aim of the Directive the Regulations place a general duty on all water users to use water efficiently.

AUTHORISATIONS

In order to minimise the regulatory burden introduced by the new controls, the Regulations establish a single cohesive framework setting out provisions for 3 tiers of control. This allows the most appropriate level of regulation to be applied. The 3 tiers of control are: general binding rules, registration and licences.

The sections below explain the principles underpinning each tier, and the diagrams on pages 12-14 indicate broadly which activities are likely to be subject to which level of control. However the key principle of the regulatory controls is that they are sufficiently flexible to enable SEPA to determine the most appropriate level of control in any set of circumstances. A key feature is that there is scope for SEPA to control an activity by means other than those indicated in the diagrams. For example, cumulative impacts may warrant an activity to be regulated under a higher level of control. Conversely it is expected that where SEPA determine that a lower level of control may be sufficient in particular circumstances, then those lower controls will be applied.

SEPA will prepare guidance for operators, detailing how such decisions would be taken.

General Binding Rules

General binding rules are intended for activities which represent a small risk to the water environment. SEPA will not be contacted by operators acting under a GBR and therefore SEPA will not know the location of such activities. Consequently, they are appropriate for low risk activities which are unlikely to represent a cumulative impact.

These rules are intended to ensure the regulation of certain activities without the need for registration or licensing. This minimises the regulatory burden on operators and the risk to the water environment is still mitigated as it is possible for SEPA to require further controls if problems become apparent.

The diagrams on pages 12-14 illustrate the activities that will be covered by general binding rules (apart from in exceptional circumstances, e.g. cumulative pressures). The activities are:

- A large number of passive weirs constructed before 1st April 2006 that do not affect fish passage
- Abstractions of less than 10m3/day
- Construction/extension of wells/boreholes and subsequent abstraction
- Ditch dredging activities
- Construction and maintenance of temporary/minor bridges
- Laying of pipeline/cable by boring
- Works to control the erosion of a bank of a river, burn or ditch using revetments
- Operation of vehicles, plant/equipment
- Low risk surface water discharges.

It is anticipated that around one third of all controlled activities will in the first instance fall within this tier of control. It should be stressed that the above list is only our opening position. We anticipate that general binding rules covering additional activities will be developed in conjunction with stakeholders as SEPA gain a better understanding of the impacts of relatively low risk activities, and begin to review the relative merits of the different control mechanisms.

It is important to note that the introduction of CAR does not affect duties to comply with any existing obligations such as those outlined in planning or natural heritage legislation.

In some instances SEPA may also require activities controlled by a general binding rule to be registered, for instance, in order to assess cumulative impacts in water bodies at risk, or in more sensitive areas such as SSSIs or Natura 2000 sites.

Registration

Registration will be used to control relatively simple activities where the environmental impacts are predictable but where cumulative impacts are likely. Registration will encompass such activities as septic tank discharges, small abstractions and minor engineering works.

Registration will allow SEPA to collect sufficient information about individual activities to assess the cumulative risk to the environment that may result when activities are concentrated in one area. For example, large numbers of septic tank discharges to land could pose a risk to groundwater and therefore private drinking water supplies; and large numbers of such discharges to coastal waters could pose a risk to designated shellfish or bathing waters.

Small domestic septic tank discharges to rivers will be covered by registration. In the past such discharges have been controlled by licences under the Control of Pollution Act regime and this change therefore represents an ease in the regulatory burden for operators. SEPA considers that about 80% of the current 100,000 Control of Pollution Act licences will eventually be confirmed as registrations under CAR.

The registration process will be very simple: operators will be required to provide SEPA with a description of the controlled activity and its location. The description of the activity which SEPA registers defines the constraints within which the activity can operate.

There is scope for SEPA to identify conditions in respect of registrations. This provides beneficial flexibility enabling SEPA to set limited constraints without the need to use a licence. For example it is expected that SEPA will set conditions for abstractions between 10 and 50 m3/day similar to those set out in the GBR for abstractions less than 10m3/day. It is stressed that any conditions associated with Registrations will remain simple and will not include the detailed site-specific standards which found in licences.

A registration provides authority to undertake the activity. This contrasts with licences which only provide authority for a single identified "responsible person" (see below). Consequently, there is no need to notify SEPA if the person who operates a registration changes.

Licences

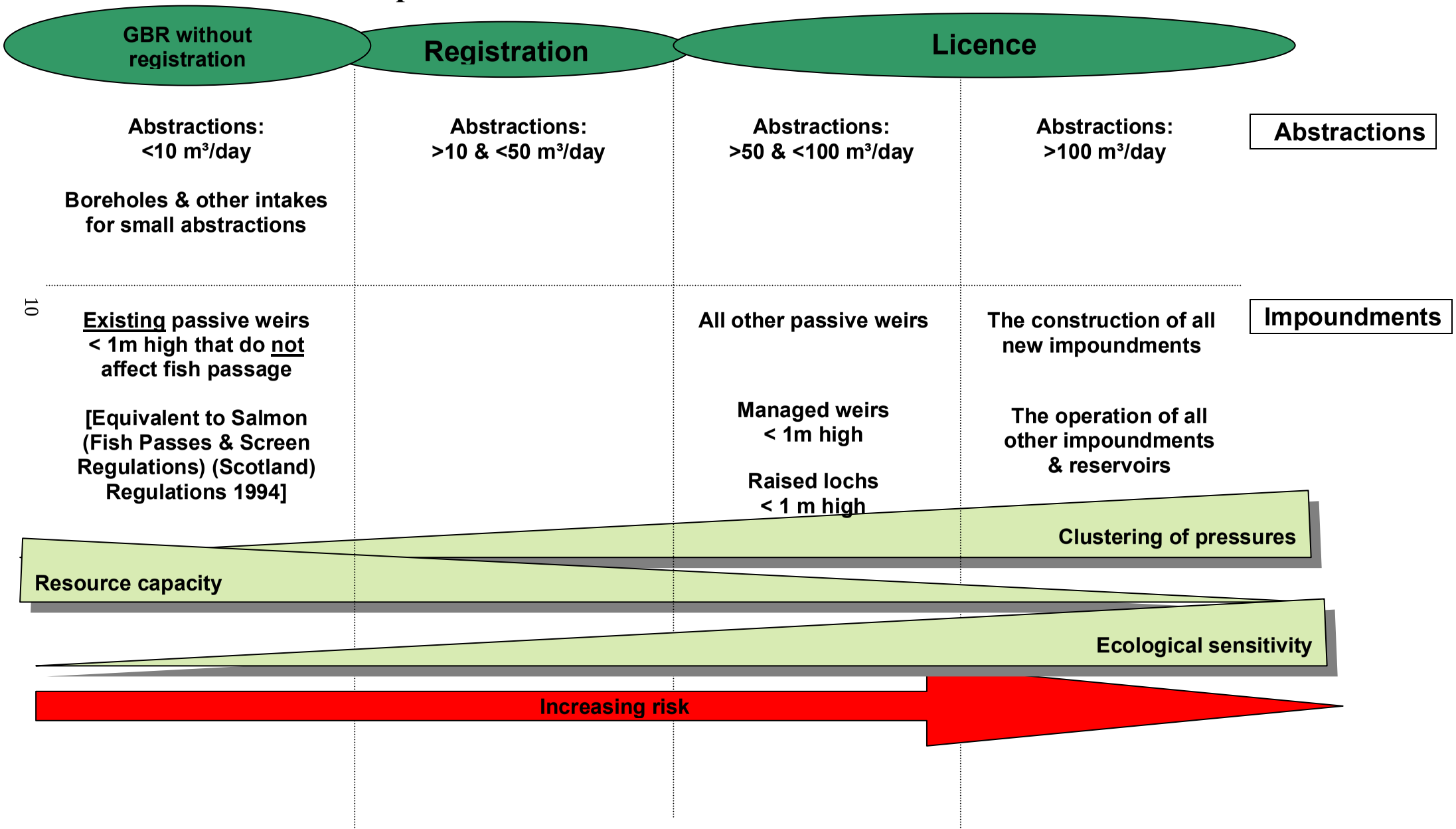
Licences will control those activities posing the greatest risk to the water environment. It is anticipated that there will be around 15,000 licences. These will be tailored to the particular circumstances of the activity concerned – its nature, extent and location.

A significant proportion of licences will be simple authorisations permitting activities with standard conditions. Other licences will be more complex and SEPA will have to set a range of site-specific conditions.

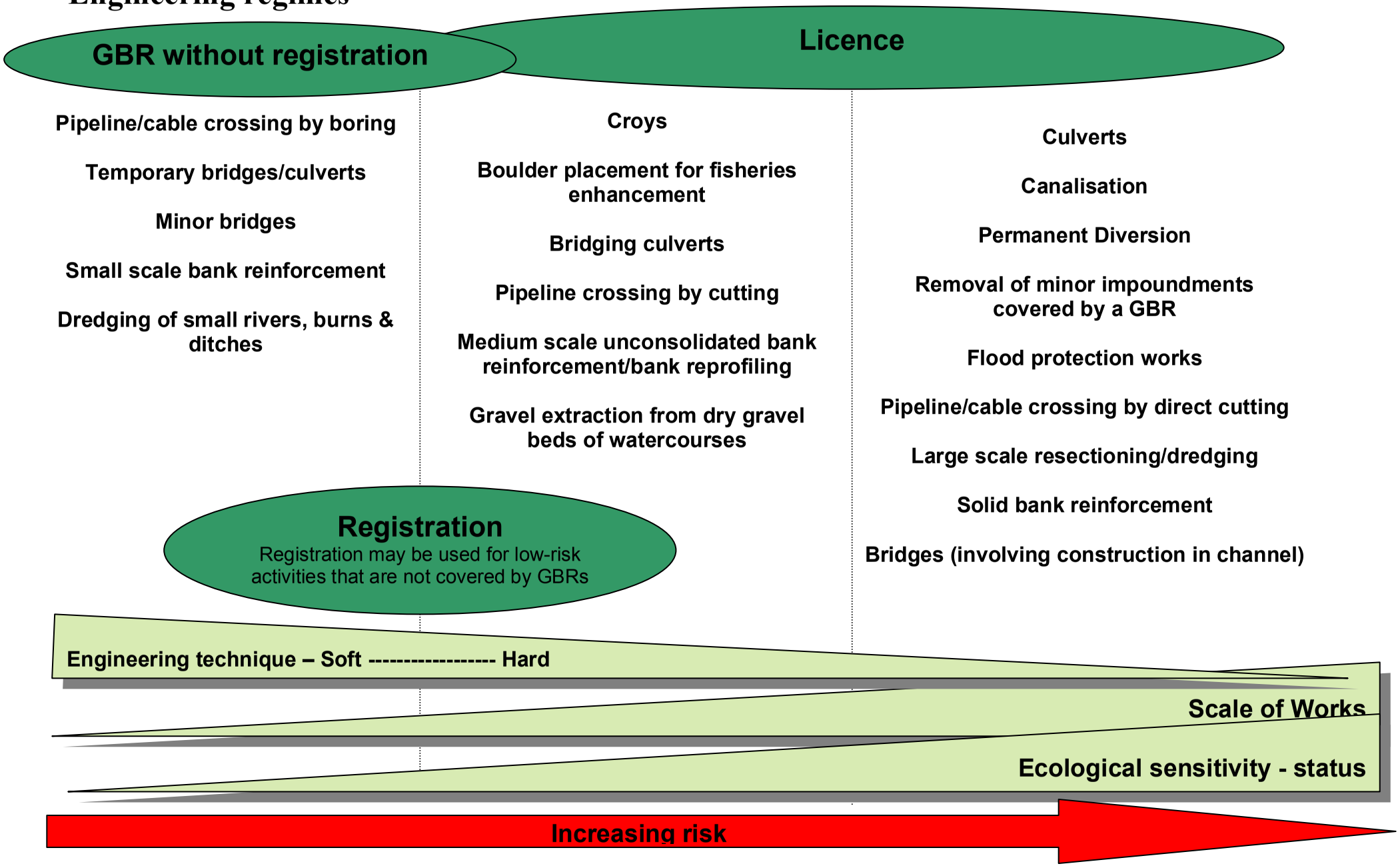
A licence authorises a responsible person to undertake the controlled activity who will be accountable for ensuring conditions set in the licences are met. A responsible person may, in legal terms, be a natural person (i.e. an individual) or a legal person (i.e. a registered company, a corporation established by statute or charter, or a partnership). Scots law does not recognise clubs, friendly societies, building societies, trade unions and other unincorporated or voluntary associations as legal persons, so such bodies cannot be responsible persons and will require to nominate an individual to be the responsible person on behalf of the association.

Tiers of authorisation

Abstractions and Impoundments



Engineering regimes



Activities liable to cause pollution

GBRs without registration	Registration	Licence	
Low Risk Surface Water Discharges - -	- - -	Sewage to soakaway >15pe. Low Risk Combined Sewer Overflows (8:1 dilution & Formula A) -	- High Risk Combined Sewer Overflows (Bathing, Shellfish & Recreational) Emergency Overflows
Emergency Overflows	Septic Tanks, Passive/Active Secondary (<15pe)	Septic Tanks & Other Sewage	Large Septic Tanks & Other Sewage
Potable water – Service reservoir overflow / cleaning, and scour water	Cooling Water: no chemical inputs, temperature issue only	Water Treatment Works – backwash Fish Farms (Small & Medium freshwater tank/cage farms & marine cage farms) Medium & Large Hatcheries Sheep Dips Cooling Water: temperature & chemical input issues Boiler blow-down Dry Docks	Pumped groundwater: may depend on risk assessment Fish Farms (Large freshwater tank farms / cage farms & marine cage farms) Industrial Process Effluents *Other trade effluents* Leachate from landfills: site drainage Mine water (historic) Open Cast Mine/Quarry

Dilution

Amenity & Priority Substances/Nutrients

Increasing risk

Management Agreements

Many examples of environmental good practice exist in Scotland already and can be used alongside regulation to enhance the protection of the water environment. Management agreements are a good example and SEPA will take into account any that exist between operators when considering and granting authorisations.

Management agreements are designed to promote the effective management of a water resource which is exploited by a number of users; for example number of potato farmers abstracting from the same river or fish farmers within a sea loch. Management agreements allow a number of operators in a distinct geographical area wish to work together to co-ordinate their activities to better protect the water environment and their own interests.

Management agreements may set out how several water users have agreed to time their abstractions to ensure they are not all abstracting simultaneously (thus enabling one water user to abstract more at times that the others are not abstracting and so leading to more efficient allocation of available capacity); or how operators will contribute to the construction of winter storage facilities that could then support summer abstractions. SEPA will work with water users interested in setting up a management agreement to inform them of the available capacity of the water source and to set licence conditions based on the terms stated in the management agreement.

Operators may ask SEPA to take into account management agreements when considering and granting authorisations. The Regulation allows licence conditions to take account of agreements between different responsible persons over the co-ordination of controlled activities.

APPLICATIONS AND APPLICATION PROCEDURE

Application for authorisation

Sufficient information will be made available to enable water users to judge which is the most appropriate level of authorisation. In particular, SEPA will design application forms and associated guidance to allow operators to decide whether to apply for a registration or a licence. In developing these forms SEPA will ensure their requests for information are appropriate to the different levels of authorisation and tailored according to the risk posed to the water environment.

Certain applications for licences will be required to undergo a period of advertisement. This is to enable third parties to make representations to SEPA about how they would be affected by the proposed activity. Advertisement is envisaged where SEPA considers that the activity may cause a significant adverse impact on the water environment such that the interests of other parties may be affected. The advertising will help SEPA obtain as much information as possible in order to make an informed decision about licensing conditions. It will also serve as a mechanism to provide information to other interested parties.

Applications for registration or for licences must be dealt with by SEPA within time limits that are set in the Regulations. This is to provide certainty for applicants. A decision must be reached on registrations within 30 days. A longer timeframe of 4 months is allowed for the processing of licence applications, to allow for the more complex nature of some licences. The 4 month period

does not include the time taken by an applicant to provide any additional information that SEPA may require to process the application or for advertising of the application. Where SEPA does not complete the processing of an application within the required time, the period for determination can be extended with the agreement of the applicant. If an application is not determined within the time period, the application is treated as refused. This then provides the applicant with the opportunity to appeal to Scottish Ministers.

Determining an application

When seeking to determine an application and either grant or refuse authorisation, SEPA's overarching concern will be to strike the correct balance between protection of the water environment and the economic consequences of any measures which may be required.

SEPA can set such licence conditions as it considers necessary to protect the water environment. However, the Regulations 15 identify some of the key aspects which SEPA should consider when determining an application for authorisation:

- ensure compliance with the Water Framework Directive and the other relevant Directives such as the Groundwater Directive, Bathing Water Directive and Shellfish Water Directive;
- ensure compliance with the WEWS Act and its associated Regulations;
- have regard to listed domestic legislation which is relevant to the protection of the water environment;
- have regard to the impacts on other water users;
- secure efficient and sustainable water use.

The term "water use" is intended to be considered as the action of a controlled activity. This definition is consistent with the concept of water use in the Directive. Consequently, in delivering efficient and sustainable water use SEPA shall ensure that it manages discharges, abstractions, impoundments, groundwater recharge and engineering activities in a manner that allows for sustainable water use. This requires SEPA to manage the available environmental capacity over the long-term such that development can continue without causing a deterioration of the status of the environment. This is important if development constraints are to be avoided.

It is intended that SEPA will be able to set conditions which require the application of Best Available Technology and the Best Environmental Option so as to secure the long-term capacity for development. However, it should be stressed that SEPA should apply these requirements in a proportionate manner so as to avoid disproportionate demands upon operators.

SEPA also have the power to issue time-limited authorisations. There is a firm intention that time-limited authorisations will not become the norm; but it is anticipated that there may be a limited number of circumstances where such a provision may be useful. An example might be where a project or activity is of known duration, or to ensure that planned river engineering works are completed before the salmon spawning season.

Risk assessment

An important part of the determination process is the requirement for SEPA to undertake an assessment of the risk to the water environment. The intention is to ensure that SEPA applies controls in a manner proportionate to the risk to the water environment.

The risk assessment process will involve a number of stages:

- Determining the level of authorisation
- Setting conditions to protect the environment

In considering the risk to the environment SEPA will decide whether an application should be covered by a registration or a licence. SEPA will base such decisions on generic assessments carried out for types of activities. If a simple description of the type of activity would normally provide the information SEPA needs to assess the risk of cumulative impacts, then SEPA will authorise such activities by registration. The diagrams on pages 12-14 identify the most likely level of authorisation required. However, SEPA will have the flexibility to set a different level of control if circumstances merit it.

If site-specific conditions are required to protect the environment then SEPA will determine the authorisation in the form of a licence. SEPA will set the conditions in a licence on the basis of a site-specific assessment of the environmental risk and the best means of controlling them. This site-specific assessment will typically involve the use of models or defined rules for decision-making. SEPA will publish its procedures for making these decisions.

Imposed authorisation

SEPA have the power to impose an authorisation where it appears that a controlled activity that should be authorised is being carried on without authorisation. This ensures fairness to all water users and protects the water environment.

Call-In Process

The Control of Pollution Act gave third parties the power to request Scottish Ministers to call in applications for licences to discharge trade and sewage effluent for their own determination and to hold a public inquiry. These provisions allow Ministers to step in to take control of SEPA's regulatory decisions. During the consultation process some consultees expressed a view that the call-in mechanism was of some value, but most stressed that, if retained, it should only be used for significant cases.

The Regulations therefore contain a provision for Scottish Ministers to issue a direction to SEPA in connection with calling in certain types of case or any particular case. It is expected that such a direction will be issued before the full provisions of the Regulations come into force on 1 April 2006.

MODIFICATION OF AUTHORISATIONS

It is clearly important for stakeholders to have certainty with regard to authorisations that have been issued; but SEPA must also be able to review authorisations at any time in order to ensure that significant changes to pressures on the water environment can be addressed.

The first review of licences, expected to begin in September 2006, will focus on water bodies at risk of not meeting the Directive's environmental objectives. As part of that review SEPA will identify and agree with businesses measures that are required by 2012 to meet those objectives. Water users must take the measures necessary to comply with the agreed conditions by 22 December 2012, in order to meet the Directive's objectives by 2015. SEPA will set measures

which are required earlier than 2012 only where there is a legislative driver such as the Habitats Directive.

However during the process of designing improvement programmes alternative objectives can be identified. For example, if the measures needed to achieve good status by 2015 would be disproportionately expensive, the timetable for achieving good status can be extended or a less stringent objective than good status can be set.

The process of developing a first programme of measures and setting environmental objectives has to be completed as part of the development of the draft river basin management plans, due to be published at the end of 2008 and setting out the proposed objectives.

Once river basin management planning is fully operational, it is expected that SEPA will review authorisations in a targeted manner when the need arises.

As a responsible person has to be named for licences under the regime, it is important that there is a mechanism for the licences to be transferred to another person in order to keep records current. This will ensure the correct person is informed when any variations or reviews to licences occur, and also enable SEPA to carry out any necessary enforcement action against the appropriate person. Any requests to transfer licences into another name must specify exactly what is to be transferred, when, to whom and why.

A responsible person can also surrender their authorisation when they cease or intend to cease carrying on a controlled activity. SEPA has the powers to ensure that such a surrender would not cause harm to the water environment. This process is very similar to that of other environmental legislation.

It is necessary to provide SEPA with the powers to revoke an authorisation, although it is envisaged that this power will be exercised only in exceptional circumstances, as is currently the case under existing environmental regimes. It is likely that this power would only be exercised where an operator was not complying with the terms of their authorisation resulting in serious environmental harm or widespread public complaint and continued to do so following enforcement action by SEPA.

ENFORCEMENT

SEPA has a duty to monitor compliance with the provisions of the Regulations and to enforce them. In order to do this, the Regulations provide SEPA with a range of enforcement powers to enable appropriate action to be taken in cases where operators are not complying with the conditions of their authorisation. Such enforcement will be carried out through the use of notices. The approach is therefore not new.

If SEPA is of the opinion that the carrying on of a controlled activity

- is contravening or is likely to contravene an authorisation,
- involves a risk of adverse impact on the water environment, or
- is causing a direct or indirect discharge of a listed hazardous substance into groundwater

then SEPA may issue a notice

- indicating that the activity is suspended or should cease, and

- outlining any remedial action that must be taken, and the date by which that action must be carried out.

In order to determine whether compliance is being achieved, SEPA may require access to premises for monitoring purposes – provisions have been made for compensation where appropriate. Once again, these provisions have been based on existing environmental legislation such as the Pollution Prevention and Control Regulations and the Control of Pollution Act 1974 and therefore do not represent a new approach.

In cases where the responsible person cannot be found, then the Regulations give SEPA the powers to carry out the works themselves.

INFORMATION AND REGISTER

The Regulations give Ministers and SEPA powers to obtain information by serving a notice requesting information about the carrying out of activities or functions under these Regulations. This requires information to be produced in line with the requirements set out in the notice, including such information that it would be reasonable for that person to obtain for the purposes of complying with the notice and will enable SEPA to make the most informed decisions possible.

SEPA are also required to maintain a public register of all activities authorised under these Regulations. The register will reflect all information provided in the application for authorisation, unless to do so would compromise commercial confidentiality. Commercially confidential information may be included in the register only if the individual carrying out the business gives consent, or if Ministers determine it is in the public interest for the information to be made public.

The register outlined above must be available, free of charge, at all reasonable times to the public and copies must be provided by SEPA at a reasonable charge.

OFFENCES

The Regulations outline a range of offences and makes provisions for addressing them.

The Regulations set out penalties for those committing an offence including a fine not exceeding £40,000 or, imprisonment of up to 6 months and daily fines for persistent offences. There are also provisions for determining liability in the case of corporate bodies or partnerships, and provisions for third parties to be charged and convicted where that person is responsible for the offence.

Provisions in respect of admissibility of evidence are modelled upon the Pollution Prevention and Control (Scotland) Regulations 2000.

Impacts on the water environment that occur as a result of an accident, natural causes or *force majeure* are included in the defence against offence provisions as long as practical steps are taken to prevent further deterioration of the water environment and SEPA are informed of the circumstances.

The Regulations set out how the courts may deal with a person convicted of an offence under the Regulations, and how the courts may order the offence to be remedied. Once again, the Pollution Prevention and Control (Scotland) Regulations 2000 have been used as a model.

APPEALS

In the longer term, the implementation of the proposed river basin planning process may require a new type of environmental appeals system to be introduced. Meanwhile, these Regulations contain a simple and efficient appeals process for handling any appeals against the initial tranche of SEPA's regulatory decisions.

Ministers will handle appeals, as is the case with Pollution Prevention and Control (Scotland) Regulations 2000 appeals. The circumstances under which the option to appeal is available are set out in the Regulations in order to provide clarity.

Provisions have been provided for operators to appeal to Ministers against the key regulatory decisions made by SEPA. For example, operators may appeal if they disagree with the:

- level of regulation required (registration, licence);
- types of conditions imposed; and
- notices imposed on water users.

APPLICATION TO THE CROWN AND SEPA

The Regulations outline how the provisions of these Regulations apply to the Crown and to SEPA. In order to ensure parity of treatment, SEPA's own activities which may impact on the water environment, such as the installation of monitoring equipment, will be regulated by Ministers. Broadly speaking the same provisions that apply to other operators will apply in such cases.

Ministers may issue guidance to SEPA on the carrying out of their functions under these Regulations, and SEPA must have regard to any such guidance.

CHARGING SCHEME

The Regulations make provisions for SEPA to introduce a charging scheme to recover costs incurred for exercising their statutory functions to protect and improve the water environment. This includes the recovery of costs of activities such as monitoring carried out on their behalf by third parties.

In order to recover its costs, SEPA is given powers under Schedule 5 of the Regulations, to impose charges for the application for an authorisation and the grant, variation, subsistence and transfer or revocation of an authorisation as well as the issue of notices.

Section 41 of the Environment Act 1995 provides the model for principle of charging and the principles for cost recovery stem from Article 9 of the Water Framework Directive. These principles mean that those persons whose activities impact adversely on the water environment

should bear the costs of SEPA's intervention. The Regulations also allow SEPA to ensure that charges provide an incentive to minimise environmental impacts. This is consistent with the principles within Article 9 of the Water Framework Directive.

Two new charging schemes will be introduced.

- A transitional charging scheme consultation will be issued in spring 2005. Subject to approval, the scheme will be implemented in October 2005 to recover the costs of transferring currently licensed point source, abstraction and impoundment activities plus applications for significant water resource activities, not yet licensed, by 31 March 2006.

- In late summer 2005 a subsistence charging scheme consultation will be issued, with charges to be become effective from 1 April 2006. This scheme will set charges to recover ongoing annual WEWS costs. Ultimately however, Scottish Ministers will take decisions on proposals for the charging scheme.

Activities carried out under general binding rules will not be subject to charge. For registration it is envisaged that there will be a charge associated with an application but there will be no on-going annual subsistence charge. Application charges will also apply to licences but in addition there will be on-going subsistence charges.

The intention is also that activities carried out to deliver an environmental service will incur reduced application charges when they are registered or licensed and may not be subject to subsistence charges. The concept of environmental service will be developed in SEPA guidance but is intended to include the following type of situations:

- engineering work undertaken solely to restore damaged river habitats;
- abstractions of mine water solely intended to prevent the breakout of polluted water;
- impoundments whose only function is to support a designated nature conservation interest;
- that component of abstractions required by SEPA to support ecology in artificial water bodies such as lades.

INTEGRATION WITH EXISTING POLICY AND LEGISLATION

As emphasised throughout this document the underpinning principle in implementing Water Framework Directive requirements is that of ensuring an integrated and holistic approach to the protection and improvement of our water environment. This section will allow stakeholders to have a clearer picture of the wider context within which the Regulations will operate.

There are a number of existing policy and legislative requirements which will be affected by the introduction of WFD obligations, and in particular these Regulations, and work is being undertaken in a phased and prioritised manner to ensure these existing requirements, set out in around 240 pieces of legislation, are reviewed, and amended where necessary.

Throughout this review process the overarching aims of this review are to ensure:

- integrated and just legislative provisions;
- duplication of regulation is prevented;
- transparent regulation.

For example, legislative control over abstraction was previously confined to a few specific sectors and set out in disparate legislative regimes. These regimes will now be superseded by the Controlled Activities Regulations. It is essential to prevent duplication of regulation and therefore the Executive is putting in place the mechanisms to amend the existing legislation to remove those sections which provide authorisation for abstraction. Where the existing legislation also provides other rights, mechanisms to retain those rights will be put in place.

In order to ensure that these objectives are fulfilled the Executive intends to lay a number of consequential amendment orders before Parliament over the coming year. This will ensure that any necessary amendments are in force before 1st April 2006.

Control of Pollution Act 1974

Part II of the Control of Pollution Act 1974 (including all secondary legislation made in exercise of powers therein) was primarily introduced to deal with point source pollution. Today it is widely recognised that, although a key aspect, it is not just 'end of pipe' discharge controls which can deliver major improvements in the water environment. In many cases, for example, the effect of diffuse pollution can be of equal or even greater significance.

The controls under Part II of CoPA have largely been absorbed into the Regulations and broadly speaking, point source discharges will continue to be regulated in an equivalent manner. However, regulation of such discharges is now risk-based and therefore activities which previously fell outwith CoPA may fall within the ambit of the Regulations. Conversely the burden of regulation for many operators has been reduced. For example, minor discharges which were previously subject to a CoPA consent may only require a registration. The key difference is that the new Regulations provide the flexibility to assign point source discharges to the appropriate tier of control.

The first consequential amendments order will therefore provide for the repeal of most of Part II of CoPA and detailed guidance will be available to existing CoPA consent holders in respect of the transitional arrangements which have been put in place to ensure a smooth and seamless transfer to the new regime.

The largest discharges which are included within SEPA's charging scheme will be required to apply to transfer their CoPA consents to a CAR authorisation during the period from 1 October 2005 to 31st March 2006. The prime purpose for this process is to require the identification of the responsible person. SEPA will transfer these discharges without imposing any additional constraints upon the discharges. The remaining CoPA consents will be deemed to have been transferred to CAR as registrations. These discharges will be progressively reviewed by SEPA over four years to identify which discharges should be covered by licences.

Groundwater Regulations 1998

Similarly the requirements of the Groundwater Directive and the Groundwater Regulations 1998 will be fulfilled by the Regulations. The first consequential amendments order will also therefore repeal the Groundwater Regulations 1998. From 1st April 2006 operators who intend to carry out activities that would previously have fallen within the ambit of the Groundwater Regulations should apply for a CAR authorisation. However, in practice the requirements on operators in respect of groundwater will not change and detailed guidance will be available to

existing groundwater authorisation holders in respect of the transitional arrangements which have similarly been put in place to ensure a smooth and seamless transfer to the new regime.

All Groundwater Authorisations will be deemed to have applied to be transferred as CAR registrations. As part of the four yearly review of discharges of hazardous substances to groundwater, SEPA will transfer most of these to CAR licences by 2010.

Pollution Prevention and Control Regulations 2000 (PPC)

PPC provides a holistic approach to different forms of pollution, e.g. air, water. Care has been taken to ensure that the two regimes are as integrated as possible. The underlying aim is to ensure that controlled activities appropriately authorised under PPC do not require to be authorised under CAR. Schedule 10 of the Regulations sets out the provisions to ensure that there is no duplication of regulation under CAR. PPC will be amended to reflect this principle of integration, and to bring it into line with WFD requirements. Sites which undertake activities such as abstractions, impoundments and engineering activities which are not covered by PPC will still have to apply for a CAR authorisation.

The Water (Scotland) Act 1980

The Water (Scotland) Act 1980 currently authorises Scottish Water to abstract for public water supply. These elements of the Act are superseded by the Regulations and therefore need to be repealed. However, the Act also confers proprietary rights for example to allow for compulsory purchase of land where agreement is not forthcoming between the operator and Scottish Water. Clearly such matters would not be appropriately dealt with by SEPA. It is therefore intended that this Act will be amended to ensure that rights of abstraction are granted via CAR but proprietary rights remain to ensure that Scottish Water can fulfil its statutory obligations.

Over the period 1 October 2005 to 31 March 2006, Scottish Water will be required to apply for a CAR authorisation. All other operators of abstractions and impoundments will similarly have to apply. SEPA will grant an authorisation in the form of a licence or registration. It will set conditions which reflect currently authorised activities or current practice and will not impose any additional constraints at this stage. SEPA may impose monitoring requirements in order to provide information to support any future review of licence conditions.

Oil Storage provisions

Our April 2004 consultation on the draft Regulations proposed that oil storage might be included in the Controlled Activities Regulations. In fact the simplified format of the general binding rules mean that inclusion of oil storage is not appropriate and as a result free standing regulations are currently being developed for oil storage activities.

Nature Conservation and Natural Heritage

Throughout the development of the Regulations the Executive, SNH and SEPA have given particular consideration to integration with existing nature conservation and natural heritage obligations, in particular those arising under the Nature Conservation (Scotland) Act 2004, the Conservation (Natural Habitats &c.) Regulations 1994 and the Wildlife and Countryside Act 1981. The combined effect of the new Regulations and the existing legislation is to deliver robust protection for both water-dependent features and for other aspects of Scotland's natural

heritage which might be consequentially affected by controlled activities. The Regulations will, for example, operate in conjunction with section 15 of the 2004 Act and with the appropriate assessment requirements in the 1994 Regulations to ensure that potentially damaging impacts on sites of special scientific interest and Natura 2000 sites are regulated in accordance with established domestic policy and the requirements of European law. The Regulations also provide SEPA with appropriate powers to ensure that activities normally authorised by means of a general binding rule can, where necessary, be more directly regulated in order to protect natural heritage interests.

The statutory authorisation processes set out in the Regulations will be supported by appropriate administrative procedures and partnership-working between agencies. For example, SNH will liaise with SEPA to identify sites or features which are likely to be particularly sensitive to certain types of controlled activity. This will assist SEPA in subjecting potentially damaging activities to appropriate assessment when carrying out its functions under the Regulations. SNH and SEPA will also work together to provide guidance to prospective operators to ensure that they are fully aware of their wider legal obligations in relation to nature conservation.

REGULATORY IMPACT ASSESSMENT

1. Introduction

1.1 The Water Framework Directive (Directive 2000/60/EC) came into force in 2000. It was transposed into Scots Law by the Water Environment and Water Services (Scotland) (WEWS) Act (2003). Among other things, the Directive requires that Scotland has a system of regulatory controls for the following activities:

- Point source discharges and diffuse sources liable to cause pollution;
- The abstraction of water from the water environment;
- The impoundment of surface water;
- Alterations to the structure and condition of surface water habitats; and
- Artificial recharge or augmentation of groundwater

1.2 Although we already have a control system for point source discharges, we do not have comprehensive systems of control for the other activities. Section 20 of the WEWS Act gave Scottish Ministers powers to make Regulations to introduce such controls. The Controlled Activities Regulations ('the Regulations' or 'CAR') are being introduced by the Scottish Executive to provide the required controls, except for controls over diffuse pollution which are being considered separately.

1.3 The Directive's overall objectives are to prevent deterioration of the status of the water environment and to aim to restore waters to good status by 2015. This will be achieved through the river basin management planning process. A draft plan must be prepared by 2008, with the full plan in place by 2009. This plan must set a programme of measures to meet the Directive's good status objectives.

1.4 The introduction of the Regulations at this time is necessary for three reasons:

- to prevent deterioration in status;
- to ensure that the regulatory process of identifying and agreeing the control measures and the environmental improvements they will deliver can be completed by the Directive's deadline in 2009; and
- to provide stakeholders with sufficient certainty for investment planning purposes and a longer lead-in time for delivering the necessary improvements.

2. Scope of this Regulatory Impact Assessment

2.1 A Regulatory Impact Assessment (RIA) for the WEWS Act was presented to the Scottish Parliament in 2003. This RIA for the Controlled Activities Regulations does not consider those costs that would arise irrespective of their introduction. Such costs include those resulting from the WEWS Act requirements for river basin management planning and environmental monitoring.

2.2 As noted above, the overall objectives of the Directive are to prevent deterioration of the status of the water environment and to aim to restore waters to good status by 2015. In transferring existing authorisations into the new CAR regime SEPA will set conditions which reflect existing conditions or practice. SEPA's review of licences, planned from 2006 onwards,

will focus on water bodies at risk of not meeting the Directive's environmental objectives. As part of that review SEPA will identify and agree with businesses the measures required to meet those objectives. That discussion process will help to inform the river basin management planning process. The Regulations will enable specific conditions to be placed on the operation of controlled activities. Water users must take the measures necessary to comply with the agreed conditions by 22 December 2012, in order to meet the Directive's objectives by 2015.

2.3 However during the process of designing improvement programmes alternative objectives can be identified. For example, if the measures needed to achieve good status by 2015 would be disproportionately expensive, the timetable for achieving good status can be extended or a less stringent objective than good status can be set.

2.4 The process of developing a first programme of measures and setting environmental objectives has to be completed as part of the development of the draft river basin management plans, due to be published at the end of 2008 and setting out the proposed objectives. The full compliance costs of delivering those objectives cannot be properly estimated until then.

2.5 In summary, whilst these Regulations will be the key tool for delivering our environmental objectives, it is the river basin planning process which will drive compliance costs, not the Regulations themselves. This RIA's main focus is therefore on the costs and benefits of the proposed regulatory regimes themselves rather than the costs and benefits of the longer term compliance measures that may be required of water users. Further information on the costs and benefits of the measures required will be provided when the draft plan is produced in 2008.

2.6 The costs incurred by SEPA in operating the regulatory regimes will be recovered through charging to operators. These costs may be offset by grant-in-aid allocated by Scottish Ministers under the spending review process. The Scottish Executive has worked closely with SEPA to ensure that both the structure of the regulatory regimes and the way in which they will be implemented by SEPA strike the right balance between costs and effectiveness.

3. Purpose of Controlled Activities Regulations

3.1 The proposed Regulations will establish a framework allowing SEPA to control certain activities that could have, or are having, an adverse impact on the water environment.

3.2 The controlled activities are:

- activities liable to cause pollution of the water environment
- abstraction of water from the water environment
- the construction, alteration or operation of impounding works in surface waters or wetlands
- carrying out building, engineering, or other works
    - in inland water other than groundwater, or wetlands, or
    - in the vicinity of inland water or wetlands, and likely to have a significant adverse effect on the water environment
- artificial recharge or augmentation of groundwater.

3.3 In its recently completed pressures and impacts analysis, SEPA estimated the extent of rivers and lochs likely to be adversely affected by these activities. The results are summarised in Table 1.

Table 1: Waters identified by SEPA's pressures and impacts analysis as being at risk of failing to achieve good status		
	Rivers	**Freshwater lochs**
Total length/ area assessed	25,000 km	1,000 km^2
Waters affected by pollution	8,000 km	450 km^2
Waters affected by abstraction or impoundment	7,000 km	420 km^2
Waters affected by building, engineering or other works	9,000 km	450 km^2

3.4 There are currently disparate and, in many instances, only partial controls on the abstraction of water, the impoundment of surface water and on engineering works affecting the water environment. The introduction of comprehensive control regimes for these activities is expected to be the most significant effect of the Controlled Activities Regulations.

3.5 At present, point source discharges are controlled through the Control of Pollution Act (CoPA) 1974. The Regulations will not significantly affect the overall costs of regulating point source discharges in the period to 2009. However, the new regulatory structure will reduce the cost of regulating low risk discharges. This will enable SEPA to concentrate more regulatory effort on tackling those discharges that are presenting a significant risk to the water environment.

3.6 Some of the measures included in CAR, especially the general binding rules, can be expected to have an effect on diffuse pollution, and their costs and benefits are thus estimated in this RIA. However, further controls will be needed to tackle diffuse pollution both in rural and in urban settings. This will be the subject of separate consideration by the Scottish Executive.

3.7 At present, artificial recharge or augmentation of groundwater is not a common practice in Scotland.

3.8 The Directive does not require environmental improvement measures to be in place until the end of 2012. However, the process of identifying and agreeing the objectives and the measures needed to achieve them has to be completed by the end of 2009. As outlined above, the Scottish Executive is introducing the Regulations at this time to:

- Enable deterioration of the status of the water environment to be prevented. Among other things, this will protect the water environment from damage that, if it occurred, might subsequently need to be remedied using costly restoration measures;

- Minimise the period in which there is uncertainty for businesses over the measures that will be required of them from 2012 to achieve the objectives of the Directive; and
- Provide sufficient time for the development of a programme of measures before the first river basin management plans must be finalised in 2009.

Reducing the regulatory burden

In line with the aims of the Hampton Report, the Scottish Executive's intent in introducing the Controlled Activities Regulations is to provide for selective, proportionate and streamlined control regimes. To achieve this, the Regulations will establish:

- **A new comprehensive control regime for each controlled activity. This will facilitate consistent and readily understood regulation**
- **A simple and flexible system of regulatory control options, including general binding rules, registration and licensing. This will enable regulatory effort to be focused on those activities posing the greatest risks to the water environment**
- **A common structure and operating procedure for all the control regimes. This will enable streamlined approaches, such as the use of a single licence to authorise several different controlled activities being conducted by a water user**
- **A single regulatory authority, SEPA. This will provide for cost-efficiencies in the management of the control regimes**

4. Estimates of impacts and environmental benefits

4.1 The recent pressures and impacts analysis provides information on the pressures on the water environment by sector. From this, it is possible to predict where the majority of the impacts of the Regulations are likely to fall:

ii) *Abstractions*: The biggest impact is likely to be on the public water supply sector, the hydropower sector, the drinks manufacturing sector and the agriculture sector. There may be moderate impacts on other sectors, such as mining.

iii) *Impoundments/flow regulation*: The largest impact is likely to be on the hydropower sector and the water supply sector. There may be moderate impacts on some other sectors.

iv) *Engineering work*: A modest impact is likely on local authorities, the construction sector and the agriculture sector. There may be limited impacts on other sectors.

4.2 SEPA has made a first tentative estimate of the scale of environmental improvements that are likely to be delivered through the Controlled Activities Regulations.

4.3 These estimates are based on:

- The results of the analysis of the pressures and impacts on the water environment, which has recently been completed by SEPA;

- An assessment of the potential measures that would be required to address the impacts indicated by the pressures and impacts analysis; and
- The results of the Quality and Standards III planning process, which has recently been undertaken by the Scottish Executive to determine the level of investment to be made in environmental improvements by Scottish Water.

Table 2: First estimate of the improvements in water quality to which the Regulations are expected to contribute by 2015

	Rivers	Lochs
Estimate of total adversely affected by point source pollution[1]	4,000 km	230 km^2
Initial estimate of improvements to which the Regulations will contribute	1,600 km	15 km^2
Proportion improved of the total affected by point source pollution	41 %	7 %

Table 3: First estimate of the improvements in river flows and loch water levels expected to be delivered by the Regulations by 2015

	Rivers	Lochs
Estimate of total adversely affected by abstraction and impoundment	7,000 km	450 km^2
Initial estimate of improvements expected to result from the Regulations	1,100 km	70 km^2
Proportion improved of the total affected by abstraction and impoundment	16%	16%

4.4 The Regulations do not provide for the restoration of damage to the physical habitats of surface waters resulting from past engineering works. Consequently, the Regulations' effectiveness in remedying existing physical damage will be limited to securing improved practices in relation to on-going maintenance works, such as river channel dredging. It has not been possible at this stage to estimate the scale of improvements that controls on such on-going works may be able to deliver.

5. Risk Assessment and Directive compliance

5.1 The UK is under an obligation to comply with EU Directives. Failure to do so may result in proceedings in the EU Court of Justice.

5.2 Article 11(3)(e) of the Directive requires Member States to establish controls over the abstraction of fresh surface water and groundwater, and impoundment of fresh surface water.

[1] Includes waters affected by point sources only and those affected by a combination of point and diffuse sources

5.3 Article 11(3)(f) of the Directive requires Member States to establish controls on artificial recharge or augmentation of groundwater bodies.

5.4 Article 11(3)(g) requires Member States to establish controls on point source discharges liable to cause pollution.

5.5 Article 11(3)(h) requires Member States to establish controls on diffuse sources liable to cause pollution.

5.6 Article 11(3)(i) requires Member States to establish controls on other activities liable to adversely affect the water environment, such as engineering works on rivers and lochs.

5.7 Article 11(3)(j) requires Member States to establish a general prohibition on direct discharges to groundwater.

5.8 Article 11(7) requires that Member States establish a programme of measures by 22 December 2009, at the latest.

5.9 Article 11(7) requires that the programme of measures be fully operational by 22 December, 2012, at the latest.

6. Implementation options considered by the RIA

6.1 The Controlled Activities Regulations will establish a requirement for prior authorisation of controlled activities. Authorisation will take one of three forms:

- ***General Binding Rules*** *(GBRs)*: The Regulations will provide authorisation for specific activities undertaken in accordance with the relevant rules. Many low risk and small scale activities, such as abstractions of less than 10 m^3 per day, would be authorised directly by the Regulations;
- ***Registration:*** A range of other small scale activities, such as septic tank discharges, would be authorised by registration with SEPA. This will provide SEPA with the information needed to manage the risk of cumulative impacts; and
- ***Licensing*****:** Large scale and higher risk activities would be authorised under the conditions of a licence issued by SEPA.

6.2 For the purpose of assessing the regulatory impact of the proposed regulatory framework, a number of options have been considered. These are:

- **Option A:** Point source pollution would continue to be controlled by SEPA under CoPA. Controls on other activities would not be introduced until 2009;
- **Option B:** The proposed Regulations, as produced following our consultations in April 2004 and March 2005;
- **Option C:** All controlled activities would as a minimum have to be registered with SEPA. Medium risk activities would have to be registered and comply with general binding rules. Large scale and high risk activities would require authorisation under the conditions of a licence issued by SEPA; and

- **Option D:** All activities falling under the scope of the Regulations would need to be licensed by SEPA.

6.3 Table 4 summarises the approximate number of activities SEPA estimates would be authorised by the different mechanisms provided for in option B, C and D. Option A would move to one of these three options from 2009 when river basin management plans and programmes of measures must be finalised.

Table 4: SEPA forecasts for the total number of activities authorised by the different mechanisms provided for in the options considered by this RIA

Authorisation mechanism	Directly by a GBR in the Regulations	Registration with SEPA	Registration with SEPA under a GBR	Licensed by SEPA
Option B	**50,000**	**80,000**	**n/a**	**15,000**
Option C	**n/a**	**100,000**	**30,000**	**15,000**
Option D	**n/a**	**n/a**	**n/a**	**145,000**

6.4 Approximately 100,000 of the activities included under each option in Table 4 are point source discharges covered by the provisions of the existing CoPA regime. The additional 45,000 activities are mainly abstractions, with some impoundments and engineering works.

7. Analysis of the costs and benefits of the implementation options

7.1 Table 8 at the end of this report provides a detailed summary analysis of the costs and benefits of the four regulatory options considered by this RIA.

The main benefits of Options B, C and D compared to Option A are:

- **Enabling compliance with the requirements of the Water Framework Directive;**
- **Enabling SEPA to prevent deterioration of the status of the water environment prior to 2009;**
- **Significantly reducing the period of uncertainty for businesses about the measures that will be required of them to implement the Directive from 2012;**
- **Providing SEPA with the additional information on water use it needs to establish alternative objectives and prepare a coherent river basin management plan for 2009; and**
- **Providing SEPA with the additional information on water use it needs to design cost-effective environmental monitoring programmes by 2006.**

7.2 Option A does not provide any of the above benefits. It provides a benefit to water users by delaying the levying of charges to recover SEPA's costs by three years until after 2009. However, as outlined in paragraph 8.15 below, this benefit may be counteracted by increased costs after 2009.

Environmental benefits

7.3 After 2009, all four options would provide an effective means of delivering progressive improvements in the status of the water environment. The extent of these improvements would depend on what could be achieved without incurring disproportionate expense.

7.4 Options B, C and D may also deliver environmental benefits prior to 2009 as a result of SEPA's plan to specify the conditions required of water users from 2012 when carrying out licence reviews. There are clear informational benefits to business from this as it will allow business greater time to plan the necessary investment needed to comply with the authorisation conditions. In some cases, businesses may decide to implement compliance measures prior to 2012. This will result in the early achievement of environmental improvements.

Informational benefits

7.5 The information collected through the Regulations on the scale and location of pressures (e.g. from applications for authorisation) is necessary to inform the river basin planning process and in particular the processes of developing a programme of measures and designing environmental monitoring programmes.

7.6 Under Option A, no new information would be obtained through a regulatory process prior to 2009. This would pose serious problems for the river basin planning process. It is likely that SEPA would be unable to develop a coherent programme of measures for addressing abstraction and impoundment pressures in time for the first River Basin Management Plan. This would also expose Scotland to a serious risk of infraction proceedings.

7.7 Options C and D could provide SEPA with information on the location of all activities, including small scale and low risk activities. The availability of such information would help SEPA identify and address those circumstances in which small scale activities contribute, in combination with other activities, to a cumulative impact on the water environment. It would also provide SEPA with a means of taking into account the needs of small scale activities when taking other regulatory decisions, such as authorising a large abstraction that might affect the resource available to a small scale abstraction.

7.8 Under Option B, SEPA would be able to obtain, through the Regulations, the information needed to manage the risks to the achievement of good status identified in the pressures and impacts analysis. SEPA would have to use alternative sources of information for identifying circumstances in which small scale activities not registered with SEPA might be contributing to a cumulative impact. Such alternatives could include environmental monitoring, one-off surveys and the use of information available from other public bodies. For minor abstractions SEPA will be able to utilise data gathered under the proposed Private Water Supply Regulations

Costs

7.9 The main costs common to all the Options, although incurred later under Option A, are:

- costs incurred by SEPA - regulation, administration and enforcement costs which will be recovered from water users; and
- costs incurred by businesses – administrative costs of obtaining authorisation and the costs of compliance measures.

Regulatory costs

7.10 Table 5 provides estimates of the costs of regulation, administration and enforcement incurred by SEPA under the different options in the period 2005/6 to 2009/10.

Table 5: Estimated costs incurred by SEPA in implementing the different options	
Option	**Average annual costs for the period 2005/6 - 2009/10**
Option A [Introduction of regulations postponed until after 2009, then option B, C or D]	**None**
Option B [The proposed Regulations]	**£3.5 million**
Option C [All activities would require as a minimum to be registered with SEPA]	**£4.0 million**
Option D [All activities would require a licence]	**£4.5 million**

7.11 The costs shown in Table 5 are the costs incurred by SEPA that are directly attributable to the introduction of the regulatory regimes for abstraction; impoundment and engineering. They do not include the costs of:

- Implementing WEWS Act's requirements, such as river basin management planning and environmental monitoring; nor the capital costs of the monitoring network. These costs will be incurred irrespective of whether the Regulations are introduced;
- Regulating point source discharges. The costs of such regulation are not significantly different to the overall costs of regulating point source discharges under CoPA.

7.12 The costs presented above will be recovered from operators through SEPA's charging scheme. SEPA's charging scheme will also recover the costs associated with those WEWS Act requirements for environmental monitoring.

7.13 SEPA are in the process of developing a charging scheme with stakeholders and there will be a full consultation before the Regulations come into force. In addition, SEPA have already provided stakeholders with briefing on issues such as indicative application costs.

Costs to businesses

7.14 The Regulations provide for the authorisation of several different activities (e.g. a discharge and an abstraction) in one licence. The ability to licence discharges and other activities using the same regulatory framework is expected to reduce administrative costs to businesses compared to the introduction of additional disparate control regimes.

7.15 Under Option A, the administrative and compliance costs to businesses in the period to 2009/10 would be zero. However, it is anticipated that beyond 2009/10 the costs to businesses would be higher than under Option B. This is because businesses would have less time to plan and implement measures and therefore could have fewer choices on how to meet the conditions of their authorisation. SEPA would also be unable to prevent deterioration of status before 2009. This could add to the costs to businesses by increasing the extent of improvement required after 2009.

7.16 Under Option B, many small scale and low risk activities, such as abstractions of less than 10 m^3 a day, would not normally incur any administrative costs. Under Options C and D, businesses operating these activities would incur the administrative costs associated with registration and licensing requirements, respectively.

7.17 The administrative costs incurred by businesses in applying for authorisation by registration or licence will vary. For registration, the administration costs to businesses are expected to be very low. Businesses would simply be required to inform SEPA about the details of the controlled activity, including its location. SEPA is developing a simple web-based registration facility to help minimise the administrative costs of applying for registration.

7.18 For licence applications, the administrative costs to businesses will depend on the scale, complexity and risks posed by the activity. For relatively small scale and medium risk activities, the administrative costs to businesses of making an application for a licence would be expected to be only slightly higher than those for registering an activity with SEPA. For higher risk activities, SEPA may require detailed information to support a licence application, including an environmental report. In the most complex cases, applicants may need to employ consultancy advice and commission environmental surveys in compiling such reports. However it is also expected that activities providing an environmental benefit will not incur charges.

7.19 The main difference in administrative costs between the options is in relation to small scale and low risk activities. Table 6 provides a comparison of the relative administrative costs associated with applications for authorisation.

Table 6: Relative administrative costs to businesses associated with applications for authorisation	
Option A	No administrative costs until after 2009 then as Option B, C or D
Option B	No administrative costs for around 50,000 activities authorised directly by the Regulations and which therefore would not need to apply to SEPA for authorisation Low, one-off administrative costs for around 80,000 activities that would require authorisation by registration with SEPA Medium-high administrative costs for around 15,000 activities that would require authorisation by licence, and additional administrative costs would be incurred each time the responsible person for a licensed activity was changed
Option C	Low, one-off administrative costs for up to around 130,000 activities that would require authorisation by registration with SEPA Medium-high administrative costs for around 15,000 activities that would require authorisation by licence, and additional administrative costs would be

	incurred each time the responsible person for a licensed activity was changed
Option D	Medium-high initial administrative costs than Option C for the estimated 145,000 activities that would require authorisation by licence rather than by registration with SEPA Subsequently, additional administrative costs would be incurred each time the responsible person for a licensed activity was changed

7.20 The compliance costs to businesses would not be expected to differ between the options. Under all options, including Option A, conditions requiring any significant changes to existing operational practice would not come into effect until 2012. Under all the options, a licence would include only those conditions necessary to manage the risk posed by the activity to the water environment. The cost to businesses of complying with any particular risk-based condition is likely to vary depending on local circumstances.

7.21 For example, to manage the risk to the water environment from an abstraction, SEPA will require information on the magnitude of the abstraction. This is likely to be one of the few new conditions that would apply before 2012. The accuracy required of such information will be proportionate to the risk posed by the abstraction, with greater accuracy generally being required where the risk is high. For low risk abstractions, including those covered by GBR or registration under Options B and C, a simple estimate of the volume to be abstracted and some means of demonstrating that the volume will not exceed the authorised limit is all that is likely to be needed. For high risk activities, more accurate information on the abstraction will need to be collected and maintained. Water users may have a number of options for providing such information depending on the accuracy required and the means by which they abstract. For example, some water users will already be metering their abstraction for their own purposes. Others may be able to calculate the rate of abstraction based on the characteristics of the pump they use for the abstraction or on other physical limits or constraints on the abstraction rate within their abstraction works. Where an abstractor needs to install a meter for the purposes of providing SEPA with the information it requires, the costs are likely to range from £200 to £300 for a medium sized abstraction (100 m^3/day) up to around £3,000 to £5,000 for a very large abstraction (100,000 m^3/day). On occasions there may be additional costs of installation or access to consider on top of the set up estimates.

Quality & Standards 3 (Q&S 3) is the capital investment programme proposed for the water industry in Scotland that will operate between 1st April 2006 and 31st March 2014. In that time period capital projects will be delivered during the first Programme of Measures for the Water Framework Directive (WFD). The same period also sees the alignment of the objectives of many existing Directives to the measures required under the WFD, and it is with the objectives of those Directives, and the overarching aims of the Water Framework Directive in mind, that the scope of the investment programme has been developed. Given that much of the identified investment is being made on the basis of current requirements, and that capital will often benefit multiple environmental drivers, including WFD objectives, it is not possible to separate out the capital costs solely for compliance with WFD that may be implemented within the Q&S 3.

Costs to the Scottish Executive

7.22 Under Option A, the costs of the WEWS Act requirements for environmental monitoring other than for water quality in the period 2006/07 – 2008/09 would have to be funded entirely

from the public purse. Under Option B, C and D, the costs of environmental monitoring directly attributable to abstraction, impoundment and engineering works would be recovered from those responsible for the pressures on the water environment.

7.23 Costs to the Scottish Executive are likely to be incurred if the requirements of the Water Framework Directive are not met. Compliance with the Directive is a legal obligation and failure to do so may result in legal proceedings. Table 7 summarises the compliance assessment for each of the options considered by this RIA.

7.24 Adopting Option A would place SEPA in a position of being unable to develop a programme of measures by the Directive's 2009 deadline for doing so and unlikely to be able to make a programme of measures fully operational by 2012. A failure to do either would mean non-compliance with the Directive's requirements.

7.25 Options B, C or D would be expected to enable compliance with the Directive's requirements.

Table 7: Summary of compliance assessment	
Option A	Non compliance with the requirements of the Water Framework Directive. High risk of legal proceedings by the European Court of Justice
Option B	Would enable compliance with the Water Framework Directive's requirements
Option C	Would enable compliance with the Water Framework Directive's requirements
Option D	Would enable compliance with the Water Framework Directive's requirements

8. Small Firms Impact Assessment

8.1 In drawing up these proposals for regulation specific consideration was given to the potential impact of controls on small businesses, such as rural hotels and agricultural activities. For many small hotels there will be a limited impact by the new proposals. In many cases it will be their use of a septic tank which bring them within the scope of the Regulations. For agricultural operators it is more likely to be small abstractions or minor engineering activities such as dredging ditches which brings them into the regime.

8.2 Those using septic tanks should already be licensed through the existing CoPA scheme. The proposals would be beneficial to these operators, as the introduction of registration under CAR would replace the CoPA licence. This would be a lower regulatory control for these businesses.

8.3 Under Option A in the short term there would be an advantage to small businesses in that they would not incur additional costs until 2009, although for those operating septic tanks the existing costs under the CoPA regime would roll forward. Under Option B there would be some relatively low costs for those businesses carrying out small scale and low risk activities, and for

businesses discharging from septic tanks there would be a lower regulatory burden. This option also provides the fairest approach as there is equity of treatment for all operators by ensuring the proposals are proportionate to risk. Under Options C and D the costs to small businesses would be disproportionately high.

9. Competition Assessment

9.1 Under Option A and in the short term, Scottish firms would retain any existing competitive advantage in relation to firms in England and Wales, where controls on abstraction and impoundment have been in place since the 1960s. Any such advantage is expected to disappear in 2012, by which time measures must be fully operational across Europe. The postponement of the introduction of Regulations until after 2009 would leave little time for Scottish firms to properly plan the implementation of the measures required of them. As a consequence, firms in England and Wales could gain some competitive advantage. The introduction of the regulations from 2005 would reduce the period of uncertainty for Scottish firms and provide them with a longer period in which to plan the implementation of the required measures.

9.2 Under Option B, Scottish firms operating small scale and low risk activities would not incur additional administrative costs. Under Options C or D, such firms would incur small administrative costs. The scale of these costs would not normally be expected to affect a firm's comparative advantage.

9.3 Scotland, as a relatively sparsely populated and water rich country, is unlikely to suffer a competitive disadvantage from the introduction of a common standard of environmental protection across Europe. The widely recognised high quality of Scotland's water environment overall compared to that of many other Member States, and indeed to that of England & Wales, could act as a source of comparative advantage.

10. Enforcement and sanctions

10.1 SEPA, as the regulatory body will be responsible for enforcement. The provisions to enable SEPA to take appropriate action will consist of notices, powers of entry, and enforcement through the courts when necessary.

11. Monitoring and Review

11.1 The Executive intend to review the Regulations within 4 years of implementation.

12. Summary and Recommendation

12.1 The recommendation is to take forward Option B, the Regulations as proposed. This option is considered to offer the appropriate balance between the administrative costs incurred by water users and the provision of effective controls for the protection and improvement of the water environment.

12.2 Option A of postponing the introduction of Regulations until after 2009 is not considered to be a viable option. Scotland's ability to complete the river basin management planning process by 2009 would be significantly compromised. Businesses would remain in a position of uncertainty until after 2009 about the measures they will be required to take from 2012. It would also result in non-compliance with the Water Framework Directive and a serious risk of legal proceedings by the European Court of Justice.

12.3 Options C and D would both produce greater informational benefits than the recommended option. This could lead to more informed programmes of measures in the future. However, in both options it is considered that the potential additional benefits are outweighed by the additional administrative costs to SEPA and water users.

13. Summary analysis of options

Table 8: Analysis of the costs and benefits of different regulatory options

Option	Benefits	Costs
Option A [Regulations delayed until 2009]	• No environmental benefits would be delivered prior to 2009; • Environmental benefits would be delivered after 2009 but, because of the short period for planning by businesses, the achievement of environmental improvements would be expected to be delayed compared to other options; • No informational benefits would be provided prior to 2009. Unlike Options B, C and D, prior to 2009 SEPA would not be able to obtain information on pressures, or on the costs of measures to address those pressures, from water users' applications for authorisation; • Regulatory costs would not be incurred until after 2009. Charging of water users to recover these costs would also only commence after 2009	• There would be no certainty for businesses about the measures required of them until after 2009. This would leave businesses with a very limited period in which to plan, and raise finance, before the Directive's deadline of 2012 for making measures operational. There would be a high risk that the Directive's deadline for making measures fully operational would be missed; • There would be a significant risk that deterioration of status would not be prevented in the period prior to 2009. This could add significantly to post-2009 costs of water environment improvements; • The lack of regulatory information on abstraction and impoundment pressures would compromise SEPA's ability to efficiently target environmental monitoring programmes in the first river basin planning cycle. This could waste monitoring resources and lead to a failure to provide suitable monitoring data for river basin management planning; • The lack of regulatory information on pressures and on the costs of measures to address those pressures would compromise SEPA's ability to develop the first river basin management plans. In particular, there would be inadequate information for making good judgements about the most cost-effective combinations of measures for achieving good status and for justifying the setting of alternative objectives; • A programme of measures could not be established by the Directive's deadline of 2009; • The introduction of regulations after the river basin management plan is adopted in 2009 would limit the flexibility on authorisation conditions. For example, it would be difficult to accommodate appeals by water users against conditions imposed

		after 2009 if doing so would compromise the objectives adopted in the river basin management plan; • All environmental monitoring required by the WEWS Act in the period until 2009 would have to be met from public funds. This would include those monitoring and planning costs attributable to abstraction, impoundment or engineering pressures on the water environment.
Option B [As per the proposed Regulations]	• SEPA would be able to prevent deterioration of the status of the water environment from 2006 onwards; • Water users would be able to phase in any improvement measures needed by 2012 from as early as 2006, depending on the date their authorisation under the Regulations was reviewed by SEPA; • The compliance conditions required of water users would be identified from as early as 2006. This would reduce the period of uncertainty for businesses compared to Option A and provide time for businesses to plan, and raise finance for, the necessary improvements; • Applications for authorisation would provide SEPA with the information on abstraction and impoundment pressures necessary to most effectively target the monitoring programmes for the first river basin planning cycle; • Applications for authorisation would provide SEPA with both the information on abstraction and impoundment pressures and the regulatory process necessary to establish a programme of measures and set objectives in time for inclusion in the river basin management plan in 2009; • Environmental monitoring and river basin planning costs attributable to abstraction, impoundment or engineering pressures would be recovered from water users from 2006 onwards reducing the burden on the public purse; • A large number of small scale and low risk activities, such as all abstractions of less than 10 m^3 a day, would be authorised directly by the Regulations. In contrast to Options C and D, SEPA would not incur any costs associated with processing applications for authorisation for such activities. SEPA would be able to focus its regulatory resources on larger scale and high environmental risk activities;	• Total financial cost of regulations: £18 million for regulation by SEPA in the period 05/06 - 09/10; plus low administrative costs in respect of 80,000 activities, and medium-high costs in respect of 15,000 activities; • Regulatory costs would be incurred, and recovered by charging water users, from 2006 rather than from 2009 as in Option A; • This Option would not require registration for a range of small scale and low risk activities, such as abstractions of less than 10 m^3 a day. To identify those situations where there may be a risk of cumulative impacts from such activities and to take account of the needs of these activities in making its regulatory decisions, SEPA would have to use other means to obtain information on the location of these activities.

	• There would be no administrative costs for operators of significant numbers of small scale and low risk activities, since applications for authorisation from SEPA would not be required	
Option C [All activities would require to be at least registered with SEPA]	• As Option B except that this Option's comprehensive registration requirements would provide SEPA with information on the location of all activities, including small scale and low risk activities. The availability of such information would make it easier compared to Option B for SEPA to identify those circumstances where there may be a risk of cumulative impacts and to take account of the needs of such activities in making its regulatory decisions	• Total financial cost of regulations: £20 million for regulation by SEPA in the period 05/06 - 09/10; plus low administrative costs in respect of 130,000 activities, and medium-high costs in respect of 15,000 activities; • The requirement to at least register all activities with SEPA would impose administrative costs on operators of small scale and low risk activities; • SEPA would incur costs associated with the processing of large numbers of applications for authorisation by registration from operators of small scale and low risk activities. This could put pressure on the resources needed to deal effectively and efficiently with large scale and higher risk activities; • The three different levels of authorisation provided for under this Option (registration; registration under a GBR and licensing) would make this a more complicated regime than Options B and D. Consequently, the regime could be more difficult to manage and for water users to understand.
Option D [All activities would require a licence]	• As Option C, except that the benefits attributed to the registration of small scale and low risk activities would be delivered by the requirement for such activities to be authorised by licensing; • This Option offers a simpler regulatory structure than either Options B or C. This may be easier to understand and operate.	• Total financial cost of regulations: £22 million for regulation by SEPA in the period 05/06 - 09/10; plus medium-high costs in respect of 145,000 activities; • The requirement for all activities to be licensed by SEPA would impose comparatively higher administrative costs on operators of those activities that would: (a) Only require registration under Option C; or (b) Be authorised by a GBR or by registration under Option B; SEPA would incur costs associated with the processing of large numbers of licence applications from operators of relatively small scale and low risk activities. This could put pressure on the resources needed to deal effectively and efficiently with larger scale and higher risk activities.

Declaration

'I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs'.

Signed:

Lewis Macdonald

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Deputy Minister for Environment and Rural Development

Date 27 April 2005

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