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## DIRECTIONS

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### ENVIRONMENTAL PROTECTION

#### The Water Environment (Shellfish Water Protected Areas: Objectives and Classification etc.) (Solway Tweed) Directions 2021

*Made* - - - - - *4<sup>th</sup> March 2021*  
*Coming into force* - - - - - *15<sup>th</sup> March 2021*

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The Scottish Ministers give the following Directions to SEPA in exercise of the powers conferred by section 40(1) of the Environment Act 1995(a), section 2(6) of the Water Environment and Water Services (Scotland) Act 2003(b) and all other powers enabling them to do so.

In accordance with section 40(6) of the Environment Act 1995, they have consulted SEPA.

#### **Citation, commencement and extent**

1.—(1) These Directions may be cited as the Water Environment (Shellfish Water Protected Areas: Objectives and Classification etc.) (Solway Tweed) Directions 2021 and come into force on 15<sup>th</sup> March 2021.

(2) These Directions extend to Scotland only.

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(a) 1995 c.25. The functions of the Secretary of State in or as regards Scotland were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c.46).  
(b) 2003 asp 3.

## Revocation

2. The Water Environment (Shellfish Water Protected Areas: Objectives and Classification etc.) (Solway Tweed) Directions 2016 are revoked.

## Application

3. These Directions apply only—

- (a) in relation to the part of the Solway Tweed River Basin District which is in Scotland; and
- (b) in relation to the exercise of SEPA's functions (so far as relevant) under—
  - (i) the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004(a);
  - (ii) Part 1 of the Water Environment and Water Services (Scotland) Act 2003(b), in so far as it applies to the Solway Tweed River Basin District; and
  - (iii) The Water Environment (Controlled Activities) (Scotland) Regulations 2011(c).

## Interpretation

4.—(1) In these Directions—

“the Act” means the Water Environment and Water Services (Scotland) Act 2003;

“the 2004 Regulations” mean the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004;

“90-percentile standard” means a standard that is failed if the most probable number of *Escherichia coli* is greater than the standard for 10% or more of the assessment period;

“assessment period” means one or more calendar years (as determined by SEPA);

“environmental objectives” has the same meaning as in regulation 2(1) of the 2004 Regulations, and “shellfish water protected area objective” means an objective falling within paragraph (b) of that definition;

“*Escherichia coli* input zone” means an area of coastal water or transitional water identified under article 13(1);

“most probable number of *Escherichia coli*” means the most probable number of *Escherichia coli* enumerated using a two stage, five-tube, three dilution most probable number test which is consistent with the international standard analytical method ISO/TS 16649-3:2005(d);

“pollution” includes pollution by any substance or heat liable to cause pollution, and for the purposes of this definition “substance” includes bacteria and other pathogens;

“shellfish water protected area” means any area of coastal water or transitional water designated under section 5A(1) of the Act as applied to the Solway Tweed River Basin District by regulation 5 of the 2004 Regulations;

“shellfish water quality” means the quality of a shellfish water protected area, assessed in accordance with the quality criteria to be applied for that purpose by article 12; and

“Solway Tweed River Basin District” means the area identified under regulation 3(1) of the 2004 Regulations.

(2) In these Directions, any reference to an enactment (including an enactment comprised in, or an instrument made under, an Act of the Scottish Parliament) is a reference to that enactment as amended from time to time.

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(a) S.I. 2004/99, as relevantly amended by S.I. 2016/139.

(b) Part 1 was relevantly amended by section 54 of the Aquaculture and Fisheries (Scotland) Act 2013 (asp 7). Part 1 applies to the Solway Tweed River Basin District subject to the modifications set out in schedule 4 to S.I. 2004/99.

(c) S.S.I. 2011/209.

(d) “Microbiology of food and animal feedings stuffs - Horizontal method for the enumeration of  $\beta$ -glucuronidase-positive *Escherichia coli* - Part 3: Most probable number technique using 5-bromo-4-chloro-3-indolyl- $\beta$ -D-glucuronide”.

### **Proposing shellfish water protected area objectives**

5.—(1) SEPA must take steps to ensure (insofar as it is able to do so) that the shellfish water protected area objectives proposed in accordance with paragraph 6(1)(a) of schedule 1 of the 2004 Regulations are objectives which would—

- (a) prevent deterioration of the shellfish water quality of each shellfish water protected area; and
- (b) protect and improve each shellfish water protected area with the aim of achieving good shellfish water quality (as assessed in accordance with article 12) by 22nd December 2021.

(2) This article is subject to articles 6 and 7.

### **Shellfish water protected area objectives: phased achievement**

6. SEPA may apply a later deadline than that specified in article 5(1)(b) if the following conditions are met—

- (a) no further deterioration would occur in the shellfish water quality of the area;
- (b) SEPA determines that all necessary improvements in the shellfish water quality of the area cannot reasonably be achieved within the timescale set out in article 5(1)(b) for at least one of the following reasons—
  - (i) the scale of improvements required can only be achieved in phases exceeding the timescale, for reasons of technical feasibility;
  - (ii) completing the improvements within the timescale would be disproportionately expensive; or
  - (iii) natural conditions do not allow timely improvement in the shellfish water quality of the area;
- (c) extensions are limited to a maximum of one update (or, as the case may be, further updates) of the river basin management plan or the update of it which first sets out the information required by paragraph (d) (except in cases where the natural conditions are such that the shellfish water protected area objectives approved under paragraph 6(3) of Schedule 1 to of the 2004 Regulations cannot be achieved within that period);
- (d) the river basin management plan (or the next update of it) sets out—
  - (i) the extension of the deadline, and explains the reasons for it;
  - (ii) a summary of the measures which are envisaged as necessary to bring the area progressively to the required quality by the extended deadline; and
  - (iii) the reasons for any significant delay in making these measures operational, and the expected timetable for their implementation; and
- (e) a review of the implementation of the measures referred to in paragraph (d) and a summary of any additional measures is included in updates of the river basin management plan.

### **Shellfish water protected area objectives: human activity or natural condition**

7. SEPA may propose less stringent shellfish water protected area objectives for a shellfish water protected area instead of those required pursuant to article 5 when the area is so affected by human activity, or the natural condition of the area is such that the achievement of the objectives required pursuant to article 5 would be infeasible or disproportionately expensive, and the following conditions are met—

- (a) the environmental and socio-economic needs served by such human activity cannot be achieved by other means which are a significantly better environmental option not entailing disproportionate costs;

- (b) the highest shellfish water quality possible is achieved, given impacts that could not reasonably have been avoided due to the nature of the human activity or pollution;
- (c) no further deterioration would occur in the shellfish water quality of the affected area; and
- (d) the establishment of less stringent environmental objectives, and the reasons for it, are set out in the river basin management plan (or the next update of it) and those objectives are reviewed every 6 years.

**Shellfish water protected area objectives: application of articles 5 to 7**

8. Articles 5 to 7 must not be applied in a way that is inconsistent with the implementation of any retained EU law relating to the environment.

**Content of monitoring programme**

9.—(1) SEPA must take steps to ensure (insofar as it is able to do so) that the monitoring programme established under paragraph 5 of schedule 1 of the 2004 Regulations (and without prejudice to any other requirement of the programme), for each shellfish water protected area—

- (a) covers monitoring of the quality of the area;
- (b) enables a reliable assessment of—
  - (i) the shellfish water quality of the area;
  - (ii) the extent to which each shellfish water protected area objective approved pursuant to paragraph 6(3) of schedule 1 of the 2004 Regulations has been, or is likely to be, achieved; and
  - (iii) any risks to the achievement of those shellfish water protected area objectives; and
- (c) enables the area to be classified by reference to its shellfish water quality in accordance with article 12 of these Directions).

(2) Monitoring in relation to each shellfish water protected area pursuant to paragraph (1) must be commenced within the period of 3 months beginning with the date on which the area is designated as a shellfish water protected area.

**Preparation of programme of measures**

10.—(1) SEPA must take steps to ensure (insofar as it is able to do so) that each programme of measures prepared in accordance with paragraph 6(1)(b) of schedule 1 of the 2004 Regulations includes measures to achieve the shellfish water protected area objectives required for each shellfish water protected area approved pursuant to paragraph 6(3) of schedule 1 of the 2004 Regulations.

(2) SEPA must review each programme of measures, in so far as it comprises measures to achieve a shellfish water protected area objective in the Scottish part of the Solway Tweed River Basin District, and, if necessary, update it by 22nd December 2021 and every 6 years after that.

(3) Where a programme of measures is updated under paragraph (2), any new or revised measure to achieve a shellfish water protected area objective which is included in the updated programme must be implemented within 3 years of the date on which that measure was added or revised.

**Implementation of programme of measures**

11.—(1) Where monitoring or other data indicate that any such shellfish water protected area objective set for the shellfish water protected area is unlikely to be achieved, SEPA must take steps to ensure that—

- (a) the causes of the possible failure are investigated;
- (b) any relevant permits and authorisations are examined and reviewed as appropriate;

- (c) the associated monitoring programme is reviewed and adjusted as appropriate; and
- (d) any additional measures needed to achieve those objectives (subject to the application of articles 5 to 7) are included in the programme of measures applying to that area.

(2) SEPA must take steps to implement (insofar as it is able to do so) each measure in the programme of measures to be applied to achieve a shellfish water protected area objective in the Scottish part of the Solway Tweed River Basin District.

**Assessment and classification of shellfish water quality: standards and criteria to be applied**

12.—(1) For the purposes of assessing and classifying the quality of each shellfish water protected area, SEPA must apply the quality criteria in paragraph (2).

(2) The quality of a shellfish water protected area must be assessed and classified as—

- (a) “excellent” if it satisfies the standard for ‘Excellent’ in the table below;
- (b) “good” if it otherwise satisfies the standard for ‘Good’ in the table below; and
- (c) “insufficient” if it does not satisfy either of those standards.

Shellfish water quality standards	
<i>Most probable number of Escherichia coli per 100g sample of shellfish flesh and intra-valvular liquid as a 90-percentile standard</i>	
Excellent	Good
≤ 230	≤ 4,600

(3) SEPA—

- (a) must discount the results of a sample if—
  - (i) it has carried out an investigation to establish whether the sample was likely to have been significantly affected by—
    - (aa) wild animal sources(a) of *Escherichia coli*; or
    - (bb) an exceptional event of short duration; and
  - (ii) in its view (based on the investigation), the sample was so affected; and
- (b) may discount the results of a sample collected from an *Escherichia coli* input zone.

(4) In paragraph (3)(a) “an exceptional event” means a one-off or otherwise unusual pollution event, other than an event caused by intermittent discharges under normal weather conditions(b).

***Escherichia coli* input zones**

13.—(1) Subject to paragraph (2), SEPA may identify one or more areas of coastal water or transitional water (within a shellfish water protected area) which it considers are immediately adjacent to sources of inputs of *Escherichia coli* resulting from human activities.

(2) The combined surface area of each *Escherichia coli* input zone identified within a shellfish water protected area must not exceed 5% of the surface area of the shellfish water protected area.

**Shellfish water protected area objectives: natural cause or force majeure**

14. For the purposes of these Directions and the achievement of shellfish water protected area objectives approved under paragraph 6(3) of Schedule 1 to the 2004 Regulations, SEPA may consider a temporary deterioration in the shellfish water quality of a shellfish water protected area as not breaching those objectives if the deterioration is the result of circumstances of natural cause

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(a) These sources include mammals such as seals and deer, and birds (for example in sea-bird nesting colonies or rafts).  
 (b) An exceptional event may, for example, include a pollution event attributed to exceptional weather or caused by a burst sewer or a breakdown at a treatment works. It would not include pollution resulting from intermittent discharges from a combined sewer overflow which occur during normal weather conditions.

or force majeure which are exceptional or could not reasonably have been foreseen, or the result of circumstances due to accidents which could not reasonably have been foreseen, and the following conditions are met—

- (a) all practicable steps are taken—
  - (i) to prevent further deterioration in shellfish water quality of the area; and
  - (ii) so as not to compromise the achievement of the objectives approved under paragraph 6(3) of Schedule 1 to the 2004 Regulations for any body of water not affected by the circumstances;
- (b) all practicable measures are taken with the aim of restoring the area to the shellfish water quality it had before the effects of the circumstances as soon as reasonably practicable; and
- (c) a summary of the effects of the circumstances and of such measures taken or to be taken in accordance with paragraphs (a) and (b) are included in the next update of the river basin management plan.

St Andrew's House,  
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4<sup>th</sup> March, 2021

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