

Scottish Executive Environment Group

**Implementing the Water Environment and
Water Services (Scotland) Act 2003:**

**Consequential Amendments to the Electricity
Act 1989, Existing Schemes & Local
Enactments.**

A Policy Statement

March 2006

INTRODUCTION

This paper relates to the consequential amendments made to the Electricity Act 1989, existing schemes and local enactments as a result of the introduction of the Water Environment and Water Services (Scotland) Act 2003, and the Water Environment (Controlled Activities) (Scotland) Regulations 2005 made thereunder. This policy statement explains the purpose of the amendments which have been introduced to facilitate a joined-up approach between these legislative regimes.

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

BACKGROUND & PURPOSE

The Water Environment and Water Services (Scotland) Act 2003 ('WEWS' or 'the 2003 Act') transposed the requirements of the Water Framework Directive ('WFD' or 'the Directive') into Scots Law, and introduced a holistic framework to protect and improve the ecological status of the water environment, whilst also protecting the social and economic needs of those who depend upon it for their prosperity and quality of life.

In implementing the Water Framework Directive in Scotland, Ministers' overriding objective is to strike an appropriate balance between protection of the water environment and the needs of a wide range of water users. In particular, Ministers have expressed their commitment to minimising the impact of WFD implementation on renewables outputs.

In June last year, Ministers introduced the Water Environment (Controlled Activities) (Scotland) Regulations ('CAR' or 'the 2005 Regulations') under section 20 of the 2003 Act. The Regulations introduce risk-based and proportionate controls to protect Scotland's water environment from the impacts of 'controlled activities' – for example abstraction, impoundment, building and engineering works, as well as point-source discharges.

Certain controlled activities have historically been regulated to varying degrees, for example on an industry specific basis, and via disparate legislative regimes. Accordingly, the Executive is conducting a phased and prioritised review of existing legislation in accordance with the principles of 'Better Regulation' to deliver the objectives set out in the Policy Statement¹ which accompanied the 2005 Regulations; namely to –

- prevent duplicate and potentially conflicting regulatory control;
- ensure an integrated and holistic approach to the protection of Scotland's water environment; and
- ensure transparent regulation.

The remit of this exercise is strictly confined to consequential amendments. In other words this exercise is limited to the 'tidying up' of existing legislation to fit with the holistic framework of CAR; as opposed to the development of new policy as such or the full scale re-evaluation of existing legislation.

¹ A copy of the policy statement may be obtained at:
<http://www.scotland.gov.uk/Publications/2005/05/0995747/57481>

This review has identified the need to make consequential amendments to legislation where the subject matter is reserved under the Scotland Act 1998. In particular, amendments are required to demonstrate how the Electricity Act 1989 and the regime for protection of the water environment which is established by the 2003 Act and 2005 Regulations should co-exist. This will ensure that legislation pertaining to different aspects of the same operation is consistent and coherent.

SEPA's Role Under CAR

In its role as regulator, the Scottish Environment Protection Agency ('SEPA') has a duty to implement CAR in line with the overall policy objective – to strike an appropriate balance between the protection of the water environment and the social and economic needs of those who depend upon it. Accordingly, SEPA will ensure that the water environment is maintained in a form suitable for other water users by considering the effect of controlled activities on other abstractors and fisheries.

The Electricity Act 1989

As part of the consequential amendments programme we have considered the Electricity Act 1989 ('the 1989 Act') which provides a consenting regime for new electricity generation developments in Scotland. These changes aim to strike an appropriate and proportionate balance between the various interests of stakeholders, the purpose of the regime under the 1989 Act, and the aim of the 2005 Regulations to secure the holistic protection of Scotland's water environment.

We consider that these amendments provide a pragmatic and workable way forward at this point in time, providing industry with certainty and avoiding duplication of regulation. Appropriate administrative arrangements will also be introduced to underpin these amendments so as to provide greater transparency and clarity for operators and regulators alike. In particular, we expect Memoranda of Understanding ("MoUs") to be put in place between:

- Ministers and SEPA in respect of the interaction between the 2005 Regulations and the 1989 Act; and
- SEPA and the Fisheries Committee in respect of the 2005 Regulations and the 1989 Act.

According to Schedule 5, Part II (Head D1) to the Scotland Act 1998, the generation, transmission, distribution and supply of electricity are reserved matters. These amendments are therefore being made by way of an order under section 104 of the Scotland Act 1998 – the means by which UK legislation can be amended in consequence of an Act of the Scottish Parliament. In respect of the amendments to section 36 of, and Schedule 5 to, the 1989 Act, a further order, under section 63 of the Scotland Act, will transfer the function of consulting with SEPA to the Scottish Ministers.

These proposals respect the devolution settlement by bringing water environment protection functions in relation to Scottish generation developments within the scope of the Scottish legislation which gives effect to the WFD.

Copies of the orders as laid (and associated Explanatory Memoranda) may be accessed as follows:

The Water Environment and Water Services (Scotland) Act 2003 (Consequential Provisions and Modifications) Order 2006:

http://www.opsi.gov.uk/si/si2006/draft/ukdsi_0110699726_en.pdf

http://www.opsi.gov.uk/si/si2006/draft/em/uksidem_0110699726_en.pdf

The Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) (No. 2) Order 2006:

http://www.opsi.gov.uk/si/si2006/draft/ukdsi_011074151X_en.pdf

http://www.opsi.gov.uk/si/si2006/draft/em/uksidem_011074151X_en.pdf

THE ELECTRICITY ACT 1989

SECTION 36 – CONSENT REQUIRED FOR CONSTRUCTION ETC. OF GENERATING STATIONS

Electricity generating stations are subject to the consenting procedure under section 36 of the 1989 Act. In granting a section 36 consent, Ministers have a wide discretion to set appropriate conditions in relation to the operation of the scheme. In the absence of a holistic regime to protect Scotland's water environment, Ministers have until now exercised this discretionary power to incorporate conditions in the generating consent for the purpose of protecting the water environment to some degree. This power is also used to place restrictions on the generating station for wider purposes – for example, in order to minimise visual impacts on the landscape.

Proposed Approach to Interaction – Future Section 36 Consents

Neither the section 36 consenting process nor the 2005 Regulations can subsume in entirety the requirements of the other. Certain aspects of the section 36 consenting process will, however, also fall to be considered by SEPA under the 2005 Regulations from 1 April 2006. We are therefore of the view that the section 36 consenting process must be retained, but modified, so as to prevent duplicate, and potentially conflicting, regulatory and planning control.

Accordingly, from 1 April 2006, Scottish Ministers will no longer exercise the discretion at section 36(5) of the 1989 Act for the purpose of imposing conditions on the generating station relating to the protection of the water environment. It is clear that this change will be of most relevance to hydro-power generation activities, and will mirror the regulatory split that already occurs in England and Wales on water abstraction and electricity consents. The amendment will, however, ensure that *any* controlled activity being carried out under a section 36 consent is not subject to duplicate regulatory control.

In order to ensure that this policy objective is delivered in practice, the section 36 consent process has been amended to include a more explicit advisory role for SEPA. This places the requirement for dialogue between Ministers and SEPA (as the CAR regulator) on a statutory footing in order to provide industry with sufficient certainty that appropriate steps will be taken to avoid overlap between the two regimes. In general, it is anticipated that SEPA will advise Ministers what steps are being taken under the 2005 Regulations to protect the water environment and which conditions do not therefore need to be included within the section 36 consent. In addition, the amendments require Ministers to have regard to the purposes of Part 1 of the 2003 Act when making a determination under section 36 of the 1989 Act.

The amendments also includes a backstop provision designed to resolve any tensions that may emerge between a section 36 consent and an authorisation granted under the 2005 Regulations on matters relating to protection of the water environment during any future review of the CAR authorisation conditions.

SCHEDULE 5 – WATER RIGHTS FOR HYDRO-ELECTRIC GENERATING STATIONS IN SCOTLAND

Under Schedule 5 to the 1989 Act, Scottish Ministers may confer on a person who holds a generation licence water *rights* to abstract, divert and use water for the purposes of constructing or extending a generating station which is wholly or mainly driven by water, and of operating that generation station after such construction or extension.

There is no obligation on a person who holds a generation licence to obtain such an order. Moreover, we understand that in practice the water rights are usually obtained by way of agreement with the relevant riparian owner(s). Schedule 5 does, however, provide a means of obtaining the water rights compulsorily, for the public interest in electricity supply, where such agreement is not forthcoming.

According to Schedule 5, where Ministers are of the view that the abstraction, diversion and use will:

- (a) substantially reduce the flow of water in any watercourse – Ministers must prescribe the extent to, and the circumstances in, which water may be taken;
- (b) substantially reduce the level of water in any loch – Ministers must either prescribe the extent to, and the circumstances in, which water may be taken, or prescribe the quantity of compensation water to be provided;
- (c) impound any watercourse – Ministers must prescribe the quantity of compensation water to be provided.

In deciding whether to grant the order, or prescribing the quantity of compensation water to be provided, Ministers are required to have regard to *all* the circumstances of the particular case. In particular, Ministers must have regard to matters such as the interests of public health, the character of the watercourse and the flow or level of water in it. As far as practicable, Ministers must also ensure the protection of the rights of riparian owners, land owners and salmon fishings.

At present, SEPA (as a statutory consultee) already has an important role in the Schedule 5 process.

Proposed Approach to Interaction – Future Schedule 5 Orders

An authorisation granted under the 2005 Regulations will *regulate* an *existing right* to abstract for WFD purposes. It will not confer a right itself.

Although SEPA will have responsibility for the protection of the water environment via the 2005 Regulations, we do not believe that it would be appropriate for Ministers to confer the rights without prescribing the extent of those rights. Therefore, Ministers should not grant the rights in isolation from environmental considerations. The conferral of the *right* (via Schedule 5) and *environmental regulation* of that right (via the 2005 Regulations) are, however, very closely connected – for example, both must prescribe the required compensation flows. It is necessary, therefore, to amend the Schedule 5 process so as to ensure that legislation pertaining to different aspects of the same operation is consistent and coherent.

Accordingly, from 1 April 2006, Ministers will be required to obtain, and have regard to, SEPA's advice in respect of matters relating to the protection of the water environment before granting any Schedule 5 order. In particular, Ministers will be required to have regard to SEPA's advice as to the extent to, and the circumstances in, which water may be taken, and the quantity of compensation water to be provided. In addition, Ministers will be required to have regard to the purposes of Part 1 of the 2003 Act.

The amendments also include a backstop provision designed to resolve any tensions that may emerge between the section 36 consent and an authorisation granted under the 2005 Regulations on matters relating to protection of the water environment during any future review of the CAR authorisation conditions.

An MoU will be put in place between SEPA and Scottish Energy Ministers regarding the amendments to both section 36 consents and Schedule 5 orders. This will set out the detailed administrative arrangements that will be required in order to deliver these policy objectives and new legislative obligations. In relation to section 36 consents, the MoU will specify those generation consents where controlled activities are likely to feature, and the section 36 consents where SEPA should therefore provide advice to Ministers.

EXISTING SECTION 36 CONSENTS, SCHEDULE 5 ORDERS, ORDERS DEEMED TO HAVE BEEN MADE UNDER THE 1989 ACT² AND VARIOUS LOCAL ENACTMENTS

Historically, conditions relating to protection of the water environment have been included in a range of electricity generation consents, orders and local enactments. As part of the current exercise, consideration has been given to how these existing consents, orders and local enactments should interact with the 2005 Regulations and authorisations granted thereunder.

Proposed Approach to Interaction

At present, an operator carrying out a controlled activity which will be ongoing on, or after, 1 April 2006 is required to apply to SEPA for authorisation under the 2005 Regulations (see schedule 10 to the 2005 Regulations). This includes controlled activities which are currently authorised via existing legislation.

In the first instance, SEPA will simply replicate the terms of any such existing conditions relating to the protection of the water environment within the CAR authorisation so as to minimise the regulatory burden on industry. SEPA will then begin a phased and prioritised review of CAR authorisations from late 2006 in order to deliver WFD objectives.

Different conditions may be set, in accordance with the principles of the 2005 Regulations, as part of that process. In the interests of providing certainty to industry, the draft order makes provision to address any tensions that may emerge between an authorisation granted under the 2005 Regulations and this existing legislation on matters relating to protection of the water environment during any future review of the CAR authorisation conditions.

² By virtue of para 32 of Schedule 17.

SCHEDULE 9 – THE ROLE OF THE FISHERIES COMMITTEE

The Fisheries Committee is a small body comprising of members from a wide range of disciplines. As such, they are uniquely placed to provide, and interpret, advice on fisheries matters.

The statutory functions of the Committee are set out in Schedule 9 to the 1989 Act. The Committee has a statutory remit to make recommendations to Scottish Ministers and any person engaging in, or proposing to engage in, the generation of hydro-electric power on any questions relating to the effect on fisheries or stocks of fish. The Committee may give advice or assistance on its own initiative, where requested by Scottish Ministers or by a generator, or intending generator.

The Committee also advises in relation to the generation of electricity from wave and tidal power, and has a non-statutory role of advising on the effects of the cooling water systems of thermal generating systems.

In addition, the Committee's responsibilities include advising on existing hydro-electric and the other schemes that fall within its remit.

Proposed Approach to Interaction

Discussions with stakeholders have demonstrated that SEPA's statutory functions under CAR are distinct from the Committee's statutory functions under Schedule 9 to the 1989 Act.

SEPA does not currently, and will not for the foreseeable future, have in-house fisheries expertise. Accordingly, SEPA will seek advice from a range of bodies (for example, Fisheries Research Services) on fisheries matters before determining any CAR authorisation. As such, the Committee's expertise will be invaluable to SEPA in carrying out its new regulatory duties. In addition, SEPA may consult the Committee on a voluntary basis as part of the CAR determination process in respect of the impacts on fisheries from other controlled activities – not just hydro-power over the 1MW threshold. This advice will enable SEPA to set appropriate conditions in the CAR authorisation.

In order to prevent conflicting advice to Ministers and industry from 1 April 2006 – for example, in respect of required compensation flows – provision has been made to amend Schedule 9 to the 1989 Act. In the case of a generation station in respect of which a controlled activity will be carried on, this requires the Committee to seek and have regard to SEPA's advice on matters relating to the protection of the water environment before issuing any advice or recommendations to Ministers or industry under the 1989 Act.

Accordingly, from 1 April 2006, it is anticipated that the Committee's advice in relation to matters concerning protection of the water environment will be given and pursued as part of the CAR process. Advice in relation to matters not concerning protection of the water environment will continue to be given and pursued by way of the terms of Ministerial consent under the 1989 Act.

The Committee have also been designated as a Responsible Authority under section 2 of the 2003 Act, thereby requiring it to exercise its normal statutory functions in a way which secures compliance with WFD objectives. In doing so, the Committee will act to support

SEPA in its lead role for river basin management planning and will help secure a successful implementation of the Directive in Scotland.

These amendments will also be underpinned by appropriate administrative arrangements, including an MoU.

In our view, this approach is an appropriate and proportionate response at this time within the context of the current consequential amendments project. The amendments to Schedule 9 recognise the respective statutory roles and responsibilities of each organisation, formalise their already good working relationship, and ensure further co-operation and provision of joined-up advice.

As part of the Executive's commitment to demonstrating a joined-up approach in respect of the different areas of its work, Freshwater Fisheries Branch intend to conduct a full review of the interaction between the Fisheries Committee's statutory duties and SEPA's statutory duties under CAR once CAR is bedded in. This review will consider whether additional steps are required to minimise any overlap between the two organisations' roles and responsibilities – for example, as SEPA's expertise in relation to fisheries matters develops.

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