

**Memorandum of Understanding
Between**

Fisheries (Electricity) Committee



**Scottish Environment Protection Agency
(SEPA)**

Memorandum of understanding between the Fisheries (Electricity) Committee and SEPA

1. Purpose

- 1.1. The Fisheries (Electricity) Committee appointed under section 5(2) of the Electricity (Scotland) Act 1989 ("the Committee") and the Scottish Environment Protection Agency established under section 20 of the Environment Act 1995 ("SEPA") are Non Departmental Public Bodies responsible to Scottish Ministers for specific statutory functions.
- 1.2. The purpose of this Memorandum of Understanding is to set out how SEPA and the Committee will further develop their existing arrangements for working together following the introduction of the Water Environment (Controlled Activities) (Scotland) Regulations 2005 ("CAR"). As such it delivers the intent of the Executive's Policy Statement on the interaction between the Electricity Act 1989 and CAR. The Memorandum of Understanding has been further developed following:
 - the Ministerial announcement of 30 January 2008 regarding the future of the Committee;
 - feed back from stakeholder following the consultation on the draft MoU.
- 1.3. This will enable both SEPA and the Committee to continue to carry out their respective statutory duties under CAR and the Electricity Act 1989 in a complementary way, as far as is practicable, and thus avoid unnecessary administrative burdens on all parties involved.
- 1.4. The Memorandum of Understanding will apply to hydropower schemes and any thermal power station abstraction which requires a CAR authorisation.

2. WEWS and CAR

- 2.1 The Water Environment and Water Services (Scotland) Act 2003 (WEWS) transposed the requirements of the Water Framework Directive (Directive 2000/60/EC) ("the Directive") into Scots law. The aim of WEWS is to protect and improve the water environment, including fish and fisheries, and to promote sustainable water use, whilst also supporting the social and economic interests of those who depend on the water environment¹.
- 2.2 Section 2 of WEWS requires SEPA and the "responsible authorities", which include the Committee², to:
 - exercise their respective functions so as to secure compliance with the requirements of the Directive;
 - have regard to social and economic impacts of the exercise of their functions;
 - contribute to the achievement of sustainable development; and
 - co-operate with each other to deliver an integrated exercise of their respective functions.

¹ Implementation of the Water environment and Water Services (Scotland) Act 2003 Annual Report to the Scottish Parliament - 2005

² by virtue of The Water Environment and Water Services (Scotland) Act 2003 (Designation of Responsible Authorities and Functions) Order 2006.

- 2.3 WEWS introduced requirements for control regimes to regulate all activities that pose a risk to the water environment. These were introduced via CAR, which came into effect on 1 April 2006. CAR covers all activities that abstract or impound water, modify the morphology (landforms) of a water body or are liable to cause water pollution. The impacts of hydro schemes on the water environment are now therefore regulated by SEPA under CAR.
- 2.4 As part of the process for determining applications for authorisation under CAR, SEPA may consult the Committee about the impacts on fisheries from any controlled activity, not just those in respect of which the Committee has a statutory function.

3. Roles and responsibilities

SEPA role

- 3.1 SEPA determines CAR applications. It monitors compliance with any conditions imposed and must take enforcement action where a responsible person or operator fails to comply with CAR conditions or where it is otherwise necessary to do so in order to protect the water environment.
- 3.2 SEPA has determined applications made under the transitional provisions of CAR³, which existed prior to 1 April 2006, on the basis of current practice for those activities. Transitional applications made for new activities will be subject to conditions to ensure that appropriate mitigation is installed to protect the water environment and that best practice is followed in the design, construction and operation including monitoring of impacts
- 3.3 SEPA will progressively review authorisations issued under the transitional provisions to ensure their compliance with the requirements of WFD in line with its obligations under CAR. These reviewed authorisations, together with any applications for new activities commenced after 1 April 2006, will be based on environmental risk assessment and will include conditions to mitigate any impacts on the ecology or the interests of other water users including fisheries.

Fisheries Committee role

Electricity Act 1989

- 3.4 Paragraph 5 of Schedule 9 of the 1989 Act provides that the Committee shall have the function of giving advice and assistance, whether asked to do so or at its own initiative, to both Scottish Ministers and operators, relating to the effect on fisheries or fish stocks of "generating stations wholly or mainly driven by water".
- 3.5 Section 36 of the Electricity Act 1989 ("the 1989 Act") requires anyone wishing to construct or operate a generation scheme wholly or mainly driven by water, in Scotland, with a capacity of more than one megawatt, to apply to Scottish Ministers for consent ("section 36 consent"). An applicant for section 36 consent for such a generating station must consult the Committee, which may make recommendations to the applicant and copy them to Scottish Ministers. Ministers may refuse consent if the applicant does not follow the Committee's recommendations.

³ Schedule 10

- 3.6 The Committee's statutory function relates to all species of fish including eels, and extends to wave and tidal power, as well as hydro-electric power.
- 3.7 Hydro schemes equal to or below one megawatt are subject to the Salmon (Fish Passes and Screens) (Scotland) Regulations 1994 and to planning control through the development control functions of planning authorities and national park authorities. Such schemes are from time to time brought to the attention of the Committee by developers, District Salmon Fisheries Boards and others. The Committee may give advice whether asked or not.
- 3.8 In addition to its statutory function, the Fisheries Committee has been asked by Ministers to advise as necessary on the effects of the cooling water systems of thermal generating stations on fisheries and stocks of fish.

Consequential amendments

- 3.9 In order to resolve the potential conflict between the requirements of the 1989 Electricity Act and CAR, and in particular to prevent conflicting advice to Ministers and operators, the Water Environment and Water Services (Scotland) Act 2003 (Consequential Provisions and Modifications) Order 2006 amended the 1989 Act, requiring:
- Scottish Ministers, before granting section 36 consent for a hydro scheme, and
 - the Committee, before making a recommendation under paragraph 5 of Schedule 9 about a hydro scheme,
 - to obtain and have regard to the advice of SEPA on matters relating to the protection of the water environment.
- 3.10 The Scottish Executive Policy Statement that accompanied the above Order anticipates that SEPA will advise Ministers what steps are being taken under CAR to protect the water environment and which conditions do not therefore need to be included in the section 36 consent.
- 3.11 It also states that the Committee's recommendations that relate to protection of the water environment (including fish and fisheries) will be given and considered as part of the CAR licence determination process, and that its recommendations that do not relate to the water environment (including fish and fisheries) will continue to be given and considered as part of the section 36 consent determination process.
- 3.12 As public bodies, both the Committee and SEPA have a statutory duty, under the Nature Conservation (Scotland) Act 2004, in exercising their functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions. They must also take into account other relevant European/national legislation concerning the water environment eg the Habitats Directive

4. Principles in administering the CAR Regime

- 4.1 SEPA and the Committee will:
- work to ensure that conditions required to protect the water environment , including fish and fisheries, and third parties are assessed as part of the CAR authorisations process;
 - coordinate their work to ensure, as far as is possible, that developers are not subject to dual regulation;

- develop and maintain licence templates which include standard conditions designed protect fish and fisheries; and
 - develop a single guidance document which takes account of fish and fisheries and will ensure that developers are informed in advance of SEPA/Committee requirements.
- 4.2 SEPA and the Committee coordination will include the sharing of information, mutual consultation and copying of responses to consultations.

5. Applications for schemes greater than 1 MW

Pre-application discussions and CAR applications

- 5.1 Developers will continue to have a duty in terms of S 36 of the Electricity Act 1989 to consult the Committee for schemes above 1MW. However, the CAR application will be considered as both a CAR application and a consultation with the Committee under S36. SEPA will pass the details of the application on to the Committee. There will be no need for operators to contact the Fisheries Committee separately.
- 5.2 SEPA will take the lead in the consultation process. SEPA will work jointly with the Committee, other stakeholders and developers as part of pre-application discussions about new schemes in so far as this is not constrained by any requirement for confidentiality imposed by the developer. These discussions may relate to both the CAR and the S 36 processes.
- 5.3 Where SEPA organises meetings with the developer it will invite the Committee to the meeting in order to develop a joint understanding of the proposals. This may include a joint site inspection. The Committee will discuss the proposals with SEPA and will prepare advice to SEPA regarding the protection of fish and fisheries.
- 5.4 The intention is that these discussions will be undertaken prior to the CAR application being submitted by the developer.
- 5.5 In accordance with Regulation 12 of CAR, SEPA will require that any application should be accompanied by a reasonable amount of information. The information requirements will be jointly developed by SEPA and the Committee, in consultation with other stakeholders, and will be provided to developers at the EIA scoping stage or as part of any planning consultation as appropriate. SEPA and the Committee will copy each other into any correspondence concerning the EIA.

Determination of applications

- 5.6 CAR sets out a statutory 4 month period within which SEPA must determine applications.
- 5.7 The Committee will finalise its recommendations/advice and pass this to SEPA for consideration in the preparation of the CAR licence. The Committee will no longer issue its formal recommendations in terms of S 36 of the Electricity Act direct to the developer. The Committee will aim to submit its recommendations/advice to SEPA within the 28-day period prescribed for consultation following advertisement of the application but this will only be possible if it has been consulted sufficiently in advance of the application being submitted/ published.
- 5.8 Should it become apparent during the process of considering the CAR application that additional information will be required by SEPA or the Committee to complete the determination process, SEPA will normally issue an information notice under Regulation 14. This will "stop the clock" and consequently allow time for the information to be provided.
- 5.9 The Committee's recommendations, agreed with SEPA will be incorporated into the CAR licence as licence conditions or in one or more of the following associated documents:
- design, operation, maintenance and decommissioning standards;
 - construction working method;
 - monitoring plan;
 - guidance to the developer.
- 5.10 A CAR licence will require the operator to comply with the specifications within the associated documents.
- 5.11 When approving the applicant's detailed proposals for the design, operation and maintenance of the scheme and their monitoring plans SEPA will take advice from the Committee in relation to matters affecting fish and fisheries.
- 5.12 The associated documents may be modified (after the licence has been agreed) by agreement between SEPA and the developer in order to reflect the development of the proposals as the scheme is finalised. Under such circumstances, SEPA will consult with the Committee during these discussions.
- 5.13 SEPA and the Committee will develop a standard version of the associated documents which will facilitate the development of site-specific requirements for individual schemes. The first version of these documents is currently under preparation and it is hoped they will be ready in the summer of 2008. However, it is recognised that site specific elements may still need to be incorporated on a site by site basis.
- 5.14 It may be necessary for SEPA to revise the wording of advice from the Committee to ensure that they form enforceable and legally correct conditions. Any such changes will be discussed with the Committee.
- 5.15 SEPA is obliged only to set conditions in a CAR authorisation and its associated documents which are proportionate and technically feasible. Where SEPA considers

that the Committee's proposed advice is not proportionate or technically feasible, it will review this with the Committee. Likewise, where the Committee considers that conditions proposed by SEPA do not adequately address its requirements, it will review these with SEPA. As part of this dialogue, SEPA will pass draft copies of the licence to the Committee for comment so that the Committee is kept fully apprised of changes in the draft licence conditions which could affect fish and fisheries. SEPA will not pass a licence to the Regulatory Review Group unless any conditions could affect fish or fisheries have been reviewed by the Committee.

- 5.16 Once SEPA has reached a proposed determination, it will send copies of the licence and its associated documents to all third parties under Regulation 15A. All third parties will have 21 days to consider whether they wish to ask Ministers to call in the application.
- 5.17 If Ministers call-in an application because of representation over fish or fisheries the Committee will assist SEPA with the correspondence with Ministers.
- 5.18 If Ministers do not call-in an application then SEPA will issue its determination to the developer.

Appeals

- 5.19 If a developer appeals against a licence condition or requirements specified in the associated document, whose purpose was to protect fish or fisheries, and which was based upon advice provided by the Committee or was imposed by SEPA (after taking advice from the Committee) then the Committee will provide SEPA with support as part of the appeal process.

6. Applications for schemes equal to or less than 1 MW

- 6.1 Where SEPA believes that a proposed hydro development of less than or equal to 1 MW may have a significant adverse impact on fish and/or fisheries, it will seek the advice of the Committee. Under such circumstances the procedures in section 5 will be followed.

7. Operator requests for variation

- 7.1 Where an operator of a hydro scheme wishes to make alterations to their licence conditions they must submit an application for a variation to SEPA. Where it appears to SEPA that such alterations may result in a significant adverse impact on the water environment, or on users of the water environment, it may serve notice on the operator to advertise such an application. In certain cases the variation may require an application under S 36 of the Electricity Act. In these cases the procedures in section 5 will be followed.
- 7.2 Where it is apparent that such alterations may affect fish and fisheries SEPA may consult the Committee in accordance with sections 5.0 as appropriate.

8. SEPA Reviews and variations

- 8.1 Where SEPA initiates a review of a licence relating to a hydropower scheme SEPA will inform the Committee of its intentions at an early stage. The Committee may provide SEPA with advice in relation to the protection of fish and fisheries
- 8.2 This is particularly relevant with regard to the approval of the construction, operation and maintenance of elements of the scheme that might affect fish and fisheries and the scope and content of monitoring plans. SEPA may from time to time review monitoring and reporting requirements and will consult the Committee on these proposals.

9. Enforcement of Licence Conditions

- 9.1 Where appropriate, SEPA will consult with the Committee regarding the enforcement of certain licence conditions.
- 9.2 As a result of the Committee exercising its right to inspect new or existing schemes or otherwise, it may bring to the attention of SEPA non-compliances with CAR licences and, SEPA will decide upon and implement any enforcement action considered necessary.
- 9.3 SEPA may need support from the Committee when taking enforcement action against an operator. The Committee will endeavour to provide expert advice/witnesses as required to ensure successful action to deliver compliance with licence conditions set to protect fish and fisheries.

10. Meetings and communication

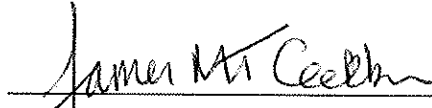
- 10.1 SEPA and the Committee will continue to maintain regular liaison meetings to include reviewing the effectiveness of this Memorandum of Understanding and considering whether it is desirable to make changes in order to improve its effectiveness. This is in addition to any meetings which may be necessary to consider individual proposals.

11. Escalation procedure

- 11.1 If the Committee and SEPA disagree on the content of the advice of the Committee regarding a particular scheme or matters relating to the approval of associated documents, they will seek to resolve the disagreement, without undue delay, by arranging for the Head of EPI for the relevant SEPA region and a member of the Committee to review the matters of disagreement and provide an opinion. If disagreements still remain then the matter will be referred to SEPA's Director of Science for further joint consideration with the Chairman of the Committee.
- 11.2 Both parties are committed fully to resolving disagreements of the kind outlined in 10.1 above through negotiation and discussion at an early stage. However, developers should be reassured that ultimately the Scottish Ministers remain the final arbiter for such matters via the CAR call-in process.

Signed by

Date



29 April 2008.

Jim Cockburn
Chairman
Fisheries (Electricity) Committee

Signed by

Date



30 April 2008

Campbell Gemmell
Chief Executive
Scottish Environment Protection Agency